Cooperative Process

for Minimizing Discovery Burden, Expense

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The challenges associated with discovery in the world of increasingly voluminous and complex electronically stored information (ESI) are well documented. These challenges call for a different approach to how parties interact with respect to meeting their discovery obligations. The new approach calls for cooperation between parties, beginning in the early stages of discovery, and – more than ever – demands that an organization's legal, IT, and records and information management professionals work together to provide an effective and cost-efficient response.

Traditional Approach: 'Discovery about Discovery'

In the traditional approach to the discovery process, plaintiffs might issue broad requests for the production of documents early in the litigation without much, if any, information about defendants' sources of information. In response, defendants serve boilerplate objections, without disclosing what they are and are not capable of providing. Defendants then proceed to collect and produce what they deem to be a reasonable response, leaving plaintiffs to guess what was and was not done behind the scenes.

More often than not, this results in a protracted process of "discovery about the discovery" – including 30(b)(6) depositions of witnesses about sources of ESI, steps taken to preserve relevant information, document retention policies and practices, and collection and production protocols – followed by disputes, motions, and hearings on whether defendants satisfied their obligations. The result is months, if not years, of contentious litigation about the process of discovery itself, increasing the costs of litigation, wasting judicial resources, and distracting from the merits of the litigation.

New Approach: Meet & Confer

In 2006, the U.S. Federal Rules of Civil Procedure were amended in an effort to address these issues and require parties to deal with e-discovery early in litigation. As noted in the 2005 "Report of the Advisory Committee on the Federal Rules of Civil Procedure" issued prior to the amendments taking effect, "The proposed amendments to Rule 16, Rule 26(a) and (f), and Form 35 present a framework for the parties and the court to give early attention to issues relating to electronic discovery, including the frequently recurring problems of the preservation of evidence and the assertion of privilege and work-product protection."

As noted in the 2007 case *Board of Regents of the Univ. of Nebraska v. BASF Corp.*, "The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable."

One of the most significant changes is the requirement under Rule 26(f) that the parties meet and confer on e-discovery issues very early in the case. That rule requires the parties to discuss "any issues relating to discoverable information; and to develop a proposed discovery plan."

Courts have also weighed in as they become increasingly intolerant of the "hide-the-ball" approach to discovery. In *Mancia v. Mayflower Textile Servs. Co.* in 2008:

> Rule 26(g) charges those responsible for the success or failure of pretrial discovery – the trial judge and the lawyers for the adverse parties – with approaching the process properly: discovery must be initiated and responded to responsibly, in accordance with the letter and spirit of the discovery rules, to achieve a proper purpose (i.e., not to harass, unnecessarily delay, or impose needless expense), and be proportional to what is at issue in the litigation, and if it is not, the judge is expected to impose appropriate sanctions to punish and deter.

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Issues to Discuss During Meet & Confer

Unfortunately, there is relatively little guidance in the federal rules on exactly what subjects the parties are expected to meet and confer about in an effort to reach early agreement. Rule 26(a) requires the parties to provide, as part of their initial disclosures, information about the categories and locations of documents and ESI that may be used to support the claims or defenses in the case.

Rule 26(f) specifically directs the parties to discuss "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced" (Rule 26(f)(3)), as well as privilege waiver issues (Rule 26(f)(5)). As noted by the Rules Advisory Committee:

> [T]he parties' conference is to include discussion of any issues relating to disclosure or discovery of electronically stored information. The topics to be discussed include the form of producing electronically stored information, a distinctive and recurring problem in electronic discovery resulting from the fact that, unlike paper, electronically stored information may exist and be produced in a number of different forms. The parties are to discuss preservation, which has new importance in this context because of the dynamic character of electronic information. The parties are also directed to discuss whether they can agree on approaches to asserting claims of privilege or work-product protection after inadvertent production in discovery.

To fill the gaps, local federal courts are increasingly issuing their own rules and guidance relating to the topics the courts expect the parties to discuss at the Rule 26(f) conference. For example, "Guidelines for Discovery of Electronically Stored Information" issued in February 2008 by the U.S. District Court for the District of Kansas, suggests that the parties meet and confer on the following matters:

- Steps taken to segregate and preserve ESI
- The scope of e-mail discovery and e-mail search protocol
- Whether responsive "deleted" ESI exists in some format and who will bear the cost of restoration
- Whether embedded data and metadata will be requested and produced
- The extent to which backup and archival data is needed, and who will bear the cost of obtaining such data
- Production format and media
- ESI that is not reasonably accessible because of undue burden or cost
- Process for addressing inadvertent waiver of privileged or trial preparation materials

The "Suggested Protocol for Discovery of Electronically Stored Information" from the U.S. District Court for the District of Maryland goes even further, noting that it may be helpful for the parties to exchange information *in advance* of the Rule 26(f) conference, such as "information relating to network design, the types of databases, database dictionaries, the access control list and security access logs and rights of individuals to access the system and specific files and applications, the ESI document retention policy, organizational chart for information systems personnel, or the backup and systems recovery routines, including, but not limited to, tape rotation

and destruction/overwrite policy."

Further, the Maryland protocol suggests that, in addition to those mentioned above in the Kansas guidelines, the following subjects "should" be discussed at the Rule 26(f) conference:

- Methods of identifying pages or segments of ESI produced in discovery
- The method and manner of redacting information from ESI
- The nature of information systems used by the parties
- Search methodologies for retrieving or reviewing ESI, including "the use of key word searches, with an agreement on the words or terms to be searched"
- Preliminary depositions of information systems personnel
- The need for two-tier or staged discovery of ESI
- Any request for sampling or testing of ESI
- The need for retention of an expert to assist the court in resolution of technical issues presented by ESI

The Sedona Conference Cooperation Proclamation at *www.thesedonaconference.org/content/tsc_cooperation_proclamation*, also promotes "open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.

Benefits of a Cooperative Approach

There are many potential benefits that result from early agreements regarding the discovery process. For example, disclosure of the steps taken to preserve relevant information and agreement that those steps were sufficient could reduce, if not eliminate, costly allegations of spoliation further down the road.

Likewise, collaboration on the search methodologies and protocols used to retrieve or cull ESI will require significant investment up front in what likely will be an iterative process for each party to get comfortable with the approach taken by the other. However, that early investment will give the parties the comfort of knowing that they are not likely to end up in an expensive and time-consuming satellite litigation trying to prove to the court (or special master), through the use of technical experts or otherwise, that their search methodologies were reasonable and sufficient. Or even worse – losing that battle and having to "do over" some portion of the discovery, assuming there has been no spoliation.

The reality is that the concept of volunteering information and collaborating to reach agreement on the process of discovery seems foreign to many litigators and potentially at odds with the way they have done discovery in the past, as well as how they view the nature of the adversarial process. Making the case for cooperation in the process of discovery is not easy; in fact, the very word "cooperation" is met with resistance among parties and counsel engaged in the heat of the litigation battle.

But in the reality of the digital world where most evidence likely is maintained as ESI, collaboration in the discovery process not only is being forced on litigants by courts, rules, and guidelines, it also makes sense from the standpoint of the overarching goal of "the just, speedy, and inexpensive determination" of disputes.

Meet & Confer Issues for Discussion

The 2006 amendments to the U.S. Federal Rules of Civil Procedure, Rule 26(f) requires parties to meet and confer early to "to discuss any issues relating to discoverable information; and to develop a proposed discovery plan."

An organization's RIM, IT, and legal staff will need to work together to provide information regarding several of the issues about which parties must meet and confer:

- Categories and locations of relevant documents and electronically stored information (ESI)
- The form in which ESI should be produced
- "Preservation…because of the dynamic character of electronic information"

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