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thedigitaledge — Early Bird Catches the Worm Rule 26 E-Discovery Conference

By Ellen T. Mathews

In issuing opinions such as those in the now infamous *Zubulake* and *Qualcomm* cases, federal courts have indicated that attorneys must be diligent in managing the ins and outs of e-discovery and electronically stored information (ESI) and take the proper time and care to become familiar with their clients' electronic data management systems and document retention policies. Likewise, the 2006 amendments to the Federal Rules of Civil Procedure signified the drafting committee's recognition that the use of technology and the resultant explosion of e-discovery has begun to play a significant role in litigation.

One specific change made to Rule 26(f) provides that the parties' proposed discovery plan, formulated during their planning conference, "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.

These developments make it clear that attorneys are now under greater pressure to perform early and continuing analyses of their cases to determine whether ESI will be important and, if so, to what extent. Such analyses are not only necessary, but also can generate enormous value for both attorneys and their clients. Taking the time and effort to plan for e-discovery on the front end of a case can reap substantial benefits down the road, such as cost savings, efficiency, and protection from potential spoliation issues and ethical violations. The Rule 26(f) conference is the perfect opportunity to put your planning to work.

With this background in mind, suppose you receive a new case and realize there likely will be substantial ESI involved. What next? Before you even set foot in your planning conference, you need to take certain steps. As early as possible, issue a "litigation hold" letter for your client to disseminate among its employees and any potential witnesses to the case. The initial litigation hold should be broad, informing employees and witnesses to refrain from deleting any ESI that is potentially relevant to your case. As discussed below, you may be able to narrow this hold later during your planning conference.

Next, you should schedule a meeting with your client's IT professionals or whoever is most knowledgeable about your client's computer information systems. If your firm has IT professionals on staff, it might make sense for one or more of them to attend this meeting as well so they can put the knowledge you gain about your client's IT system into context. In this meeting, you need to become familiar with how your client uses computers on a daily basis, which you can discover by asking some basic questions, such as: How many and what type of computers does the client use? What type of e-mail server does the client use? How does your client create and store documents? What are your client's data and document retention policies? After you become knowledgeable about your client's computer use, you need to identify which of your client's employees or agents are most likely to have case-related ESI and where these persons (and their computers) are located.

Once you know enough about the location, volume, and nature of your client's ESI, you will be prepared to have a meaningful Rule 26 conference, at which you should address and, if possible, agree on the following points:

Preservation—Computers ordinarily create, delete, and overwrite certain information without any user input. Inform opposing counsel of your client's current document and data retention policies. Determine whether and to what extent those policies may remain in place. An early agreement on preservation will protect you and your client from spoliation charges later in the case.

Scope and source—It likely will be impractical to preserve and/or produce the totality of your client's ESI. Instead, use your planning conference to determine from whom you must gather ESI and the point in time at which information becomes relevant to your particular case. This discussion will be informed by the size of your case, the amount in controversy, and the costs and burden involved in gathering identified ESI. Protect your client from spoliation charges and save time and money by narrowing the scope of relevant ESI.

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Form—ESI can be produced in many forms, including printed in hard copy, burned on a disk, and sent via e-mail. You should be able to come to an agreement early on about how you will produce and receive ESI, which will avoid the expense and delay of production in unreadable, incompatible, or otherwise inappropriate forms.

Privilege issues—The sheer volume of ESI can be staggering and performing a thorough privilege review cost-prohibitive. One solution is to enter into a "quick peek" agreement, a fairly new creature in litigation that allows a party to produce discoverable information without engaging in a privilege review and without destroying the privilege. The parties agree on a procedure for the location and return of inadvertently produced privileged information. If the court enters your agreement as an order, the order protects you from waiver claims in other lawsuits and against third parties.

ESI is fast becoming an issue in many cases. Gaining sufficient general knowledge about ESI and planning ahead for your specific case are key to preventing discovery battles down the road and to meeting your ever-increasing ethical obligations relating to ESI.

Ellen T. Mathews is a commercial litigation associate at Burr & Forman, LLP, in Birmingham, Alabama. She can be contacted at emathews@burr.com.

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