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Planning Discovery

OVERVIEW OF THE E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE By Farrah Pepper*

On December 1, 2006, the amendments to the Federal Rules of Civil Procedure ("FRCP") related to electronic discovery (or "e-discovery") went into effect. This article provides an overview of those amendments and identifies some issues that attorneys should be thinking about from this point forward.

Overview of Rules

The FRCP amendments relating to e-discovery impact six Federal Rules (Rules 16, 26, 33, 34, 37 and 45). See Text of FRCP Amendments and Advisory Committee Notes submitted to Congress, located on the U.S. Courts web site at http://www.uscourts.gov/rules/Ediscovery_w_notes.pdf. The amended FRCP creates new terminology in Rule 34(a) for the subject of e-discovery – "electronically stored information" or ESI. While ESI is undoubtedly already included in productions on a regular basis as a matter of custom, the amended rules make it clear that it is not a practice that is open for debate. With estimates that more than 90% of all corporate information created today is electronic, it is clearly not an issue that is going away anytime soon. See web site for ARMA International at <http://www.ama.org/erecords/index.cfm>.

The amendments to the FRCP can loosely be grouped into four topics: (1) planning discovery; (2) managing discovery; (3) regulating privilege; and (4) imposing sanctions.

The amended FRCP forces e-discovery issues to the forefront of the litigation process. Rule 26(f) requires the parties to meet and confer to discuss issues related to preservation of ESI prior to the scheduling conference with the court. The results of the parties' pre-discovery agreements are to be memorialized in amended Form 35. Rule 16(b) authorizes the court to include provisions related to the preservation or production of ESI in its scheduling order.

These amendments in the aggregate mean that attorneys have an obligation to their clients to understand the ESI issues of the case well in advance of the meet-and-confer with opposing counsel. This will require delving into the sometimes complex IT framework and policies of the client, as well as developing a list of questions to ask opposing counsel about their client's systems. To avoid falling into the trap of agreeing to things that are unworkable or unfavorable to their clients, attorneys should form an e-discovery response team. At a minimum, attorneys need a reliable guide at the client to lead them through the IT operations. Ideally, attorneys will also involve a litigation support professional at their firm and retain a reliable e-discovery vendor.

Managing Discovery

Some of the amendments are relatively non-controversial. Rules 33(d) and 45, for example, clarify that ESI is information that is discoverable by interrogatories and subpoenas, respectively. Rule 26(a) includes ESI as one of the items that must be provided in the list of initial disclosures as a matter of due course.

Other amendments are more complex and open to judicial interpretation. Rule 34(b) establishes that when ESI is requested, the requesting party has the right to specify the form in which the ESI will be produced. The responding party has the right to object to the form suggested. If no form is specified, then the responding party must either

*Farrah Pepper is a litigation associate in the New York office of Gibson, Dunn & Crutcher LLP. She can be reached at fpepper@gibsondunn.com.

provide the ESI in the form in which it is "ordinarily maintained" or else in a form that is "reasonably usable."

This Rule gives the requesting party an advantage that it should not overlook. Failure to specify a format of production in the initial request means that your adversary has the right to choose any "reasonably usable" format it wants, a term whose parameters will almost certainly be defined through motion practice. This is yet another reason why diligent counsel should think through the ESI issues, such as format, at the very outset of the litigation.

Another amendment that almost certainly will be subject to judicial interpretation is Rule 26(b)(2), which sets up a two-tier discovery process for ESI that is accessible (such as active email) and inaccessible (such as certain backup tapes). Rule 26(b)(2) specifies that a party can withhold inaccessible data if it identifies its existence and that the burden then shifts to the requesting party, who has the option of filing a motion to compel discovery or for a protective order. The withholding party then must demonstrate that the information is not "reasonably accessible" due to undue burden or cost. Even if this showing is made, the court can still order the discovery if the requesting party can demonstrate "good cause." It is at this stage that sampling may be ordered, a technique that is used to test the relevance of a limited portion of ESI to determine if the cost-benefit analysis weighs in favor of ordering full discovery.

Complicating the analysis is the fact that neither the terms "reasonably accessible" nor "good cause" are defined in the Rules themselves. The Advisory Committee Notes to the Rules do provide some guidance, however. The Notes give some examples of inaccessible data including backup tapes, "legacy" data from obsolete systems and deleted, fragmented data – while at the same time noting that it is impossible to define all the technology features that might impact accessibility of ESI. The Advisory Committee Report lists the considerations that demonstrate good cause and they largely track the seven-factor test outlined in the well-known case Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003), used to determine cost-shifting when relatively inaccessible ESI is sought in discovery. See Summary of the Report of the Judicial Conference Committee on Rules of Practices and Procedure, located on the U.S. Courts web site at www.uscourts.gov/rules/Reports/ST09-2005.pdf.

This amendment is yet another example of why attorneys need an e-discovery team to help them through this process. The legal and technical

issues are intertwined and attorneys will need to convincingly argue why data is accessible (or not) and be conversant in the mechanics of sampling. The availability of cost-shifting potentially can save clients substantial sums of money, so it is a very practical and worthwhile topic for attorneys to keep in their e-discovery arsenals.

Regulating Privilege

Rule 26(b)(5) sets forth procedures for how to maintain privilege claims even after documents are inadvertently produced. Though the rule itself doesn't mention ESI, the Advisory Committee Report makes clear that this amendment was motivated by the sheer volume of ESI and the various ways ESI is stored and displayed, factors which make mistakes in productions more likely. Rule 26(b)(5) does not speak to whether there is waiver or not when the documents are initially produced.

This is one of the more controversial new amendments, since there are risks and uncertainties connected with its proposals. More than one court has cast doubt on the soundness of this amendment. See, e.g., Hopson v. Mayor & City Council, 232 F.R.D. 228 (D. Md. 2005) ("[A]bsent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule."). Also, there is the risk of waiver in other cases and to third parties who are not subject to any privilege agreements in a given case. This area is one to keep an eye on, especially in light of the proposed 2008 amendment to Federal Rule of Evidence 502, which will touch on related issues.

In addition, harkening back to the discussion above about "Planning Discovery," privilege and any agreements related to it are also topics included in the Rule 16(b) orders and Rule 26(f) meetings, as well as memorialized in Form 35. Therefore, privilege is a topic that attorneys must contemplate and strategize about very early in the litigation process and well before any mistakes happen.

Imposing Sanctions

The threat of sanctions is a topic that tends to get the attention of both attorneys and their clients, as well it should. There have been a series of high-profile cases involving awards of sanctions against parties (and their counsel) for e-discovery failures, such as the Zubulake series of opinions mentioned earlier and Coleman (Parents) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 679071 (Fl. Cir. Ct. Mar. 1, 2005) (which culminated in an eye-opening \$1.45 billion verdict).

The imposition of sanctions is addressed in Rule 37(f), or the so-called "safe harbor" provision. This Rule forbids courts to impose sanctions on parties who failed to produce ESI if the ESI was lost as a result of the "routine, good-faith operation of an electronic information system" (in other words, business as usual).

However, this "safe harbor" may not provide as much protection as a first reading of the language would suggest. Attorneys still must ensure that the litigation holds and document retention programs that are in place are valid. Failure to do so will leave a client (and its attorneys) open to allegations of spoliation of evidence and resulting sanctions.

Moreover, this Rule does not do anything to shield parties from sanctions that are imposed from sources other than the FRCP, such as courts' inherent powers. This has suggested that the safe harbor might not be very "safe" after all. Only time will tell whether this provision will stem the tide of sanctions that have been imposed in recent years for ESI failures, such as in Zubulake and Coleman.

Conclusion

In the wake of December 1, there will likely be a great deal of motion practice as attorneys try to feel out how these new amendments will be interpreted on a practical level. Until then, and well before litigation strikes, attorneys should start assembling their e-discovery response teams and educate themselves about their clients' IT environments in order to stay on top of the e-discovery tide.