



LOCAL PRACTICES FOR ELECTRONIC DISCOVERY

BY ANNE SHEA GAZA AND JASON J. RAWNSLEY

The 21st century saw the introduction of buzzwords like electronically stored information (ESI), key word searching, data sampling, and predictive coding in courthouses across the country. As companies embrace electronic solutions such as cloud computing and remote archiving, key litigation documents and information—including discoverable documents—are no longer stored in steel file cabinets. This shift from paper to electronic communication and storage has transformed every step of litigation, from initial case assessment to discovery and even trial.

Recognizing how the electronic age has changed and will continue to change how we litigate, on Dec. 1, 2006, the U.S. Supreme Court amended the Federal Rules of Civil Procedure (the 2006 Amendments) “to give greater guidance to courts and litigants in dealing with electronic discovery issues.”¹ The 2006 Amendments were designed to cover four areas:

- early attention to electronic discovery issues,
- the role of accessibility in discovering electronically stored information,
- the form of production for such information, and
- sanctions for failure to produce requested information.

Yet the 2006 Amendments were neither the starting point nor the end point for the handling of ESI. Indeed, presaging the 2006 Amendments, the District Court for the District of Maryland stated that “it is no longer acceptable for the parties to defer good faith discussion of how to approach discovery of electronic records. ... [C]ounsel

have a duty to take the initiative in meeting and conferring to plan for appropriate discovery of electronically stored information at the commencement of any case in which electronic records will be sought.”² Similarly, prior to the adoption of the 2006 Amendments, some districts, such as the District of Delaware, developed comprehensive guidelines for electronic discovery that called for early disclosures and discussion regarding ESI.

In the wake of the 2006 Amendments, at least 30 districts have adopted either courtwide or individual judicial procedures to complement the changes to the federal rules. Although most of the procedures adopted by the courts concern the Rule 26(f) conference and Rule 16 scheduling orders, courts have also developed rules that take into account the implications of electronic discovery for subpoenas and other aspects of civil procedure. This article explores some of the ways that district courts and judges across the country have responded to ESI issues and the 2006 Amendments.

Local Rules

Perhaps the most obvious starting point, given their formality, are local rules addressing ESI that have been adopted by district courts across the country. When adopted, local rules often address ESI by establishing the parties’ obligations in conducting their Rule 26(f) conferences. These rules typically outline areas for discussion, such as which databases or electronic storage systems are to be searched, whether the information is reasonably accessible, how to apportion the costs of electronic discovery,

and how to preserve electronically stored information.³

But district courts vary widely in how detailed their local rules prescribe, for instance, the subjects that counsel are to discuss in preparation for the Rule 26 conference. The local rules of some districts are silent on this issue, while others have made minor changes. For example, the District of Connecticut's local rules simply state that the scheduling order may include provisions for electronically stored information.⁴ By comparison, the District of New Hampshire's local rules direct the parties to conform their discovery plans to a sample discovery plan that is provided by the court, which requires the parties to set forth their electronic discovery proposals and any disputes related to those proposals.⁵

Other districts have gone much further to implement the spirit of the 2006 Amendments. One of the local rules for the Eastern District of Wisconsin, for instance, requires the parties to discuss, when developing their discovery plan, the accessibility and expense of electronically stored information, its format, measures taken by the parties to preserve it, procedures for inadvertent disclosure, and anything else connected with electronically stored information.⁶ These tend to be standard considerations that courts have ordered parties to consider before filing their Rule 26(f) report. For example, one of the local rules for the Eastern and Western Districts of Arkansas includes mostly the same provisions as those listed by the Eastern District of Wisconsin but substitutes the following language for a provision about inadvertent disclosure of ESI: "whether the disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business."⁷

The local rules for the Northern and Southern Districts of Mississippi go even further and include a list of 11 topics on which parties must confer and add to the considerations listed above the possible production of metadata, separate considerations for the production of e-mail, and even the possible existence of discoverable electronically stored information that has already been deleted.⁸ The District of Wyoming also mandates that 11 topics be discussed, including the admissibility of electronically stored information during motion practice and during trial.⁹

Default Standards or Guidelines

Because local rules typically govern all civil proceedings pending before a given district court, some districts have preferred to develop comprehensive electronic discovery standards or guidelines that may be applied on a case-by-case basis. District courts in Delaware, Tennessee, Kansas, and Maryland are examples of jurisdictions in which default guidelines or standards have been promulgated and may be applied in given circumstances.

Notably, the District of Delaware's Default Standard for Discovery of Electronically Stored Information predated the 2006 Amendments by about two years, although Delaware's standard was revised in the wake of the changes. As the name implies, the default standard applies when parties are unable to agree on how to manage electronic discovery. Nevertheless, the opening paragraph states that "it

is expected that parties to a case will cooperatively reach agreement."¹⁰ Similarly, the Default Order for the Middle District of Tennessee comes into effect when parties fail to reach a voluntary agreement about the management of the discovery of ESI.¹¹

In terms of their substantive provisions, the two standards take similar approaches in outlining what ESI matters are expected to be addressed by the parties as part of the Rule 26 process and throughout discovery. To that end, in the absence of agreement between the parties, both standards call for the designation of an electronic discovery coordinator for each party—an individual who must be knowledgeable about that party's systems¹²—as well as a retention coordinator, who may be deposed to avoid later accusations of spoliation.¹³

Rule 16 notices from the District of Kansas direct parties to become familiar with the provisions of that district's Guidelines for Discovery of Electronically Stored Information,¹⁴ which were adopted to "facilitate compliance with the provisions of Fed. R. Civ. P. 16, 26, 33, 34, 37, and 45."¹⁵ Counsel appearing before the District of Maryland are expected to have read that district's extensive Suggested Protocol for the Discovery of Electronically Stored Information, which weighs in at 28 pages and goes into such detail as to cover the conditions under which a requesting party will be permitted to conduct onsite inspections of ESI.¹⁶

Thoughtful and comprehensive guidelines for electronic discovery such as those discussed above can capture the attention of both judges and litigants in other jurisdictions. For example, a district court in the Northern District of Oklahoma directed the parties to review the District of Kansas' guidelines for e-discovery when explaining that "the obligation is on the requesting party to express their interest in ESI in a particular agency or department, by letter, by motion or during a meet and confer."¹⁷ In a case from the Eastern District of Kentucky, one of the parties cited to the District of Delaware's default standard as support for its attempt to compel the opposing side to produce metadata.¹⁸

Individual Practices

In the absence of local rules or default guidelines, some judges have nevertheless recognized the need for judicial guidance on ESI issues and have adopted individual case management strategies. Sections addressing ESI discovery plans are typically provided in either Rule 16 orders or model scheduling orders, though parties are generally encouraged to voluntarily agree on a joint e-discovery plan. In the absence of agreement, parties must determine whether a particular judge has—through preferences, procedures, model forms and orders, or case law—addressed e-discovery concerns. For example, even though the District of Massachusetts as yet has no local rule addressing discovery of ESI,¹⁹ District Judge Richard G. Stearns' scheduling conference notice lists an article about electronic discovery from a legal periodical that the parties should consult before the scheduling conference.²⁰

Still other judges list their preferences about manage-

ment of ESI discovery in individual practice forms accessible on the district courts' websites. The Individual Practices of Magistrate Judge Andrew J. Peck of the Southern District of New York state that he endorses the "Sedona Conference Cooperation Proclamation." Through the practices included in his list, Judge Peck further directs counsel to familiarize themselves with decisions in *William A. Gross Construction Associates Inc. v. American Manufacturers Mutual Insurance Co.*²¹ and *Mancia v. Mayflower Textiles Services Co.*²²

Judge Colleen McMahon, also of the Southern District of New York, maintains her own set of Rules Governing Electronic Discovery, which are similar to the districtwide guidelines or default standards discussed above. Judge Frank D. Whitney of the Western District of North Carolina also has his own set of standards, his Standing Order on Protocol for Discovery of Electronically Stored Information, which is incorporated by reference into his initial scheduling order. Judge Whitney's thorough 27-page order leaves no stone unturned and addresses the changes to each of the Federal Rules amended in 2006. Like the default standards discussed above, the Order Governing Electronic Discovery of Judge Timothy J. Savage of the Eastern District of Pennsylvania applies in cases in which the parties cannot come to an agreement themselves.

Changes Concerning Other Federal Rules

Even though Rules 16 and 26 have received most of the attention, courts have not neglected the other changes that were made in 2006. As part of the 2006 Amendments, Rule 45 was updated to address the potential burdens imposed on third parties served with subpoenas seeking the production of ESI. In further recognition of the unique burdens potentially imposed on third parties, the Northern and Southern Districts of Mississippi have adopted local rules that go well beyond amended Rule 45. The local rules for those districts direct the serving party to meet and confer with the third party and to discuss the same discovery issues that the parties to the litigation must consider during their Rule 26 conference.²³

Other district courts try to reduce the sort of thumb-wrestling discovery disputes that can occupy so much of a judge's time by providing novel solutions to recurring problems. One such solution has been the inclusion in local rules of definitions of certain terms that are commonly found in discovery requests in that district. For example, the District of Connecticut's local rules include a definition of "identify" for the purposes of electronic discovery that applies to all discovery requests.²⁴

Another solution has been the introduction of representatives of the party's information technology team in the meet-and-confer process leading up to motion practice. For example, the case management procedures for Judge Virginia M. Kendall of the Northern District of Illinois require that parties who have a dispute about the discovery of voluminous electronic documents must meet and confer with the opposing party's information technology specialist before filing a motion to compel e-discovery.

Some courts have developed specialized sets of rules

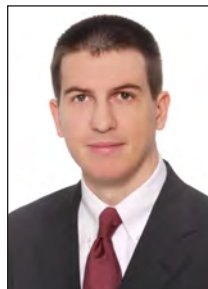
for different types of cases. The Western District of Oklahoma has a separate set of "best practices" for electronic discovery in criminal cases. The district lists the issues defense counsel should discuss with the U.S. attorney's office at the Rule 16 conference (though none of the provisions listed would be out of place in a civil matter).²⁵ The District of Massachusetts' local rules include a separate rule for scheduling and procedures in patent cases, which lists the topics about electronic discovery to be discussed before the Rule 16 conference.²⁶

Conclusion

Aside from the central importance of electronically stored information to discovery today—itsself a major incentive for parties to anticipate and forestall any issues—it is critical to recognize that the wide variety of methods that district courts have adopted to see that discovery proceeds in a fair and orderly manner make it vital that litigants do not neglect such considerations until the intervention of the court is needed. By drawing attention to electronic discovery, the 2006 Amendments have successfully prompted courts and judges to adopt procedures that will make litigants focus on issues related to discovery of electronically stored information early in the pretrial process and throughout the entire process. **TFL**



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Endnotes

¹*W.E. Aubuchon Co. v. Benefirst LLC*, 245 F.R.D. 38, 41 (D. Mass. 2007).

²*Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 245–46 (D.

Md. 2005).

³See Fed. R. Civ. P. 26 Advisory Committee's note (2006).

⁴See D. Conn. R. 16(b).

⁵See D.N.H. R. 26.1.

⁶See D. Wis. R. 26.

⁷E.D. and W.D. Ark. R. 26.1.

⁸See N.D. and S.D. Miss. R. 26.

⁹See D. Wyo. R. 26.2.

¹⁰Default Standard for Discovery of Electronic Information ¶ 1 (D. Del.).

¹¹See M.D. Tenn. Admin. Order 174, *In re Default Standard for Discovery of Electronically Stored Information (E-Discovery)*; see, e.g., *Montano-Pérez v. Durrett Cheese Sales Inc.*, 2010 WL 1959452, at *3 (M.D. Tenn. May 12, 2010)

“The parties previously reached agreements on how to conduct electronic discovery; this agreement was filed with the parties’ initial case management order and is still in effect. Thus, the default standard contained in Administrative Order No. 174 need not apply in this case.”)

¹²*Compare* Default Standard for Discovery of Electronic Information ¶ 3, with M.D. Tenn. Admin. Order No. 174 ¶ 3.

¹³*Compare* Default Standard for Discovery of Electronic Information ¶ 7, with M.D. Tenn. Admin. Order No. 174 ¶ 7.

¹⁴*See, e.g., Patterson v. Goodyear Tire & Rubber Co.*, No. 08-2060, 2009 WL 1107740, at *5–6 (D. Kan. Apr. 23, 2009) (“Based on the arguments made at the March 25, 2009, hearing, as well as those contained in the parties’ briefs, it is clear to the Court that the steps required by the ESI Guidelines did not occur. ... This is unacceptable.”).

¹⁵Guidelines for Discovery of Electronically Stored Information (ESI) (D. Kan.).

¹⁶*See* Suggested Protocol for Discovery of Electronically Stored Information (D. Md.); D. Md. R. App. A at Guideline 1.b.

¹⁷*Oklahoma ex rel. Edmondson v. Tyson Foods Inc.*, No. 05-329, 2007 WL 1498973, at *6 (N.D. Okla. May 17, 2007) (“The Court directs the parties to the Guidelines for the Discovery of Electronic Stored Information for the District of Kansas ... to serve as guidance pending enactment by this district court of its own local rules and/or guidelines.”).

¹⁸*Kentucky Speedway LLC v. Nat’l Ass’n of Stock Car Auto Racing*, No. 05-138, 2006 WL 5097354, at *8 (E.D. Ky. Dec. 18, 2006).

¹⁹*See, e.g., Dabl v. Bain Capital Partners LLC*, 655 F. Supp. 2d 146, 148 (D. Mass. 2009) (“The proper handling of electronic discovery is a new and developing area of law practice. The Federal Rules first addressed electronic discovery in 2006 and the Local Rules of this court have yet to provide any guidance on electronic discovery. Therefore, the court appreciates that it treads in what still are largely unknown waters.”).

²⁰Judge Stearns recommends Mark S. Sidoti and Phillip J. Duffy, *Electronic Discovery Agreements*, N.Y. L.J. (Dec. 3, 2007).

²¹256 F.R.D. 134 (S.D.N.Y. 2009).

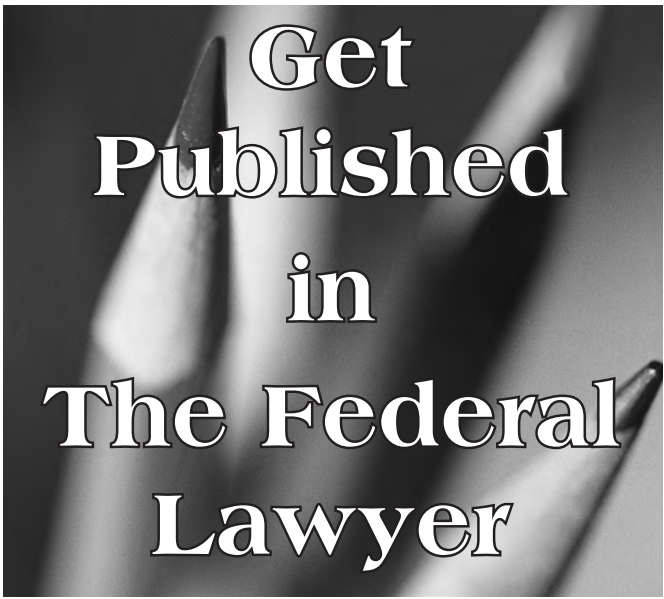
²²253 F.R.D. 354 (D. Md. 2008).

²³*See* N.D. and S.D. Miss. R. 45(d).

²⁴*See* D. Conn. R. 26(c)(4) (“When referring to documents or electronically stored information, to ‘identify’ means to provide, to the extent known, information about the (i) type of document or electronically stored information; (ii) its general subject matter; (iii) the date of the document or electronically stored information; and (iv) author(s), addressee(s) and recipient(s).”).

²⁵Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases (W.D. Okla.).

²⁶*See* D. Mass. L.R. 16.6(A)(7).



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