New York Law Journal
NEW YORK LAW JOURNAL SPECIAL SECTION
ALM
LITIGATION
Web address: http://www.nylj.com
TUESDAY, FEBRUARY 19, 2008

Don't Dread the Rule 26(f) Conference

It can be used to your advantage.

BY DAVID LENDER

AS IS WELL KNOWN by now, the Federal Rules of Civil Procedure were amended, effective Dec. 1, 2006, to address certain issues relating to the discovery of electronically stored information, or ESI. These changes include, among other things,

(i) a new two-tier approach to discovery that permits litigants not to produce ESI in the first instance from sources identified as "not reasonably accessible because of undue burden or cost,"

(ii) a uniform protocol for dealing with inadvertently produced privileged materials, and

(iii) a limited "safe harbor" that, absent exceptional circumstances, prohibits a court from imposing sanctions under the Federal Rules due to the loss of ESI "as a result of the routine, good faith operation of an information system."

David Lender *is a partner in the litigation department of Weil, Gotshal & Manges, head of the firm's e-discovery task force and the co-author of "E-Discovery: Law and Practice" (Aspen Publishing, 2008 supplement).*

Among the most important amendments, however, is the requirement that litigants discuss ESI at their initial discovery planning conference. The Committee Note to Rule 26(f) explained that "discussion at the outset may avoid later difficulties or ease their resolution."

Specifically, Rule 26(f) was amended to require litigants to discuss three additional items during their initial conference.

First, in developing a discovery plan, litigants are required to discuss and incorporate the parties' views on "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."

Second, the parties are required to discuss "any issues relating to preserving discoverable information."

Third, the parties need to discuss and include in their discovery plan "any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order."

The amended rule does not set forth what litigants are expected to discuss at the Rule 26(f) conference regarding the discovery of ESI, other than the form or forms in which it should be produced. However, the Committee Note suggests that all issues are potentially on the table for discussion, including, by way of example:

- the parties' information systems to help develop a discovery plan that takes into account the capabilities of those systems;
- identification of, and early discovery from, individuals with special knowledge of a party's computer systems;
- specific topics for discovery and the time period for which discovery will be sought;
- sources of information within a party's possession, custody or control that should be searched for ESI;
- whether information is not reasonably accessible, including the burden or cost of retrieving and reviewing such information; and
- whether metadata or embedded data needs to be produced.

As for preservation issues, the Committee Note recognizes that the "complete or broad cessation of a party's routine computer operations could paralyze the party's

activities," and directs parties to "take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps."

Lastly, as for privilege issues, the Committee Note encourages parties to discuss attempts to minimize the costs and delays associated with reviewing ESI for privilege by agreeing to protocols that minimize the risk of waiver.

The most common approach is a "claw back" agreement whereby the parties agree that the inadvertent production of privileged materials does not constitute a waiver of the privilege. However, the Committee Note also proposes more radical approaches, including "quick peeks," whereby a requesting party can initially examine potentially responsive materials, and the producing party only conducts a privilege review after the requesting party selects the documents it seeks for production.

Many district courts have issued local rules governing the Rule 26(f) conference that complement the amended Federal Rule.[1] In addition, states have begun to implement electronic discovery rules governing state court proceedings.[2] Thus, it may soon be a rare occurrence to be involved in a litigation and not be required to at least discuss issues pertaining to the discovery of ESI at the onset of the case.

The New Burdens and Concerns

Companies are rightfully concerned about the new burdens associated with the Rule 26(f) conference.

Parties (and their lawyers) will need to prepare for this conference, including obtaining an understanding of the client's computer systems, which means additional costs as well as the associated burdens on already over-taxed IT personnel. Even worse, parties can no longer hide behind objections, as they may have done before the new rules went into effect, in response to Rule 30(b)(6) depositions or interrogatories directed at ESI.

The buzz word commonly used to describe the initial case management conference under the new rules is "transparency." Companies are expected to openly disclose information about their computer systems, warts and all. They will need to be prepared to discuss their various backup systems and to identify what data is backed up, how they are backed up, and the periods for which they have retained backup tapes.

Even more frightening, companies may need to explain what they have been doing to preserve potentially relevant information up to and prior to the conference. Courts often find that the duty to preserve is triggered well in advance of the filing of the lawsuit.[3]

However, the Rule 26(f) conference does not occur until after the lawsuit is commenced. Thus, oftentimes months if not years before the conference even takes place, parties have made decisions about the scope of preservation, including whether to preserve, what to preserve and from whom to preserve.

The Committee Note states that it is important to discuss preservation early in a case, because failure to do so "increases uncertainty and raises a risk of disputes." However, some litigants may seek to use the Rule 26 conference as a vehicle to challenge the reasonableness of your preservation efforts, resulting in more spoliation challenges at the outset of the case.

In addition, failing to adequately prepare and discuss ESI at the Rule 26(f) conference could have significant consequences. In *In re Seroquel Products Liability Litig.*,[4] for example, the court stated the importance of parties becoming familiar with their systems and discussing them at the conference. As the court explained,

> [i]dentifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take.[5]

Because defendant failed to make a "sincere effort" to facilitate an understanding of its database records, despite a case management order in which it agreed to provide such information, the court found that sanctions were warranted.[6]

Thus, *In re Seroquel* provides a healthy warning to litigants about the importance of understanding the clients' computer systems, especially since courts are encouraged to actively manage the process and have been entering orders pursuant to Rule 16(b) that include "provisions for disclosure or discovery of electronically stored information."[7] If you agree to a deadline or disclosure, which is then encompassed in a case management order, without first having an understanding of your client's system and whether the deadline or disclosure can actually be achieved, the repercussions can be enormous.

Start With the Right Mindset

Despite these risks and burdens, the Rule 26(f) conference, if viewed and prepared for correctly, can provide a real opportunity to limit the breadth and associated costs of electronic discovery. Below are some suggested issues to consider when preparing for it.

Limit the Scope of Preservation. Companies are neurotic about removing backup tapes from circulation, and rightfully so. Once a tape is taken out of circulation, it is out of circulation for that case as well as any other litigations that then exist or are reasonably anticipated at any time while the tape is out of circulation.

The concern about backup tapes is not the cost of restoring the tape, which is relatively modest. Instead, the concern is the costs associated with reviewing the information on the tape for responsiveness and privilege, which would not otherwise need to be done if the tape was recycled pursuant to the company's routine recycling practices.

The key to getting agreement on limiting the scope of preservation will obviously depend on the specific facts of the case. However, by way of example, if you have implemented a reliable preservation hold, then there is no reasonable basis for a party to insist that you also retain backup tapes on a going forward basis, unless there is some reason to believe that the backup tape is the only repository of relevant information.

Alternatively, consider agreeing to a periodic snapshot, rather than retaining all backup tapes, to protect yourself and assuage your adversary's concerns in the event that some custodian makes a mistake and fails to preserve all relevant information. If your adversary refuses to be reasonable, and insists you keep everything, you have options, including raising the issue with the court. As noted above, the Committee Note states that parties need to be reasonable when it comes to preservation. Also, consider asking your adversary to pay for some or all of the preservation costs.[8]

Limit the Scope of Production. The review of ESI for production and privilege has resulted in significant costs for litigants. More and more cases involve companies hiring dozens of temporary attorneys (sometimes in India) to review documents for production. In a large case, it is not unusual for ESI document review to costs tens if not hundreds of thousands of dollars per month.

However, the Rule 26(f) conference provides an opportunity to limit the scope of review and production. For example, litigants should be prepared to discuss key word searching to limit the scope of the documents that need to be reviewed for production. Parties also should be prepared to discuss limiting the time period of documents and capping the total number of custodians that need to be reviewed.

The key to success here is being reasonable. When a producing party proposes limiting the production to 50 custodians and the requesting party wants 75, consider compromising in the middle. When your adversary states that (s)he is not yet prepared to select all of the custodians at the conference, let him or her select the custodians over an agreed period of time. With key word searching, employ an iterative process. If a selected word results in too few or too many hits, be flexible enough to revise the key words.

However, if your adversary is unreasonable, again consider seeking court intervention. It is hard to imagine how a requesting party will justify its demands, at least without paying for some of the costs, when the producing party states that it offered to produce documents for up to 50 custodians, at the requesting party's choosing, which would result in the review of more than one million potentially responsive documents, but the requesting party wanted more. If the smoking gun is not in the files of the 50 most relevant people chosen by the requesting party, it is hard to imagine that the key to the case is somewhere else.

Forms. Companies are hesitant to produce documents in native format because, among other things, they cannot be bates-stamped or redacted. There also are concerns about litigants altering the native document. Be prepared to discuss the form of production at the initial conference. For most documents, especially e-mail, native production makes little sense. However, the key to success here is being flexible. If you can get your adversary to agree on a TIFF or PDF production, with associated meta data in load files, do not foreclose reasonable future requests for native production of select documents.

Voicemail and IM. As a matter of business practice, most companies (with certain exceptions, including those in regulated industries) do not generally retain IM or voicemail. Consider raising these types of ESI at the initial case management conference and reaching agreement that they do not need to be preserved on a going forward basis. Be prepared to discuss the burdens with having to preserve voicemail and IM based on your client's current technical capabilities.

Backup Tapes and Other Information Not Reasonably Accessible. To the extent that you have historical backup tapes, be prepared to discuss in concrete terms what is contained on those tapes, the likelihood that they contain any relevant information not available from more accessible sources, and the costs associated with restoring and reviewing information on the backup tapes.

As noted above, new Rule 26(b)(2)(B) provides a two-tiered approach to discovery and states that a party, in the first instance, "need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." If that showing is made, a requesting party can still obtain such information if it shows "good cause," but the court may order cost-shifting as a condition for the production.

Privilege Considerations. It is virtually impossible to conduct a privilege review in any significant litigation without the inadvertent production of some privileged materials. Given the number of people involved in reviewing documents for privilege, and the difficulty in assessing the role of the attorney in e-mail communications, mistakes will happen. Always seek to obtain a claw-back agreement, preferably included in a court order, that requires your adversary to return any inadvertently produced materials.

In addition, given the growing sizes of electronic document productions, the review of such documents for privilege and the costs associated with preparing privilege logs can be staggering. Be prepared to discuss ways to limit these privilege-related costs with your adversary, including seeking to limit the number of custodians or types of documents for whom or which a privilege log needs to be prepared, limit the privilege log to documents that predate the litigation or dispute, and limit the privilege log to the last strand in an e-mail chain without requiring that each strand in the chain be individually logged.

Who Should Appear at the Conference. Consider whether it makes sense to bring an IT employee or a technical expert to the conference. At a minimum, make sure you interview those individuals in advance so you understand the limitations of your client's computer system. Before you agree to produce all relevant e-mail within three months, which may be incorporated into a court order, it is important to know whether this is even possible.

In Conclusion

In sum, an early discussion about ESI will now be one of the first steps in any litigation.

As more and more information is stored electronically, it becomes increasingly more important to try and use the conference to limit the scope of discovery. It is also critically important to be prepared and to be reasonable.

The conference is your first opportunity to build credibility and trust with your adversary, which will be necessary to accomplish your goal of limiting the costs associated with producing ESI. And if your adversary is unreasonable, seek court intervention.

1. See, e.g., http://ralphlosey.wordpress.com/localrules/ (identifying 30 district courts that have enacted special rules to deal with ESI). See also *O'Bar v. Lowe's Home Centers Inc.*, No. 5:04-cv-00019-W, 2007 WL 1299180 (W.D.N.C. May 2, 2007) (ordering parties to prepare pre-certification discovery plan and offering detailed guidelines to govern such discovery plan, including topics to be discussed).

2. See http://www.ediscoverylaw.com/2008/01/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules/ (listing states that have enacted ESI rules); http://www.ediscoverylaw.com/2008/01/articles/resources/list-of-states-actively-considering-the-adoption-of-special-ediscovery-court-rules/ (identifying states considering amendments to rules).

3. See, e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (finding duty to preserve triggered 10 months before the filing of the complaint). For a complete discussion of the duty to preserve, see Adam I. Cohen and David Lender, "Electronic Discovery: Law and Practice" (Aspen Publishing, 2008 supplement), Chapter 3.

4. 244 F.R.D. 650 (M.D. Fla. 2007).

5. Id. at 660.

6. Id. at 661. The court also criticized defendants' "purposeful sluggishness" in producing documents, performing an unreasonable key word search, without conferring with the plaintiffs or validating their efficacy, and failing to insert page breaks in millions of pages of documents, among other failings. Id.

7. Similar to Rule 26(f), Rule 16(b) of the Federal Rules of Civil Procedure was amended effective Dec. 1, 2006, to allow courts to enter orders regarding the discovery of ESI.

8. See *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 373 (S.D.N.Y. 2006) ("If the demanding party seeks the preservation of information that is likely to be of only marginal relevance but is costly to retain, then rather than deny a preservation order altogether, a court may condition it upon the requesting party assuming responsibility for part or all of the expense.").