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## Featured Article

### Preserving Reasonableness in Electronic Discovery

Article contributed by:  
*Joseph G. Falcone and Lawrence Savell, Chadbourne & Parke LLP*

#### Introduction

Lawyers and business executives continue to wrestle with the implications and implementation of the December 1, 2006 amendments to the Federal Rules of Civil Procedure regarding electronic discovery (the Amendments). Although in some ways the Amendments represented the latest step in a process of evolution regarding the inclusion of electronically stored materials in the discovery process, in other aspects they broke new ground and created new obligations and potential pitfalls.

Counsel and clients can do much to manage and limit the risks – and the burdens – in complying with electronic discovery obligations. What is required is, to a significant extent, a rethinking and a reorganization of the process of dealing with discovery. That entails moving consideration of discovery issues to an earlier point in the life of the litigation and actively taking the steps necessary to get an early but comprehensive understanding of the universe of potentially responsive electronic materials. Such steps can facilitate using the Rules' directives to advance and protect the client's interests.

#### Analysis of Key Provisions

Although the Amendments addressed numerous aspects of electronic discovery, perhaps the most significant are the revisions to Rule 26, which require substantive communication between the parties regarding electronic data very early in the litigation.

Rule 26(a)(1) provides in pertinent part that a party must, without waiting for a discovery request, provide initial disclosures to other parties, including "a copy of, or a description by category and location of, all documents, electronically stored information, 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 . . . ."

In turn, Rule 26(f) provides in pertinent part that the parties must, "as soon as practicable" but at least 21 days before a

scheduling conference is held or a scheduling order is due, confer on subjects including:

- Making or arranging for the disclosures required by Rule 26(a)(1).
- Any issues relating to preserving discoverable information.
- Developing a proposed discovery plan that indicates the parties' views and proposals concerning (a) any changes in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made; and (b) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.

Rule 26(a)(1) further requires that the initial disclosures mandated in that provision 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 asserts such objection in the Rule 26(f) discovery plan.

Rule 26(b)(2) sets forth certain limitations on the scope of discovery. These include Rule 26(b)(2)(B)'s consideration of the undue burden of producing materials from sources that are not "reasonably accessible":

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

That provision expressly references Rule 26(b)(2)(C), which gives the court discretion in terms of imposing further limitations upon application of what has become known as the "principles of proportionality":

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;

(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).

In addition, the amendments to Rule 34 include the following sequence regarding electronic data:

- The requesting party may specify a form for producing electronically stored information.
- The responding party may object to such a requested form.
- If the responding party so objects – or if no form was specified in the request – the responding party must state the form or forms it intends to use.
- Unless the parties otherwise agree or the court otherwise orders, if the requesting party does not specify a form, the responding party must produce the material in a form or forms in which it is ordinarily maintained or is reasonably usable.

#### *Implications for Counsel*

Given these directives, litigation counsel needs to get an extensive understanding of the client's electronic data holdings and situation at the outset. Beyond allowing the client to comply with its obligations, obtaining and understanding the necessary information also furthers the client's interest by allowing litigation counsel to take steps and address issues that may help avoid problems later in the course of discovery.

Litigation counsel, in coordination with inside counsel, basically needs to have an audit conducted of the client's electronic data holdings that are believed likely to contain information relevant to the claims or defenses or the subject matter of the dispute. IT personnel with knowledge of the client's electronic holdings need to be identified and worked with. The audit needs to inventory with specificity the various locations, systems, applications, and other parameters of the electronic universe that may include responsive materials, and whether such are reasonably accessible or not. The audit may organize the populations located into various categories. A guide recently prepared for federal judges proposed the following breakdown, listed in order of

increasing distance from what is available in the ordinary course of business, and increasing cost and effort required to access:

- “Active electronic records”: materials currently being created, received, or processed, or that need to be accessed frequently and quickly.
- “Systems data”: records of logging on and off a computer or network, applications and passwords used, websites visited.
- Offline archival media, backup tapes for disaster recovery, deleted files, and legacy data created on now-obsolete systems with obsolete operating and computer software.

See Barbara J. Rothstein, Ronald J. Hedges, and Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, at 7 (Federal Judicial Center 2007) (“Even active data may involve substantial burdens to produce – for example, when vast amounts are requested or when data are requested in a form that requires the reprogramming of databases.”). Others have used slightly different nomenclature to make a similar point. See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318–19 (S.D.N.Y. 2003) (dividing the universe into “Active, online data” (such as hard drives, network drives, servers); “Near-line data” (removable media in jukebox); “Offline storage/archives” (removable media on shelf); “Backup tapes” (sequential access, possibly with compression); and “erased, fragmented or damaged data”).

Among the many types of questions that should be considered are the following:

- What is the universe of maintained electronic material?
- What is the subset universe of potentially responsive electronic material?
- What hardware systems are involved (both networked and stand-alone)?
- What applications software was used?
- What databases?
- Is the necessary hardware functional? Available elsewhere?
- Are systems/software/databases still available?
- Are systems/software/databases proprietary or customized? If so, what export/report options exist?

- Can the software run on present/available operating systems?
- What is the approximate volume of material in each category?
- How far back do the materials go?
- How are these materials maintained (form/format, central vs. local)?
- Who internally and externally has access to these materials and systems?
- Are backup tapes/material ever used also as archives?
- What backup protocols are employed?
- Are backup tapes/materials recycled? When?
- Are other removable media used/maintained?
- How accessible are the materials in each classification? What time, expense, and other burdens would be required to access them?
- What retention policies and litigation holds are in place?
- Who are the key IT people regarding the materials?

Good contemporaneous records should be maintained as to the results of this investigation, which may serve as the basis for subsequent submissions regarding the good faith and adequate steps taken. For systems/materials deemed not reasonably accessible, as much and as detailed factual support as possible should be collected.

Effectively marshalling the information necessary to illustrate to opposing counsel (and, ultimately, if necessary, the court) that the particular electronic data in question is in fact not reasonably accessible will increase the likelihood of prevailing on that issue. In *Palgut v. City of Colo. Springs*, No. 06-cv-01142 (D. Colo. Dec. 3, 2007), the court addressed the issue of three-to-four-year-old backup tapes stored in the City Attorney’s vault:

I find that such “back up tapes” are not currently accessible by Defendant City of Colorado since they do not have the hardware to access them. That these “back up tapes” were being kept by Defendant City of Colorado Springs in the event of a major disaster. Moreover, since Defendant City of Colorado Springs has agreed to do an additional search [of other, reasonably accessible electronic data], in weighing the possible yield of

relevant information from such “back up tapes” in comparison to the cost for such restoration, the cost of restoration outweighs the possible yield of relevant and probative information[.]

Similarly, in *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, No. 05-cv-02310, 2007 BL 163615, at 7 (D. Minn. Nov. 29, 2007), the court ruled that a database need not be restored where, “[b]ecause of the high cost to restore and maintain the database and the fact that it would have to be restored from original sources, the court determines that the *Odom* database is not at present reasonably accessible.”

In *Michigan First Credit Union v. Cumis Ins. Soc’y, Inc.*, No. 05-cv-74423, 2007 BL 157245, at 3, 6 (E.D. Mich. Nov. 16, 2007), the court denied a motion for sanctions brought by a plaintiff who had requested that “[a]ll electronically stored documents shall be produced as they are maintained in the ordinary course of business in their ‘native format,’ along with the intact metadata.” Defendant objected, and the court agreed that production of the metadata in question under the factual circumstances presented would be extremely burdensome, with no corresponding evidentiary value. Consequently, the court held that “[d]efendant shall not be required to produce its electronically stored documents in ‘native format’ or to produce metadata.”

In addition, proper preparation by the producing party can also turn the judicial spotlight on the requesting party and its requests. See *Rothstein et al., supra*, at 20 (“Judges must also encourage parties to narrowly target requests for ESI and to make these as early as possible in the litigation. Judges must evaluate whether the costs of complying with the requests are proportional to their benefit.”).

Early attention to these matters also facilitates:

- Early making of an informed decision as to what the most appropriate form of production would be, followed by consideration of a possible objection to the requesting party’s specified form and/or assertion of a preferred form.
- Early focus on the kinds of analogous material that might be sought from the opposing party in affirmative discovery.
- Early identification and involvement of a possible company witness to testify as to the company’s compliance.
- Early focus on potentially relevant data, reducing disruption to client’s business, narrowing the scope of material requiring further review, reducing review costs and minimizing the risk of inadvertent production of privileged material.

### Further Considerations

Although obviously paper documents and electronic data are quite different, it is nevertheless often instructive to consider how a proposed action would have fared in the paper realm. Indeed, couching an argument in such context may be persuasive. For example, so-called “fishing expeditions,” historically frowned upon in the paper environment, should similarly not be countenanced by courts in the ESI context, even though electronic data can be more readily searched. In *Palgut*, the court found:

That the 2006 Amendments to Fed. R. Civ. P. 34 simply clarify “that discovery of electronically stored information stands on equal footing with discovery of paper documents.” See Advisory Committee’s Note on 2006 Amendments. Consequently, without a qualifying reason, plaintiff is no more entitled to access to defendant’s electronic information storage systems than to defendant’s warehouses storing paper documents[.]

*Accord Scotts Co. LLC v. Liberty Mut. Ins. Co.*, No. 06-cv-00899, Slip Op. at 6–8 (S.D. Ohio June 12, 2007). See also *Hedenburg v. Aramark Am. Food Servs.*, No. 06-cv-05267, Slip Op. at 4 (W.D. Wash. Jan. 17, 2007) (Denying motion to compel and noting that “[i]f the issue related instead to a lost paper diary, the court would not permit the defendant to search the plaintiff’s property to ensure that her search was complete.”). In *Balfour Beatty Rail v. Vaccarello*, No. 06-cv-00551, Slip Op. at 5 (M.D. Fla. Jan. 18, 2007), the court, in denying a motion to compel, reasoned:

Plaintiff’s requests simply seek computer hard drives. Plaintiff does not provide any information regarding what it seeks to discover from the hard drives nor does it make any contention that Defendants have failed to provide requested information contained on these hard drives. . . . Plaintiff in the instant case has made no showing which would justify granting access to Defendants’ hard drives. Indeed, allowing Plaintiff to gain access to Defendants’ hard drives in this case would permit Plaintiff to engage in a fishing expedition.

See also *RLI Ins. Co. v. Indian River Sch. Dist.*, No. 05-cv-00858, 2007 BL 131662, Slip Op. at 4 (D. Del. Oct. 23, 2007) (motion to compel denied as it “seems akin to a fishing expedition”).

### Conclusion

In all aspects of litigation, proper preparation is vital to the pursuit of a successful outcome. In the context of electronic discovery issues, such requisite preparation is both expanded in scope to include sophisticated analysis of the potential electronic universe of material in play, and accelerated in time to a point in the litigation at which

