New Amendments to Rule 26 Dictate Use of Electronic Discovery Technology

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Under the Rules Enabling Act, 28 U.S.C. §2072, the U. S. Supreme Court's amendments to the Federal Rules of Civil Procedure became effective on December 1, 2000. New changes in the rules governing discovery, particularly Rules 26(a) and 26(b)(2), support the conclusion that litigators must use electronic discovery technology 1) to have greater assurance they can be in compliance with the Rule, and 2) to make advantageous use of the changes.

Of particular importance, as discussed in greater detail below, is the removal of the "opt out" provisions in Rule 26(a)(1); now ***all*** federal litigants must make the early disclosures (and document productions) required by the rule.

So how can electronic discovery tools and methods keep you from running afoul of the Rule 26 changes, or help you benefit by their application?

And what, exactly, is "electronic" discovery?

Electronic discovery is asking for – and insisting on – the production of original evidence in computer-generated, electronic format, whether on hard drives, backup tapes, floppy disks, CD-ROMs, ZIP or JAZ drives.

The cost-efficient approach is to get as much data as possible in electronic format first and then scan-OCR only those paper documents that have no electronic original, such as telephone notes or handwritten marginalia. Electronic data can be easily lost or destroyed in the early stages of a case, through spoliation by continued use of computers by the opposing party's employees.

Key benefits from "e-Discovery" include:

realizing dramatic savings (50% or more) in getting thousands or millions of documents without having to print, scan and attempt to reconstitute them in electronic format through optical character recognition (OCR) software;

· getting 100% of all computer-searchable text from the original source (word-processed documents, e-mails, spreadsheets, databases, etc.), instead of 85% accuracy or less due to flaws in all OCR software – with electronic evidence, you don't run the risk of missing the "killer" documents;

· capturing important "file properties" and "metadata" ("data about the data") that are part and parcel of electronic documents, data that can be readily ported to databases for search and analysis that may tell you more than the text of the file

itself can (such as date of the file's last modification; author; recipient; whether, in the case of e-mail, a message has been opened; the "path" or folder where the file was stored on the computer; the computer used to create the document; and dozens more);

· the ability to easily search text in electronic files with any number of search terms or criteria, similar to key word searches in WestLaw or Lexis/Nexis, with text from "hits" being easily cut and pasted to briefs, annotations, compilations, databases, etc.;

· reviving files ostensibly "deleted" from a computer, along with other hidden files and file fragments – often thereby finding the very documents the other side hopes you'll never see;

· keeping all discovery-related data in one convenient place: storage of the original electronic source documents is compact, taking up no more physical space than the size of a hard drive or backup tapes – and storage media is cheap (30 gigabyte drives currently cost $150 and less);

· the ability to have all discovery-related data easily reproduced for clients, co-counsel or new parties entering the case; instead of taking days to photocopy paper documents, file and box them, thousands or millions of documents can be copied to hard drive(s) or CD-ROM(s) in a matter of hours;

· the original electronic source documents can be made available and reviewed over the Internet by a dedicated, private, highly-secure Web site, allowing counsel, co-counsel and support staff to collaborate on reviewing, coding and annotating documents, at the office or from anywhere in the world.

So how do all of these advantages become even more compelling under the new Rule 26 changes?

1. **<u>E-Discovery makes it easier to respond to the fast-track provisions of Rule 26(a).</u>**

   Rule 26(a) is, strictly speaking, not a discovery rule, but rather a rule requiring voluntary disclosure of evidence, "without awaiting a discovery request." And it contemplates not just "disclosure," but producing copies or "making available for inspection and copying as under Rule 34" both documents and "things."

   Before December 1, 2000, federal district courts could opt out of Rule 26(a) by local rule, a choice made by some two-thirds of all district courts.

   No more. Litigators (and their clients) unused to having to disgorge vast amounts of data right at the outset of the lawsuit – without even being asked for it – may find themselves permanently behind the eight-ball if they fail to comply. In fact, failure to comply with the voluntary disclosure provisions of Rule 26(a) can result, according to Rule 26(g)(3), in the imposition of "…an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."

   Here is the pertinent text of the rule, with my italics added for the provisions where electronic discovery has a major role to play, which we'll examine by comments

contained in brackets:

"Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures.

Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or ***a description by category and location of, all documents, data compilations, 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;

[Significance: "data compilations, and tangible things…that the disclosing party may use" include digital data stored on computer hard drives, backup tapes, and other storage media. Computer-savvy attorneys can legitimately expect the opposing side to produce both the data and the computers that produced them for bit-stream image copying of the storage media (in order that "deleted" files and other retrievable information can be examined for potential relevance and use at trial). Production of only printouts of e-mail messages out of context, for example, or word-processed documents, will not satisfy this subparagraph.]

(C) ***a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material***, not privileged or protected from disclosure, ***on which such computation is based, including materials bearing on the nature and extent of injuries suffered***;

[Significance: in today's digital world, all financial, accounting and tax information is generated and preserved in electronic format. Summary computations must be supported by "the documents or other evidentiary material" from which the computations are made. One can therefore reasonably expect, given the realities of today's business world's pervasive use of computers, the voluntary disclosure and production of all relevant spreadsheets, databases, bank statements, audits and tax computations made in electronic format.]

(D) …

(E) …

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not

appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures - if any - are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. ***A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures***."

[Significance: corporations that are not prepared for litigation – and electronic discovery requests in particular – are not going to find any sympathy for crocodile tears shed over its not having a firm grip over its own data, or its lack of data retention and recovery policies and procedures. Companies expert in the identification, retrieval, analysis and management of data and data risk control, are available to assist enterprises in marshalling its data stores and to develop policies to reduce the unnecessary and potentially harmful accumulation of data that is no longer useful.

[With such expert assistance becoming increasingly the standard of care expected of corporate litigants, the only way to comply completely, fully, cost-effectively and on time with the new Rule 26 requirements is through the adoption of automated systems that keep track of enterprise data. There are unique tools and techniques to assist you and your clients in using the best solutions to accomplish these goals. Besides reducing liability risks, these solutions promote the advantageous preparation for litigation. An attorney who knows where the "good news" and the "bad news" are in his or her client's data can avoid surprise and be in a much better position to assess the merits of a case.]

2. E-discovery is favored by the limitations on discovery set out in new Rule 26(b)(2)

Again, here is the full text of Rule 26(b)(2) with my italics for significant text, along with commentary:

"(2) Limitations.

By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30.[1] By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that:

(i) ***the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive***;

[1] Under new Rule 30, depositions are limited to 7 hours over the course of a day, with 10 depositions in total being the maximum number allowed unless the parties agree or the trial court orders otherwise, evincing a policy to curtail nuisance and marathon depositions.

[Significance: case law is unambiguous that electronic evidence, if available, is preferred over paper printouts from that evidence, since, among other reasons, the electronic data contain valuable metadata, are easier to search for key words, and are cheaper to copy and store. The courts have repeatedly recognized that paper documents are not the equivalent of their original electronic sources. Given the fact that e-discovery is "more convenient, less burdensome and less expensive" than the technically (yet pervasive) process of print-scan-OCR, courts will increasingly favor electronic discovery as the preferred approach.]

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) ***the burden or expense of the proposed discovery outweighs its likely benefit***, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

[Significance: if your discovery choices are limited due to the other party's budget, or the issues in the case may seem "minor" to the court but of importance to your client, the burden and cost to the opposing side is virtually nothing if you decide to image-copy selected hard drives or backup tapes in the opposing party's possession. The exercise can be done in a matter of hours, after-hours or on a weekend day so as not to interrupt business or cause embarrassment, and yet you will have, either on a "clean" new hard drive (costing less than $200, most likely) ***the whole data universe*** of the other side. The parties can either agree or argue about how much of that universe is to be available to you to inspect and copy, but you have it all in one place, the data frozen and secure, where you can retrieve and examine a small portion of it (say, e-mail), or a large number of files.]

Just as courts move toward a preference for filings of documents in electronic form over manually served and filed pleadings, so, too, will the cost benefits and efficiencies of electronic discovery find increasing favor among judges who must interpret the new language in Fed. R. Civ. Proc. 26. Litigants, too, will benefit from not having to initiate and pursue discovery of key information in order to get it at the very beginning of the case. Thanks to Rule 26(a), cases are put on a fast track with something a lot more useful than the bare allegations of the pleadings.

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