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The Importance of E-Discovery

By Scott Dodson



It was bound to happen sooner or later. A New York law firm, Sullivan & Cromwell LLP, recently sued its electronic discovery vendor for missing deadlines and preparing the wrong documents for production, for which the law firm seeks to avoid \$710,000 in outstanding bills from the vendor. Suits like this one, which are certain to become more and more common as litigation becomes more and more electronic (and as e-discovery becomes more and more complicated and expensive), underscore the importance of civil rules of procedure that take into consideration the realities of e-discovery.

E-discovery has brought about a new jargon: search terms, .tif format, metadata, file conversion, backup tapes, redlined versions, servers, intranets, cookies, cache files, deleted fragments. These terms were practically unheard of a decade ago. Now they are part of an indispensable discovery lingo.

E-discovery is, in many ways, completely different than paper discovery. Electronic data are both easier and harder to destroy than paper documents. It is easier because resaving a working draft can destroy previous iterations. It is harder because data can remain in computer memory even after a file is deleted. Electronic data are easier to modify, even unintentionally (even accessing a document

may change its modification date). Files can be converted from a native format to a more or less user-friendly (usually, searchable) format. Some files may need the accompaniment of special software or programs to be understandable. Electronic data may reside in multiple locations and in many copies, so the sheer volume of electronic data presents its own burdens and costs of retrieval and review.

The Federal Rules of Civil Procedure were amended in December 2006 to take into account many of these e-discovery issues. The amendments made five categories of changes. First, Rules 16, 26(f), and 35 put a premium on party discussions about e-discovery issues. The rules now require the parties to meet and confer about e-discovery issues (in particular, form of production, data preservation, and privilege waiver) early in the discovery process. The rules also require disclosure of certain electronic data in parties' initial disclosures.

Second, Rule 26(b)(2) attempts to strike a balance between one party's burden in retrieving inaccessible electronic data and another party's good cause for obtaining the information. Reasonably accessible electronic data is included in discovery requests generally. Inaccessible data, on the other hand, need not be searched or produced as a routine part of responding to discovery without a

court order, which may be granted if the opposing party shows good cause for the information.

Third, Rule 26(b)(5) addresses the fallibility of attorneys' privilege reviews in the context of e-discovery. Specifically, the new rule creates a presumption against waiver if a party discloses or produces privileged material inadvertently and notifies the recipient of the error in a timely fashion. If the party meets the requirements, the recipient must return, sequester, or destroy the specified materials and all copies and is prohibited from using the materials in any way. The rule allows the recipient to challenge the claim of privilege or protection, notwithstanding the recipient's obligation to sequester, return, or destroy.

Fourth, Rules 33 and 34 address the form of production. Rule 34(b) in particular allows parties to request production of specific forms of electronic data. If a requesting party does not request a specific form, a producing party may produce the data either as "ordinarily maintained" or in a form that is "reasonably usable." A responding party may object to the form specified by the requesting party on normal grounds, such as undue burden.

Fifth, Rule 37(f) addresses sanctions for spoliation of electronic data. Because of the high spoliation rate and the burdens of preservation, Rule 37 limits a court's ability, absent exceptional circumstances, to impose sanctions for the good faith deletion of data if the deletion was the result of a routine operation of an electronic information system.

Many states, including Idaho, New Jersey, Indiana, Minnesota, Montana, and New Hampshire, have begun to adopt their own e-discovery rules for state court practice. Arkansas has been slower to address e-discovery issues through the rulemaking process, but the Arkansas Supreme Court appears to be aware of the problem. On January 10, 2008, the Court approved amendments to Rule 26(b) of the Arkansas Rules of Civil Procedure. Those amendments, which take effect immediately, amend Rule 26(b)(5) to track the new federal standards for the inadvertent disclosure of privileged or protected material.

The 2007 Reporter's Notes specifically

link these amendments to the rules of privilege waiver to the difficulties and risks of e-discovery:

Lawyers do their best to avoid mistakes, but they sometimes happen. Discovery has always posed the risk of the inadvertent production of privileged or protected material. The advent of electronic discovery has only increased the risk of inadvertent disclosures. This amendment addresses this risk by creating a procedure to evaluate and address inadvertent disclosures, including disputed ones.

The Arkansas rule amendments are only a small step towards addressing all of the issues that e-discovery raises, but they evince an acknowledgment by the Arkansas Supreme Court and the Arkansas Supreme Court Committee on Civil Practice that the rules must adapt to address the new challenges e-discovery presents.

The amendments to the rules tell only half the story; the other half is how practitioners are actually using and interpreting them. That half of the story will be told, at least in part, by two other articles included in this issue. Todd Newton will discuss how to advise clients on policies and procedures regarding what they need to do to protect, preserve, and manage electronic information before litigation. Spence Fricke will discuss the importance of litigation hold notices to clients. ■



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