Guidance on e-Discovery in the Federal Courts Percolating out of the Civil Rules Advisory Committee

*By Donald A. Daugherty, Jr.**

Introduction

Among the numerous challenges that the information age has thrust on courts and practitioners across jurisdictions is the handling of "e-discovery." Simply and more specifically put, how can parties to litigation deal reasonably, rationally and cost-effectively with discovery of computer-based information, which can now be created and stored in near-infinite quantities, as well as in an abundance of new forms? One example of e-discovery problems: although the overwhelming majority of a litigant's digitally-stored information may likely be irrelevant to the issues involved in a lawsuit, parties often try to devise effective yet practical ways to review the entire universe of information because it is that needle in the haystack upon which many lawsuits turn.

While a growing number of federal courts are providing some guidance through decisions[1] and local rules,[2] comprehensive, uniform direction may be coming next year in proposed amendments to the Federal Rules of Civil Procedure.

Over the past several years, the Civil Rules Advisory Committee ("the Committee") to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and its Discovery Subcommittee ("the Subcommittee"), have been considering whether to amend the rules of civil procedure to encompass electronic discovery issues expressly. The Subcommittee identified and studied various issues relating to electronic discovery and its initial efforts culminated in an April 2003 report.[3] The Committee endorsed the report and authorized the Subcommittee to continue examining e-discovery issues. The Subcommittee reported back in October 2003, but the minutes from that meeting have not yet been published. The next step in the deliberative process is a February 2004 conference to be held at Fordham University's Law School, at which comments on the Subcommittee's work will be solicited from a broader audience.[4]

To this point, the Subcommittee has not drafted proposed amendments for public review but is still considering whether promulgating new, special rules for dealing with e-discovery is appropriate in the first place. The Committee could decide to let the courts continue to work through these fascinating but thorny issues and then, at some later point, draw on the best practices for creating rules. However, this seems unlikely and, at the least, the Subcommittee's work thus far identifies the most significant e-discovery issues and provides some persuasive authority for how to approach them.

Areas of Primary Concern and Possible Responses

In the April report and October meeting, the Committee and Subcommittee have focused on essentially six areas of concern.

(1) Including Discussion of E-Discovery Issues in Early Discovery Planning

Rule 26(f) requires parties "to confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case."[5] The Subcommittee firmly believes that "thoughtful attention at this early point to the likely needs of discovery of digital information can reduce or eliminate a number of problems that might otherwise arise later."[6] Consequently, the Subcommittee is considering amendments to Rule 26(f), 16(b) and possibly Form 35.

In its April report, the Subcommittee also considered expanding initial disclosures required under Rule 26(a). For example, Rule 26 could be amended to require disclosure regarding each party's electronic data storage and communication systems. However, from the draft October meeting minutes, it appears that the Committee may drop further consideration of amending Rule 26(a).[7]

(2) Definition of Document—Rule 34

"Document," as defined in Rule 34, includes "writings, drawings, graphs, charts, photographs, phono-records, and *other data compilations from which information can be obtained*…."[8] While this definition should include computer-based information, it could be revised to "include a more modern and accurate definition of the various types of digital data that can be sought through discovery."[9] For example, are voicemails received through Voice Over Internet Protocols and/or stored electronically considered "documents"? Similarly, does a "document" include the meta-data and embedded data automatically generated when the document is created?

The Subcommittee has acknowledged that devising a new definition will be difficult.[10] Furthermore, given the speed of technical innovation, any new definition might quickly be made obsolete by developments like non-electronic computing through chemical or biological methods. One possible option is to create a Rule 34.1, which would specifically apply to electronic discovery.[11] Alternatively, the Committee could adopt the "Texas approach," which would define document as "those things accessible during the normal course of business."[12]

(3) Form of Production

The Subcommittee is considering amending Rule 34 to address disputes that often arise over the form of production of electronic discovery.[13] For example, hard copies may leave out important data (*e.g.,* meta-data) and may be more difficult to search than digital versions. At the same time, electronic versions of data may be difficult

to use without particular software to which the requesting party does not have access or which may even be proprietary software of the responding party.

One approach would be to amend Rule 34(b) to require that the requesting party specify the form to be used. Another approach would be to establish a default rule as to the form. If the Committee decides to propose amendments to Rule 34, an amendment to Rule 33(d) (which allows a party to respond to an interrogatory by producing business records) will also be necessary.

The Subcommittee has acknowledged that trying to grapple with these issues is challenging because "every case is different...Perhaps the best thing is to prod people to discuss these issues up front rather than trying to specify what to do with them."[14]

(4) The Burden of Retrieving, Reviewing And Producing Data That The Responding Party Uses Rarely Or Never

Although the rules presume that the responding party will bear its discovery costs, e-discovery presents problems that might justify disturbing this presumption. Computer backup systems preserve enormous amounts of data that are "never intended to be used absent a catastrophic event."[15] Moreover, the lack of any organization to data bytes stored on backup tapes and the like may encumber locating materials on a specific topic; consequently, reviewing it may require "heroic efforts" with attendant heroic costs.[16]

The Subcommittee has made clear that it believes the rules "should protect against the burden of producing 'inaccessible' data unless a court determines that the burden is justified."[17] The rub, of course, is determining when data is truly inaccessible and the extent of the burden that can be imposed to retrieve it. To reach all modes of discovery, the Subcommittee has been considering addressing this issue through new Rule 26 provisions, including a proviso that would allow a court to order the production of "inaccessible" data.[18]

One option discussed by the Subcommittee is adopting the "Texas principle:" under this approach, one must decide whether the data is "reasonably available to the responding party in its ordinary course of business."[19] A second option is found in ABA Discovery Standard 29(b)(iii), which provides that the party seeking discovery "generally should bear any special expenses incurred by the responding party in producing the requested information."[20]

A related issue concerns the extent to which amendments to the rules will affect how businesses preserve "discarded" information and what archive practices and systems should be promoted.[21]

Notwithstanding the practical significance of these issues, from the minutes of the October meeting, the Committee appears to be far from reaching clear answers on how to address them.[22] Although the Subcommittee had considered changes to Rule 26 to address these issues,[23] it ultimately may allow parties and courts to continue to handle them on a case-by-case basis.

(5) Inadvertent Waiver of Privileges

Producing massive quantities of data in a form that cannot be reviewed by the naked eye increases the risk of disclosure of privileged information (not to mention production of information that does not respond to any request by opposing counsel).[24] Such inadvertent disclosure could include not only attorney-client material, but also trade secrets or confidential business information. And the costs to the responding party of screening such massive quantities can be enormous. In order to address this risk of inadvertent waiver of applicable privileges, the Subcommittee has drafted a new provision for Rule 34(b). The provision permits courts to enter an order that would "insulate mistaken production against the waiver consequence."[25] The Subcommittee is also considering other approaches, such as adopting the "quick peek" approach often used in cases involving discovery of huge amounts of paper, or an amendment that would incorporate the multi-factor tests already developed by the courts to limit the effects of inadvertent waiver.[26]

(6) Adopting a "Safe Harbor" For The Preservation of Electronic Data

Along with the issue of who bears the costs of production, the most significant, practical e-discovery concern faced by litigants and their counsel is when and for how long must these gigabytes of information be stored in order to avoid claims of spoliation.

Thus, the Subcommittee has drafted a "preservation protocol" in response to two specific concerns:

> (1)Important data is either deleted or lost by the time it is sought for litigation purposes; and
> (2)"[E]ntities from which data are sought say they can't foresee what methods of data preservation will be deemed sufficient by courts."[27]

Under the safe harbor protocol considered by the Subcommittee, sanctions would be limited against a party that has fully complied with it. The protocol would be included in a new Rule 34.1, an addition to Rule 26, and/or a new Rule 37.[28] The protocol would make clear the duty to preserve information, but would recognize the responding party's good faith operation of disaster recovery or other systems. The protocol would also require that, before sanctions can be imposed, the destruction of data must be willful or reckless and not merely negligent.[29]

Conclusion

E-discovery issues remain ripe for further consideration by the Committee. Undoubtedly, both the difficulty of "solving" these concerns (especially given that they

will continue to mutate rapidly) and the risk of unintended consequences are major. Yet practitioners in the trenches want guidance.[30] If the Committee concludes that amendments are necessary and appropriate, the proposed amendments will be drafted and made available for public comment in the Summer of 2004.

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Footnotes

[1] An especially influential series of decisions on e-discovery issues comes from Judge Schira Scheindlin of the Southern District of New York. *See* Zubulake v. UBS Warburg*, LLC*, 2003 WL 21087884 (S.D.N.Y. May 13, 2003); Zubulake v. UBS Warburg*, LLC*, No. 02-Civ-1243, 2003 WL 210876136 (S.D.N.Y. May 13, 2003); Zubulake v. UBS Warburg, LLC, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003); *see also* In Re Ford Motor Co., 345 F. 3d (11th Cir. 2003), 2003 WL 22171712 (11th Cir. September 22, 2003); Fennell v. First Step Designs, Ltd., 83 F.3d 526 (1st Cir. 1996); Stallings-Daniel v. Northern Trust Co*.,* 202 WL 385566 (N.D. Ill. 2002).

[2] *E.g.,* E. & W. D. Ark. R. 26.1; D. Wyo. R. 26.1(d)(3).

[3] *See* Lynk & Marcus, *Discovery Subcommittee Report on Electronic Discovery*, (April 14, 2003) [hereinafter *April Report*].

[4] Civil Rules Advisory Committee, Draft Minutes of October 2-3, 2003 Meeting, at 30 [hereinafter *October Minutes*].

[5] Fed. R. Civ. Pro. 26(f).

[6] *April Report, supra* note 3, at 8.

[7] *October Minutes*, *supra* note 4, at 31.

[8] Fed. R. Civ. Pro. 34 (emphasis added).

[9] *April Report*, *supra* note 3, at 10.

[10] *October Minutes*, *supra* note 4, at 34-37; *April Report*, *supra* note 3, at 11.

[11] *April Report*, *supra* note 3, at 11.

[12] *Id.*

[13] *October Minutes*, *supra* note 4, at 37-39; *April Report*, *supra* note 3, at 11-12.

[14] *April Report*, *supra* note 3, at 12; *see also October Minutes*, *supra* note 4, at 38.

[15] *April Report*, *supra* note 3, at 13; *see also October Minutes*, *supra* note 4, at 40-42.

[16] *April Report*, *supra* note 3, at 13 n.7 (discussing *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003)).

[17] *October Minutes*, *supra* note 4, at 39; *see also April Report*, *supra* note 3, at 13-14.

[18] *October Minutes*, *supra* note 4, at 39-40.

[19] *April Report*, *supra* note 3, at 14; *see also October Minutes*, *supra* note 4, at 40-41.

[20] *April Report*, *supra* note 3, at 14.

[21] *October Minutes*, *supra* note 4, at 38-39.

[22] *Id.* at 37-39.

[23] *October Minutes*, *supra* note 4, at 40-42.

[24] This risk became unfortunate reality for the federal government in an ongoing, high-profile prosecution, where grand jury material and other privileged information contained in a government paralegal's computer network account was mistakenly attached to a hard drive provided to defense counsel. *See* United States v. Rigas, 02 Cr. 1236 (S.D.N.Y. Sept. 2003)(Sand, J.) (ordering defendants to return privileged information).

[25] *April Report*, *supra* note 3, at 14.

[26] *October Minutes*, *supra* note 4, at 43-44.

[27] *April Report*, *supra* note 3, at 16; *see also October Minutes*, *supra* note 4, at 45-46.

[28] *October Minutes*, *supra* note 4, at 45-46; *April Report*, *supra* note 3, at 16.

[29] *October Minutes*, *supra* note 4, at 45.

[30] For additional information on the challenges presented by e-discovery, *see Draft Amendments to ABA Civil Discovery Standards*, A.B.A. Lit. Section (November 17, 2003); Thomas Y. Allman, A Preservation Safe Harbor in E-Discovery (July 13, 2003); Sedona Conference WGS, *The Sedona Principles for Electronic Document Production* (March 2003).