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COMMENTARY

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Electronically Stored Information And the New Amendments To the Federal Rules of Civil Procedure

By Stephen M. Prignano, Esq.*

Introduction

On Dec. 1 amendments to the Federal Rules of Civil Procedure went into effect to address the growing complications of electronic discovery. While it is true that the new rules now provide much-needed guidance in this area, they also impose significant obligations on litigants and their counsel.

Practitioners unfamiliar with discovery of computer-generated information, either because they do not view themselves as technologically proficient or because they lack experience with the subject matter, can no longer bury their heads in the sand. The new rules bring substantial changes in the procedures for discovery, pretrial practice, motion practice, sanctions and discovery from third parties. Compliance with the new rules will demand not only knowledge of new procedures, but will also require litigation counsel to be conversant with computer technology generally and their client's information technology practices and systems in particular.

Despite the burgeoning growth of computer-generated information in litigation of all types, not since the 1970s have the rules been amended to account for the discovery of materials that are electronic in nature. Over the years, the document/paper-based focus of the federal rules has gradually grown out of step with the realities of modern technology. Unlike static paper documents, electronic information is often dynamic, changing content or form as users access and work with computer files.

Digital information is also easily produced, replicated and stored, leading to exponentially greater volumes of information than had been true in the paper world. These and other issues have greatly complicated discovery and were identified by the Advisory Committee on Civil Rules as requiring significant amendments to the Rules of Civil Procedure.

Electronically Stored Information

Perhaps the most fundamental change in the new rules is the creation of a new category of discoverable material known as "electronically stored information." ESI is now used in addition to the more traditional term "documents" to describe information that is subject to discovery. Indeed, as will be seen, certain procedures apply only to ESI, and so it becomes important to understand how the new rules depart from traditional discovery procedures to address ESI's unique characteristics.

While the rules do not define ESI, the advisory committee's notes make clear that the term is intended to have the broadest possible meaning. Indeed, the old term "data compilations" has become a subset of ESI.

Essentially, ESI refers to any information that can be stored in a medium that can be accessed or read by an electronic device. Certainly, digital information generated by a computer and stored on hard disk drives, floppy disks, magnetic tapes, memory cards, removable memory

devices, portable USB drives and the like will qualify as ESI. The term, however, is also broad enough to cover information stored on cell phones, Blackberrys, personal digital assistants, MP3 players, digital cameras, voice mail systems and other devices on which electronic information can be stored.

Thus, as used in Rule 34, ESI encompasses information "stored in any medium." The committee notes make clear that ESI is intended to account for future changes in computer technology.

References to ESI are pervasive throughout the federal rules amendments. ESI is specifically made part of a party's initial disclosure obligation under Rule 26(a)(1)(B). Thus, parties must provide a copy or description of all ESI used to support claims or defenses without a request for production.

ESI is also used to define the scope of discovery under Rule 26, to identify information that is subject to disclosure in response to interrogatories and requests for production under Rules 33 and 34, and to identify items that must be addressed in the pretrial conference under Rules 16 and 26. Specific limitations on sanctions that may be imposed under Rule 37 are provided for the loss of ESI, and Rule 45 has been amended to provide for discovery of ESI from third parties.

Early Identification of Electronic Discovery Issues

The amendments clearly emphasize the need for the parties to identify and discuss, both with each other and the court, issues that may arise with respect to the discovery of ESI. Thus, the amendments provide several opportunities for the parties to address potential electronic discovery issues before they become problematic.

First, under Rule 26(f) the parties are now directed to discuss as soon as practicable, and not less than 21 days before the scheduling conference under Rule 16, "any issues relating to preserving discoverable information." Where discovery of ESI is contemplated, the parties must also develop a discovery plan that includes any issues relating to the discovery or disclosure of ESI, including the form in which ESI should be produced. The Rule 16 pretrial order, in turn, will now include provisions for the disclosure of ESI.

Although the rules do not define when the obligation to preserve ESI begins (that obligation is determined by reference to substantive law), Rule 26(f) directs the parties to discuss this issue when the discovery of ESI is contemplated. Thus, the parties must be prepared to discuss whether,

and under what circumstances, measures must be taken to preserve ESI. These measures may include a litigation hold, if one has not already been put in place, directions to key employees to preserve e-mail and electronic data files, and interruption of routine computer processes (such as recycling backup tapes) that may result in the destruction of ESI.

As with preservation issues, other important items that should be discussed under Rule 26(f) will require counsel to become familiar with his or her client's computer systems and electronic information management practices. Thus, the parties should discuss the sources of ESI to be searched, the search criteria to be used, whether testing or sampling should be conducted, the electronic format that should be used to produce ESI, and whether certain sources of information (such as backup tapes) are reasonably accessible and can be searched.

Another important item to be discussed is a protocol for dealing with the inadvertent disclosure of privileged material, which unfortunately is becoming more problematic with the high volume of ESI materials that must be produced. Early identification and resolution of these issues will assist both the parties and the court in avoiding many of the pitfalls that have become commonplace with electronic discovery.

A New Discovery Paradigm — Reasonable Accessibility

One of the significant changes to the rules concerns the scope of discovery under Rule 26 as specifically applied to ESI. Under Rule 26(b)(2)(B) a party need not produce ESI that it identifies as being from sources that are "not reasonably accessible." This represents a significant change in prior discovery practice, where all discoverable information was produced, subject to the limitations of Rule 26(b)(2)(C).

Under the new procedure set forth in the amended Rule 26, a responding party can now make a written designation that certain sources of ESI were not searched because the data contained in those sources were too expensive and/or burdensome to access. Once this designation has been made, the propounding party, if dissatisfied with the designation, may nevertheless move to compel the production. In that event, the responding party "must show that the information is not reasonably accessible because of undue burden or cost." If this showing is made, the court may still order the production if the propounding party demonstrates "good cause," and the court may "specify conditions for the discovery."

Thus, the rules essentially create two tiers of ESI. The first tier comprises data that is readily accessible and available

on active computer systems. ESI in this category is subject to production just as any other category of discoverable information.

In the second tier, however, a responding party now has the option of designating ESI as not reasonably accessible and, at least initially, avoiding the burden and expense of searching this category of information. ESI in this group will most commonly consist of data on offline, archival storage media, such as computer backup tapes, that require expensive and time-consuming data processing to restore to usable format.

Of course, notwithstanding the option of designating this data as not reasonably accessible, a responding party will need to preserve this category of ESI in the event it is later compelled to produce the data.

In the event that a hearing is required to determine whether a party should be required to produce ESI that is not reasonably accessible, the committee notes provide some guidance with respect to factors that a court should consider. Thus, some of the important considerations will be:

- Whether the request for ESI was specific or framed broadly;
- Whether the ESI is available from sources that are more readily accessible;
- Whether a party once had and should have maintained the ESI on more readily accessible sources; and
- The importance and usefulness of the information sought in relation to the issues at stake in the litigation and burden of production.

The rules make clear that the court can specify conditions for the discovery of inaccessible data, which the committee notes explain can include provisions for cost-shifting and/or cost-sharing. However, little guidance is provided concerning the circumstances under which the costs of ESI production should be shifted from the responding party to the propounding party.

To fully address the issues likely to be considered at a Rule 26(b)(2)(B) hearing, it is entirely possible that a party may require discovery of the responding party's computer systems and procedures with respect to the storage and retrieval of ESI. It is apparent, therefore, that the procedures set forth in amended Rule 26 could very well lead to collateral litigation.

Format Wars — Rule 34

Another point of contention in electronic discovery has been the electronic format in which a responding party is required to produce ESI. Opportunities for gamesmanship

in this area have abounded. Producing parties would naturally seek the production of ESI in computer formats with the greatest functionality, typically in formats that are "native" to the computer system creating the file.

Thus formats that permitted computerized searching of electronic data were sought, as well as formats that preserved a computer file's metadata (statistics and information about a computer file embedded within the file). On the other hand, responding parties would typically seek to limit production to computer formats that would enable the producing party to do little more than view the data.

Under the amended Rule 34 a propounding party now has the ability to designate the format in which it seeks the production of ESI. A responding party may object to this designation and counter-designate the format in which it will produce data. A court may resolve the dispute on a motion to compel or for a protective order, but in that event the court will not be limited to the format(s) designated by either party and may choose an entirely different format.

Sometimes the propounding party lacks sufficient information about how the responding party maintains its data and therefore may not be in a position to designate the format in which ESI is sought. If the propounding party makes no designation, the responding party may then designate the format in which it will produce ESI, but ESI must be produced in a form in which it is ordinarily maintained or reasonably usable.

If the responding party simply produces ESI in a particular format, without making an advance designation, it runs the significant risk that the propounding party will deem the format unacceptable. Such circumstances could lead the propounding party to seek another production of the same ESI in a different format. It therefore becomes critically important that the format of production be determined in accordance with the procedure set out in Rule 34 before ESI is produced.

Sanctions Under Rule 37 — A Limited Safe Harbor

Sanctions, sometimes significant, have become increasingly common in electronic discovery disputes. Many critics of the former Rule 37's application to electronic discovery have noted that the burden of sanctions for even negligent loss of electronic data has made litigating in the computer age a trap for the unwary.

In an effort to rectify this situation, Rule 37 has been amended to provide a limited safe harbor when routine computer operations result in the loss of ESI. Thus, under

the amended Rule 37, absent exceptional circumstances, a court may not impose sanctions where ESI is lost "as a result of the routine, good-faith operation of an electronic information system."

This change is intended to address situations in which normal business operations of computer systems delete information, sometimes impacting whether ESI will be available in discovery. In these circumstances, the touchstone to protection under Rule 37 is the good faith of the responding party.

What constitutes good faith in the circumstances has yet to be determined by the courts. Where a party is aware of threatened or pending litigation, or where a party is subject to a preservation order or has issued a litigation hold, it is doubtful that a party can allow routine operations to continue where it is certain that relevant, discoverable ESI will be lost. This would seem to apply whether the ESI is on accessible or inaccessible sources.

Conversely, if, despite knowledge that ESI will be needed in discovery, a party makes reasonable, good-faith efforts to prevent data loss, but such loss nevertheless occurs as a result of routine computer operations, it may be that the steps taken to prevent such an occurrence will insulate a party from sanction.

Likewise, if a party has no good-faith reason to know that ESI will be needed and therefore does not interrupt routine computer operations, the loss of ESI will not necessarily lead to sanction. Again, a party's good-faith actions under the circumstances will be the key to determining whether sanctions are warranted.

Finally, it is important to note that Rule 37's limited safe harbor begins with the words "[a]bsent exceptional circumstances."

Given this qualification, there may still be room for sanctioning even good-faith loss of ESI in certain situations. While neither the rule nor the committee notes provide helpful guidance concerning this qualification, it is possible that the loss of ESI could be so prejudicial to the propounding party in a given case that sanctions may still be warranted.

Of course, the limited safe harbor provided by Rule 37 does not restrict the court's inherent authority to order sanctions.

Conclusion

For better or worse, electronic discovery is with us, and it now becomes critically important for civil practitioners to learn the new rules and the nuances of electronic discovery. The obligations imposed by the new rules make clear that practitioners can no longer afford to be without knowledge of basic computer skills and electronic information systems. More importantly still, counsel must communicate clearly with their clients regarding a party's obligations under the amendments, and they must take affirmative steps to learn about their client's methods for creating, storing and retrieving electronic information.

** Stephen M. Prignano is a partner in the litigation practice group of the 520-attorney national law firm Edwards Angell Palmer & Dodge in Providence, R.I. He can be reached at sprignano@eapdlaw.com.*