

Best Practices Are Now Potential Malpractice: New E-Discovery FRCP Rules

By Katheryn A. Andresen¹

In the United States, civil litigation is ruled by the Federal Rules of Civil Procedure (“FED. R. CIV. P.”). Unlike other common law countries, the United States is unique in requiring the litigating parties to handle the discovery process amongst themselves without significant judicial oversight. The FED. R. CIV. P. are intended to govern that process by clearly identifying each party’s obligations with regards to requests for, and responses to, discovery requests, whether by documents, interrogatories, or testimony by witnesses. The FED. R. CIV. P. were initially drafted in 1938 by the United States Supreme Court under the Rules Enabling Act of 1934.² The FED. R. CIV. P. have been modified from time to time, generally based upon the recommendation of the Judicial Conference of the United States. Most states have adopted their own versions of civil procedure rules based on the FED. R. CIV. P. model.

Under the FED. R. CIV. P., Rules 16 and 26, the parties to a litigation action must meet to discuss discovery and other pre-trial matters and propose a scheduling order to the court addressing such discovery timelines. Rule 26 allows a plaintiff to request the production of documents relevant to the matter and the defendant has the obligation to preserve and produce such documents unless they are protected by privilege. With the widespread use of computers, the Internet, electronic mail, and back up systems, most parties have at least some information that would be deemed “electronically stored information” (“ESI”). Prior to the change in December 2006, Rule 26 meant that a defendant would have to preserve and search through all forms of electronic media for documents responsive to a discovery request. The cost and time burdens to respond to requests for ESI under the previous version of Rule 26 were often significant. In response to motions to the courts and judicial rulings having to address exceptions to Rule 26 for ESI production on the basis that compliance was too costly and unduly burdensome, the United States Judicial Conference proposed changes which were enacted as of December 1, 2006.

Rule 16 and 26 Preliminary Conferences

FED. R. CIV. P., Rule 16 governs Pretrial Conferences and Scheduling Management. Under the revised rules, Rule 16 now requires the parties to deal early on in the litigation with the issue of ESI discovery, if such discovery is intended to occur.³ In conjunction with Rule 16, FED. R. CIV. P., Rule 26(f) directs the parties to discuss ESI discovery. “Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by

¹ Ms. Katheryn (“Kate”) A. Andresen is partner with the law firm of Hellmuth & Johnson, PLLC. Ms. Andresen is an experienced transactional attorney, with an emphasis in technology and intellectual property considerations. She is a frequent author and guest speaker on technology law related matters, both nationally and internationally. Ms. Andresen authored the second edition of *THE LAW AND BUSINESS OF COMPUTER SOFTWARE* (West Services, Inc., 2007-2011). This article was written for a National Business Institute seminar “E-Discovery: Applying the New FRCP Changes” held in Bloomington, Minnesota in November 2009.

² 28 U.S.C. § 2072.

³ See Committee Notes to Rule 16(b); a copy of the changes and Committee Notes may be found online at: http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. References to Committee Notes throughout this paper refer to this document.

minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement."⁴

Specifically, the December 2006 changes renumbered Rule 16 (b) (5) and (6) to (7) and (8) and added the following new (5) and (6) requirements for items that "[t]he scheduling order may also include"⁵:

- (5) provisions for disclosure or discovery of electronically stored information;
- (6) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production;

The Rule 26(f) conference required at the start of the litigation must address ESI if such information is to be produced. In particular, the parties are expected to discuss the types of information systems used in storing or accessing ESI. In addition, the parties are required to discuss the format of the production of the ESI. Due to the extensiveness of such information, the parties may also mutually agree that production will precede the final review for privilege, with the understanding that privilege will be asserted as soon as reasonably ascertainable and plaintiff will be precluded from asserting that the privilege was waived in that circumstance.

Rule 26 Changes for Reasonably Accessible Data

Ironically, the fact that information is stored electronically should make access, and therefore production, easier than traditional paper files. A typical request for documents might require production of "all originals and non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise." In reality, to fully comply with such a request, backup copies of ESI would need to be restored, reviewed and due to the sheer volume typically of ESI and the multiple copies of backup tapes potentially saved, the cost for such restoration, review and filtering for "non-identical copies" can cost a significant amount of money. In extremely complex and large litigation cases, it would not be unlikely that the production would result in millions of unique documents and having to review against multiple backup tapes for possible variations could take months in addition to the cost for such a review.

The December 2006 changes revised Rule 26(b)(2) by numbering the first two sentences as subparagraph (A) and the last half as (C) and inserting the following (B):

- (B) 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.

The Committee Notes for this addition recognize the possible substantial burden and/or cost associated with the production of some ESI and requires the parties to recognize this and address it during the discovery conference. The focus is on the phrase "reasonably accessible." The defendant may respond that production of a certain request is not appropriate due to substantial burden or cost (i.e. the ESI is not

⁴ Committee Notes following Rule 16.

⁵ Fed. R. Civ. P., Rule 16(b).

reasonably accessible), but any refusal to produce due to this burden requires the identification “by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”

Even if a party does not have to produce ESI under this new section, it will still have the statutory obligation to preserve such information.

If the parties do not agree about the ESI to be produced or not due to this new section (B), the courts may still rule on either a motion to compel discovery or a motion for a protective order. In preparing to rule on such a motion, the responding party may have to: (i) conduct a sampling of the information contained on the sources “not reasonably accessible”; (ii) allow for some form of inspection of such sources; and (iii) produce a witness to testify about such information systems.

Even if the ESI is deemed not reasonably accessible, a court still has the discretion to compel production upon review of the “good cause” for requesting the motion to compel as well as a review of the issues balancing the need for the information against the burdens and costs. According to the Committee Notes to Rule 26 (b) amendments:

“Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.”

The burden of proof for such a hearing is split, the producing party bears the burden with regard to its assertion that the information is “not reasonably accessible” and the requesting party bears the burden for showing good cause that the need for the information outweighs the burdens and costs. The court in ruling on such a motion may conclude that some or all of the cost associated with an order to compel may be shifted to the requesting party. According to the Committee Notes: “The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party’s willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause.”

Rule 26 Post Production Privilege Assertions

Due to the sheer volume of information typically generated as ESI, the risk of waiver as to privilege for producing an otherwise privileged document and the time and effort required to avoid such a waiver increase dramatically. In order to address this concern, the changes to Rule 26 allow for a post-production assertion of privilege and the other party may be precluded from asserting a waiver argument as to such production. Both the FED. R. CIV. P. Rule 26 (b)(5)(B) and Rule 26 (f) address the subject of privilege assertions post-production and the right, or not, of the other party to assert a waiver argument to permit use of the document.

Under Rule 26 (f), the parties during the pre-trial discovery conference can agree to allow for quicker release of ESI, provided that the producing party has the right to assert privilege claim with respect to any produced document as soon as the producing party has ascertained the privilege exists. In such a pre-trial arrangement, the scheduling order may expressly acknowledge the post-production privilege assertion as well as the loss of the receiving party to assert a waiver argument. The parties may agree upon other caveats as to the timing and/or timeliness of such a post-production privilege claim. Additionally, they may agree as to when a claim of waiver may still be validly brought with such post-production privilege assertions.

The December 2006 changes did not affect the court's authority to rule on discovery motions and/or consider arguments both for and against either the post-production privilege assertion or the right of the receiving party to argue waiver of such a privilege. As the Committee Notes state for Rule 26 (b)(5)(B): "Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law." Under Rule 26 (f), the Committee Notes state: "On other occasions, parties enter agreements — sometimes called "clawback agreements"— that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances."

The case management, scheduling order, or other such order may incorporate any agreement the parties came to during the Rule 26 (f) conference. The Committee Notes added: "Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case management or other order."

Rule 33 and 34 Specification of Form

Both the FED. R. CIV. P. Rules 33 (Interrogatories to Parties) and 34 (Production of Documents and Things...) were amended in the December 2006 amendments to expressly incorporate ESI. Rule 33 (d) and Rule 34 (a) both have the same broad definition of ESI. The purpose of this modification according to the Committee Notes is: "[m]uch business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well."

Rule 33 was changed to allow for ESI, but the Committee Notes recognized that "[s]pecial difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system." This means that substitution of ESI for an interrogatory is permitted "only if the burden of deriving the answer will be substantially the same for either party." If the responding party provides ESI under a Rule 33 response, the responding party may also be responsible to provide technical support or information on the application software to ensure the interrogating party may locate and identify the response to the interrogatory. Additionally, as indicated in the Committee Notes, "the responding party must give the interrogating party a 'reasonable opportunity to examine, audit, or inspect' the information." Again, such audit or examination may require the responding party to provide technical support or information on the application software.

If the production of ESI under Rule 33 (d) means that the interrogating party must have access to the responding party's information system to adequately locate and identify the response, then the responding party may be obligated ascertain and provide the

information itself if there is a security concern to protect sensitive interests of confidentiality.

The FED. R. CIV. P. Rule 34 was amended in 1970 to reflect that “documents” might mean different things depending on changes in technology. The obligation for computer information was that when the data could only be obtained through a device, the responding party may be required to use such device to translate the data into a useable form (e.g. printing a report from an electronic database.) In the December 2006 changes, Rule 34 was amended to make ESI on an equal footing to traditional documents. The Committee Notes remarked: “[t]he change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined.”

Rule 34 now encompasses documents or ESI “stored in any medium” to account for new developments in technology. The requirement of Rule 34 for ESI to be translated from one medium into another, does not, however, require translation into another language.⁶

As with Rule 26, Rule 34 may allow for a requesting party to sample or test a medium containing ESI in addition to the requesting party’s right to inspect or copy such information. Recognizing this right may be a problem, the Committee Notes acknowledge that: “[a]s with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c).” The Committee also acknowledged that inspecting information systems for ESI “may raise issues of confidentiality or privacy.” The express right to test or sample was not added “to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances.” Rather the Committee noted that the courts should guard against undue intrusiveness under this right.

Under Rule 34, a producing party must produce documents as they are “kept in the usual course of business.” The production of ESI is subject to a comparable requirement to, as the Committee noted, “to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party.” The December 2006 amendments to Rule 34 also allow the requesting party to specify the format to be used for production of ESI. Especially with ESI, the form of production may be critical to the usefulness of the production. If the requesting party fails to specify the format to be used for the production of ESI, the producing party has the discretion to produce in any reasonable format it chooses. It would be wise, however, for the parties to discuss and agree upon format prior to production as any disagreement may end up with a court compelling the producing party to re-produce the ESI in another format if the requesting party can show that the originally produced format is “not reasonably usable.”

If the parties cannot agree to the format for ESI under a Rule 34 production, “the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel.”⁷ If the parties cannot agree, the court decides and has discretion to order production in any format the court deems appropriate.

Producing parties under Rule 34 must translate ESI into a form that is “reasonably usable”. As noted under the Rule 33 changes, if necessary, the producing party may be required to provide technical support or information on the application software to the

⁶ See *In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

⁷ See Committee Notes for Rule 34.

requesting party to ensure the form of production is “reasonably usable.” If ESI production involves “‘legacy’ data that can be used only by superseded systems”, then the question of whether production is required at all or in another format will be handled under Rule 26 (b)(2)(B) considerations.

Rule 45

The FED. R. CIV. P. Rule 45 allows for party to subpoena “evidence or to permit inspection”. The December 2006 changes allow for a subpoena of ESI, including the specification of the form of such production. As with Rule 34, the parties may agree to the form, challenge a requested form, or change the “reasonably usable” quality of the form produced. Rule 45 expressly prevents a producing party from having to produce information in more than one form.

Additionally, Rule 45 allows for the producing party to object to the request or the form requested as unduly burdensome or expensive. As with Rule 26, the parties either work these issues out amongst themselves, or the court will issue an order as to the right for production and or the right to avoid production on the basis that production would be unduly burdensome or expensive.

Rule 45, as with Rule 34, allows for testing or sampling, provided that such right does not constitute a burden or affect confidentiality or privacy obligations. The considerations and right for court discretion to rule on such Rule 45 disputes is equivalent to the discussion under Rule 34. As with Rule 26, the producing party also has the right to assert privilege post-production. Upon notice of the privilege, the Committee Notes explain:

“After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.”