Rulemaking In State Courts: A Rationale For Adopting ESI Provisions Of FRCP 26

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The Federal Rules of Civil Procedure were amended on December 1, 2006 to address discovery of electronically stored information (ESI). Among the amendments to the Federal Rules were significant changes to Rule 26 that provide additional protections to litigants who are dealing with a proliferation of computer usage, inexpensive data storage, and developments in communication technology that have changed discovery practice tremendously over the past several years. While several states have adopted (or are working on adopting) new rules, some of which are modeled after the Federal Rules, many states have either decided not to implement new rules or have adopted a "wait and see" approach to see how the Federal Rules work before adopting state rules. We have seen since its adoption in 2006, that three provisions in Fed. R. Civ. P. 26 greatly benefit litigants: the so-called "claw-back" provision; the two-tiered bifurcation of discovery based on active and "not reasonably accessible" information; and the inclusion of a discussion of ESI in early case planning conferences. Some states decided long ago not to compel litigants into early case management conferences and may not be likely to revisit that issue. Adopting the claw-back and two-tiered approach, however, would provide litigants with much needed protection and predictability in the discovery process.

The Claw-Back Provision: Fed. R. Civ. P. 26(b)(5)(B)

> *Information Produced*. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Modern discovery practice is a burdensome and expensive endeavor. The sheer volume of unorganized electronic information and embedded metadata involved in modern document productions increases the risk that attorney-client communications or attorney work product will be inadvertently produced to opposing counsel during discovery. Due to the risk of the possibility of a subject matter waiver arising from such inadvertent disclosure, the burden and expense of discovery are often enormously increased by the countless hours spent by attorneys and paralegals diligently screening potentially responsive documents and electronic information for privileged or protected communications. The "claw-back" agreement has made its way in to recent discovery practice as a means of easing the burden and expense of privilege screening.

Under a claw-back agreement, the parties agree that documents will be produced without any intent to waive privilege or other protections. A typical agreement will provide that if a privileged or protected document is inadvertently produced, the producing party informs the receiving party, who is obliged to return the document and prohibited from using it in the litigation. Parties will commonly present the agreement to the court in the form of a stipulated protective order or case management order.

Fed. R. Civ. P. 26(b)(5)(B) codifies this practice, and provides that a party who has inadvertently produced privileged information must notify the recipient and assert the basis for the claim of privilege. The recipient is obligated to "promptly return, sequester, or destroy" the purportedly privileged materials. The parties are permitted to file the information under seal with the court and move for a ruling, if the claim of privilege is disputed. It is important to note that Rule 26(b)(5)(B) is not limited to electronically stored information, and it also does not address whether a privilege or protection has been waived by inadvertent production, which is governed by the substantive law of the jurisdiction.

In an attempt to create a uniform standard in the Federal courts with respect to the effect of inadvertent disclosure, Federal Rule of Evidence 502 was enacted in September 2008. Under the new rule, inadvertent disclosure will result in waiver if the producing party failed to take reasonable steps to preserve the privilege, or failed to make a reasonable attempt to rectify the error. Fed. R. Evid. 502(b).

Neither the claw-back provision of Fed. R. Civ. P. 26, nor the waiver provision of Fed. R. Evid. 502(b) reduce the burden on parties to do their best to ensure that client confidences are not revealed. They do, however, recognize the reality that errors are more likely to occur in modern ESI productions than they were in paper productions. States that are holding back on adopting full-blown e-discovery rules would do their citizens a welcome service by adopting these limited protections.

Two-Tiered Discovery: Fed. R. Civ. P. 26(b)(2)(B)

> *Specific Limitations on Electronically Stored Information*. 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.

Fed. R. Civ. P. 26(b)(2)(B) permits producing parties to hold back from production ESI that is "not reasonably accessible" because of undue burden or cost. The purpose of Rule 26(b)(2)(B) is to protect litigants from expending vast sums of money and time extracting data from relatively inaccessible sources such as legacy systems, backup tapes, and erased, fragmented or damaged data that were created in the regular course of business. The producing party has the initial burden of proof to show that the ESI is "not reasonably accessible." Once shown, the court must determine whether: (i) the ESI sought is cumulative, duplicative, or more readily available from another source; (ii) the requesting party 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. If the court determines that the "not reasonably accessible" information should be produced, it may impose conditions upon the discovery, including sampling, testing, and shifting costs to the requesting party.

This two-tiered approach is a positive step towards reducing the often exorbitant cost of e-discovery. States have the opportunity, however, to go further than the Federal Rules in this regard. Long before the Federal Rules were amended, Texas adopted a provision that requires the requesting party to "pay the reasonable expenses of any extraordinary steps required to retrieve and produce [electronically stored] information." Tex. R. Civ. P. 196.4. The benefit of such a rule is to increase the incentive for parties to conduct discovery in an economically rational way.

Another improvement on Federal Rule 26 would be to add a provision that makes clear that parties are not under an obligation to preserve ESI that is "not reasonably accessible" absent a court order. There is support in the Federal courts for this: "[A]s a general rule, a party need not preserve all backup tapes even when it reasonably anticipates litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). When parties put a litigation hold policy on destruction of documents in response to pending litigation, "that litigation hold does not apply to inaccessible back-up tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy." *Oxford House, Inc. v. City of Topeka, Kansas*, No. 06-4004-RDR, 2007 WL 1246200, *4 (D. Kan. Apr. 27, 2007) (citing *Zubulake*, 220 F.R.D. at 217). The rationale for this proposed change is to limit the necessity of forcing businesses to implement the expensive and disruptive effects of preserving information that is not easily accessed. It would also allow businesses greater comfort that they will not be sanctioned for failing to preserve ESI that likely has little value in the lawsuit and will be extremely costly to put into a usable format.

Early Case Management: Fed. R. Civ. P. 26(a), (f)

> *Initial Disclosure*. [A] party must, without awaiting a discovery request, provide to the other parties: … "a copy of, or a description by category and location of … electronically stored information … that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses …. "
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> *Discovery Plan*. A discovery plan must state the parties' views and proposals on: … any issues about disclosure or discovery of [ESI], including the form or forms in which it should be produced; ….

Federal Rule 26 requires early disclosure and early conferences regarding both paper and electronic discovery. Many states, however, rejected the mandatory conference when it was first introduced in the Federal system in 1980, and the mandatory disclosures which were introduced in 1993. Because the law of e-discovery is still in its formative years, agreements between parties are still the best way to introduce predictability into the discovery process. Leaving decisions to the whim of a court can lead to unfortunate results. For instance, in *Veeco Instruments, Inc. Securities Litigation*, No. 05 MD 1695(CM)(GAY), 2007 WL 983987 (S.D.N.Y. Apr. 2, 2007), the parties failed to confer about an electronic discovery protocol and the court expressed its dismay: "[A]ll parties were obligated in a case such as this to discuss the limits of electronic discovery given the certain need for a protocol here." *Id.* at *1. The court ultimately ordered defendant to restore and produce email from back up tapes at an estimated cost of $124,000. The court reserved ruling on cost-shifting.

Accordingly, if states are still unwilling to require parties to meet and confer regarding ESI issues early in litigation, litigants are well-advised to do so voluntarily. Most states have mechanisms to compel early discovery conferences, and parties who are met with reluctance from opposing counsel to lay out an e-discovery plan should invoke those procedures.

Electronic discovery is now a fact of life. In states that have not adopted a comprehensive set of civil procedure rules, courts are promulgating *ad hoc* case law, rules, and procedures to deal with e-discovery which provide little guidance or assistance to litigants. Litigants, courts, and state rulemaking bodies should draw on the Federal Rules amendments, along with the *Uniform Rules Related to the Discovery of Electronically Stored Information* and the *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* which all provide a strong backbone upon which states can build a comprehensive, uniform set of rules to address electronic discovery in their courts.

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