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Modernizing the Rules of Engagement

Rule amendments, accepted and proposed, seek to guide New Jersey's federal practitioners through the e-discovery process

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Discovery is information. Advances in technology have permanently changed the way information is created, stored and exchanged. As electronic discovery's role has become significant in nearly all litigation, so too have questions and disputes concerning compliance with discovery requests. In recognition of the complex issues concerning electronic discovery, Local Civil Rule 26.1 was amended in October 2003 to include a new section to guide attorneys who practice in the federal courts in New Jersey. Additionally, federal practitioners should be aware of proposed amendments to the Federal Rules of Civil Procedure, which may be promulgated shortly.

Local Civil Rule 26.1(d)

Prior to the initial conference under Fed. R. Civ. P. 26(f), attorneys are required to review the client's information management systems, including computer-based and other digital systems, to understand how information is stored, archived and retrieved, and how this information may be used to support claims or defenses. L. Civ. R. 26.1(d)(1). This includes review of software, databases, document management systems, e-mail, instant message and voice-mail. Counsel must also identify a person with knowledge of the client's information management systems who can facilitate discovery. Id.

Next, counsel must notify the opposing party prior to or at the Rule 26(f) conference of the categories of computer-based information that may be sought. L. Civ. R. 26.1(d)(2). During their Rule 26(f) conference, the parties must agree on: preservation and production of digital information; procedures for dealing with inadvertent disclosure of privileged materials; restoration of deleted data; whether production will include back-up, historic or legacy data; the media and format of production; and costs of production. L. Civ. R. 26.1(d)(3)(a)-(b).

Paying For E-Discovery

Generally, the person producing electronic discovery bears the cost of production. Where the requested data is not readily available in accessible form, however, the requesting party may be required to bear the cost. In a decision concerning cost allocation of electronic discovery, *Zubulake v. UBS Warburg LLC*, 2003 WL 21087884 (S.D.N.Y. May 13, 2003), Judge Shira Scheindlin set forth seven factors to consider in determining if, and to what extent, restoration and retrieval costs should be shifted to the requesting party:

- Extent to which the request is specifically tailored to discover relevant information;
- Availability of such information from other sources;
- Total cost of production, compared to the amount in controversy;
- Total cost of production, compared to the resources available to each party;
- Relative ability of each party to control costs and its incentive to do so;
- Importance of the issues at stake; and
- Relative benefits to the parties in obtaining the information

Data Production

Data can be produced in various ways: by copying disk drives or other storage systems onto a disk or other media; through raw data; through readable or readily convertible data; or producing the data in hard copy. Although

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a party may be required to produce electronic evidence, a party may not be required to provide that evidence in a particular format, especially where the requesting party has not particularized the format in the production request. A party, therefore, may be able to provide the information in its standard form, which may not be easily accessed by the other party. The requesting party may then be required to seek an order that the documents be produced in a more accessible format. See, e.g., *Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1997) (directing defendant to provide requested data on a conventional computer disk or hard drive, and either loan the plaintiff the software required to read the data or provide on-site access to access the system); *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437 (D.N.J. 2002) (finding that because company had simultaneously printed out hard copies of requested documents while scanning the documents and then charged plaintiffs for producing the hard copies, without giving them the option of paying for either the hard copies or the disks, Magistrate Judge Hughes ordered that the disks be copied and produced).

Spoliation

Spoliation concerns in the e-discovery context arise where electronic evidence has been lost, altered or destroyed in some way. Judges may be unwilling to accept parties' claims of accident or ignorance under these circumstances. See, e.g., *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332 (D.N.J. 2004) (imposing monetary sanctions and a spoliation inference jury instruction where defendant deleted e-mails pursuant to its general data management procedures, even though it was on notice of the suit and failed to preserve the data).

Safe Harbor Provision

When producing documents electronically, especially in large volumes, the likelihood of producing privileged documents increases significantly. Thus, as suggested in the Local Rule, it is important for the parties to reach agreement regarding the inadvertent disclosure of privileged and work-product documents before engaging in electronic production of documents.

Proposed Rule Amendments

In June 2005, the U.S. Judicial Conference's Committee on Rules of Practice and Procedure recommended the adoption of amendments to Federal Rules of Civil Procedure 16, 26, 33, 34, 37 and 45. Similar to L. Civ. R. 26.1(d), the proposed changes will offer guidance to litigants engaged in electronic discovery, encourage them to address potential issues early in litigation and are intended to bring uniformity to the practice of electronic discovery in the federal courts. The proposed amendments, which address five areas pertaining to electronic discovery, will be presented for approval to the full Judicial Conference in September.

Early Attention to E-Discovery

The proposed amendments to Rule 26(f) require parties to address electronic discovery issues during the initial discussions required by Rule 26(f), which may include the form in which electronic discovery is produced, the time period for which discovery will be sought, whether the information is reasonably accessible, and preservation of discoverable information that might otherwise be deleted or overwritten in the routine operation of a party's computer system. The parties may also discuss whether the court should enter an order protecting the right to assert privilege after inadvertent production of privileged information. The proposed changes to Rule 16 allow judges to include any electronic discovery-related agreement arising from Rule 26(f) conferences in their scheduling order.

'Reasonably Accessible' Information

Under the proposed changes to Rule 26(b)(2), a party seeking discovery of electronically stored information that is not "reasonably accessible" must first obtain a court order based on a showing of "good cause." The good cause analysis weighs the requesting party's need for the information against the burden on the responding party. Although not defined under the proposed amendments, the Committee Notes suggest that "reasonably accessible" information likely includes any information the responding party routinely accesses or uses, but may not include disaster recovery data, legacy data, deleted data, or other data that requires significant cost, effort or burden to produce.

Safe Harbor Provisions

Recommended amendments to Rule 26(b)(5) will allow parties to avoid unintentional waivers of privilege that otherwise result from inadvertent production of a privileged document. Because the huge volume of electronically stored information often makes preliminary privilege reviews difficult, Rule 26(b)(5)(B) provides a procedure by which a responding party that inadvertently produces privileged information can assert privilege within a reasonable time after production. After receiving timely notice of a claim of privilege, the receiving party must return, sequester or destroy the privileged information. A variety of factors, including the date when the producing party learned of the production, the extent to which the receiving party used the information and the magnitude of production, bear on whether notice is given within a reasonable time.

Under Rule 37(f), a party may not be sanctioned, absent a court order requiring preservation of electronically stored information, for failing to provide information that is lost due to routine computer operations if the party took reasonable steps to preserve potentially discoverable information. Potentially discoverable information includes anything the party knew or should have known to be discoverable in the action.

Rules 33 and 34

Proposed amendments to Rules 33 and 34 will allow parties to request or produce information in electronic format by including specific references to "electronically stored information." Additionally, Rule 34(b) provides that if the request does not specify a form of production, a responding party may choose to produce electronic information in the format in which it is ordinarily maintained or in an electronically searchable form. Production in more than one form may be ordered for good cause.

The unique features of electronically stored information demand special discovery consideration. While the proposed amendments to the Federal Rules of Civil Procedure are not yet in force, they provide helpful guidance to litigants addressing electronic discovery. For attorneys who practice in the federal courts in New Jersey, Local Civil Rule 26.1(d) has already assisted litigants in managing electronic discovery issues and will provide a head start to the anticipated changes to the Federal Rules. ■