



DIGITAL DISCOVERY & E-EVIDENCE



VOL. 7, NO. 11 232-235

REPORT

NOVEMBER 1, 2007

Reproduced with permission from Digital Discovery & e-Evidence, Vol. 7, No. 11, 11/01/2007, pp. 232-235. Copyright © 2007 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

FEDERAL PRACTICE

In some jurisdictions, understanding the December 1, 2006 Amendments to the Federal Rules of Civil Procedure is only the first step.

Local Flavor: ESI Rules in Delaware, Kansas, Maryland, and Ohio

By CONOR R. CROWLEY, ESQ.

On December 1, 2006, the Federal Rules of Civil Procedure (the “Rules”) were amended to specifically address the discovery of electronically stored information (“ESI”). These amendments encourage early discussion and agreement between parties concerning the discovery of ESI, suggest procedures for post-production assertions of privilege, and tailor the standard for the imposition of sanctions for failure to produce to account for the unique characteristics of ESI and the information systems on which it is created and maintained. However, neither the Rules nor the Advisory Committee Notes thereto provide detailed practical guidance to attorneys grappling with ESI discovery issues.

To facilitate compliance with the amended Rules, a number of district courts have issued practical instructions for attorneys appearing in those courts. The most detailed guidance has been issued by the District Courts

for the Districts of Delaware, Kansas and Maryland which have respectively issued a standard, guidelines and a suggested protocol (collectively, “local guidelines”).¹ For practitioners in jurisdictions without such local guidelines, these provide a useful, practical road map for the detailed negotiations and information exchanges in which the Rules require counsel and parties to engage. For the judiciary in other jurisdictions, a careful reading of these local guidelines should inform

¹ The U.S. District Court for the District of Delaware issued a “Default Standard for Discovery of Electronically Stored Information (“E-Discovery”)” (hereinafter, the “Delaware Standard” or “D. Del. Standard”); the U.S. District Court for the District of Kansas issued “Guidelines for Discovery of Electronically Stored Information (hereinafter, the “Kansas Guidelines” or “D. Kan. Guidelines”); the U.S. District Court for the District of Maryland issued a “Suggested Protocol for Discovery of Electronically Stored Information” (hereinafter, the “Maryland Protocol” or “D. Md. Protocol”); the U.S. District Court for the Northern District of Ohio issued a “Default Standard for Discovery of Electronically Stored Information (E-Discovery)” as Appendix K to the Local Rules (hereinafter, the “Ohio Standard” or “N.D. Ohio Standard”) that is practically a facsimile of the Delaware Standard and will be discussed only briefly.

Conor R. Crowley is a Managing Director and Associate General Counsel for DOAR Litigation Consulting in New York.

efforts to promulgate similar guidance for practitioners and parties.

Preparation for the Rule 26(f) Conference. The amended Rules require the parties to exchange little information about ESI prior to the Rule 26(f) conference, mandating only that the parties provide each other with a copy, or description by category and location, of all ESI “in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”² However, certain local district courts have identified specific information that the courts suggest, or direct, the parties share before meeting.

Although the Kansas Guidelines do not require the exchange of specific information prior to the 26(f) conference, the Guidelines provide more detail than the Rules with respect to the topics about which counsel should be informed prior to meeting. The Delaware Standard and the Maryland Protocol direct counsel to exchange information about ESI custodians and systems prior to meeting, with the Maryland Protocol providing a comprehensive list of information to which parties are entitled.

The Kansas Guidelines indicate that, prior to the 26(f) conference, counsel should become knowledgeable about the structure and operation of their clients’ information systems, identify individuals with knowledge of those systems and make a reasonable attempt to review their clients’ ESI to ascertain the contents.³ In reviewing their clients’ ESI, counsel should attempt to ascertain whether the contents include archival, backup and legacy data.⁴

The Delaware Standard is even more detailed, providing for the exchange of lists of the most likely custodians of relevant ESI and each relevant information system including the “nature, scope, character, organization, and formats employed in each system.”⁵ The Delaware Standard also provides for the appointment and identification of both a “retention coordinator” and an “e-discovery liaison.”⁶

The Maryland Protocol provides the most specific preparation instructions and requires the exchange of specific information. Parties are directed to exchange information relating to network design, the types of databases, database dictionaries, access control lists, security access logs, ESI retention policies, organizational charts for information systems personnel, backup and systems recovery routines, including tape rotation and destruction/overwrite policies.⁷ Importantly, a request by a party for this information is defined to be a “reasonable request” which should not be denied.⁸

The Maryland Protocol also directs the parties to discuss the scope of ESI discovery, who will participate in the conference and whether one or more participants should have an “ESI coordinator” at the conference.⁹ The Protocol also directs counsel to identify key per-

sons and their ESI practices¹⁰ and to become reasonably familiar with their clients’ relevant past and current ESI.¹¹

Alternatively, counsel may identify a person who can participate in the conference and who is familiar with: software; storage systems; backup and archival systems; legacy systems; website information; event data records; communication systems; ESI erasure, modification or recovery mechanisms; policies regarding records management and retention; litigation hold policies; the identities of key custodians; and, the identities of vendors or subcontractors who store ESI.¹² The Protocol also directs counsel to negotiate preservation agreements ahead of the conference.¹³

The most detailed guidance has been issued by the District Courts for the Districts of Delaware, Kansas and Maryland which have respectively issued a standard, guidelines and a suggested protocol (collectively, “local guidelines”).

Benefits. Clearly, the 26(f) conference is more effective and efficient when both sides are fully informed and capable of discussing, and reaching agreement on, complex ESI issues. The exchange of detailed information prior to meeting will allow counsel to focus on negotiating agreements for the preservation and production of ESI rather than arguing over the exchange of information that will ultimately need to be shared. For this reason, courts that are considering promulgating similar local guidelines should include lists of specific information to be exchanged ahead of the 26(f) conference.

The Rule 26(f) Conference. Although amended Rule 26(f) directs the parties to discuss ESI discovery during their meet-and-confer, the topics to be discussed are described broadly: the capabilities of the various computer systems used by the parties; the form(s) of production; whether the ESI is reasonably accessible; ESI preservation; and, how claims of attorney-client privilege or attorney work product protection are to be addressed.¹⁴

The Committee Notes acknowledge that it may be important for the parties to discuss their information systems and “accordingly important for counsel to become familiar with those systems before the conference,” but expand upon Rule 26(f) only by reference to other

² Fed.R.Civ.P. 26(a)(1)(B).

³ D. Kan. Guidelines at 1.

⁴ Id.

⁵ D. Del. Standard. at 2.

⁶ Id.

⁷ D. Md. Protocol at 6.A.

⁸ Id. at 6.C.

⁹ Id. at 7.D.

¹⁰ “Key persons” is defined as “the natural person or persons who is/are a ‘key person(s)’ with regard to the facts that underlie the litigation, and any applicable clerical or support personnel who directly prepare, store, or modify ESI for that key person or persons, including, but not limited to, the network administrator, custodian of records or records management personnel, and an administrative assistant or personal secretary.” Id. at 7.C.

¹¹ Id. at 7.D.

¹² Id.

¹³ Id. at 7.E.

¹⁴ Fed.R.Civ.P. 26(f).

rules.¹⁵ With the parties presumably having exchanged detailed information regarding ESI prior to meeting, the local guidelines discussed above direct the parties to focus on reaching agreement on the scope of preservation and production, the manner in which searches for responsive ESI are to be conducted, the discovery of information deemed not reasonably accessible and to discuss in more detail the form of production.

The Kansas Guidelines add metadata¹⁶ to the list of subjects to be discussed and outline a more detailed discussion on the subject of not reasonably accessible ESI. The parties are instructed to discuss: the burdens and costs of accessing and retrieving such ESI; the needs that may establish good cause for production; and, conditions for retrieval and production such as scope, time and allocation of costs.¹⁷

As with the preparation for the conference, the Maryland Protocol goes far beyond either the Rules or the Kansas Guidelines to provide a comprehensive list of topics to be discussed, including: the anticipated scope of requests for production of, and objections to, ESI; the methods of storing and retrieving not reasonably accessible ESI, including the anticipated costs and burden of retrieving such ESI; methods of identifying pages or segments of ESI; method and manner of redacting information from ESI if only part of the ESI is discoverable; cost sharing for the preservation, retrieval and/or production of ESI, with a rebuttable presumption that the producing party bears all costs as to reasonably accessible ESI and that there will be cost sharing or shifting with respect to ESI that is not reasonably accessible; potential use of a shared online repository for ESI; search methodologies, identification of systems that will not be searched, restrictions or limitations on the search, factors that limit the ability to search, the use of key words, and other scope limitations; any agreement concerning retention of an agreed-upon Court expert, retained at the parties' cost, to assist in resolving technical ESI issues.¹⁸

To ensure that parties understand the importance of preparation for the 26(f) conference, the Protocol warns that a party's failure to be reasonably prepared for the conference may be used to support a motion for sanctions by the opposing party for the costs incurred in connection with that conference.¹⁹

To facilitate more effective and efficient ongoing communication concerning e-discovery, both the Delaware Standard and the Maryland Protocol provide for the appointment by each party of an ESI coordinator.²⁰ The Maryland Protocol requires that the appointment of one or more information technology or information

management systems personnel to fill this role.²¹ The Delaware Standard does not require that this position be filled by a party's information systems personnel but explicitly requires that this coordinator be: familiar with the party's electronic systems and capabilities; knowledgeable about the technical aspects of e-discovery; and, prepared to participate in e-discovery disputes.²²

With the increasing complexity and variety of search technologies available, and the question of cost shifting potentially arising in the context of both preservation and production in the future, courts crafting their own local guidelines should consider providing clearer guidance on these complex subjects.

Preservation/Retention. The Committee Notes to Rule 37(f) note that the duty to preserve relevant information arises from "many sources, including common law, statutes, regulations, or a court order in the case."²³ Accordingly the amendments direct the parties to discuss ESI preservation but in no way modify the preservation obligation.²⁴ In contrast both Delaware and Maryland provide detailed practical directions.

The Maryland protocol specifically instructs counsel, prior to the 26(f) conference, to advise their clients, including key custodians and information systems personnel, as to their preservation obligations.²⁵ In doing so, counsel are directed to consider: the scope of the litigation hold; an analysis of what must be preserved; a determination of where relevant ESI is maintained; the contents, and method of distribution, of the litigation hold notice; and, procedures for monitoring compliance with the litigation hold.²⁶

The Delaware Standard directs the parties to attempt to reach an agreement outlining the steps each party will take to segregate and preserve the integrity of relevant ESI.²⁷ The parties are also each directed to appoint a "retention coordinator", an individual responsible for retention of that party's ESI, and advised to depose each other's retention coordinator to avoid later accusations of spoliation.²⁸ Retention coordinators are charged with: ensuring that identified custodians' email is not permanently deleted in the ordinary course of business and that all other ESI maintained by identified custodians is not altered; and, providing notice of the criteria used by spam and/or virus filters for emails and attachments.²⁹ The retention coordinators are directed to implement these procedures within seven days of identifying the relevant custodians, and counsel is required to file a statement of compliance with this section of the Delaware Standard with the court.³⁰

¹⁵ Fed.R.Civ.P. 26 Advisory Committee Notes, 2006 Amendment, subdivision (f).

¹⁶ Metadata consists of both system metadata and application metadata. Examples of system metadata include a file's name, location, format and the dates on which a file was created, modified and accessed. System metadata thus provides information that would otherwise have to be entered as part of the document coding process. Application metadata include spreadsheet formulae, and comments or redline changes in word processing documents.

¹⁷ D. Kan. Guidelines at 4.

¹⁸ D. Md. Protocol at 8.

¹⁹ Id. at 9.C.

²⁰ The term used by the Delaware Standard is "E-Discovery Liaison". D. Del. Standard at 2.

²¹ D. Md. Protocol at 7.B.

²² D. Del. Standard at 3.

²³ Fed.R.Civ.P. 37 Advisory Committee Notes, 2006 Amendment, subdivision (f).

²⁴ For a thorough discussion of preservation and retention obligations, see *The Sedona Conference Commentary on Legal Holds* (The Sedona Conference Working Group Series Aug. 2007), available at www.thosedonaconference.org.

²⁵ D. Md. Protocol at 7.A.

²⁶ Id.

²⁷ D. Del. Standard at 7.

²⁸ Id.

²⁹ If the criteria employed by such filters are reasonable, emails and attachments filtered out are deemed non-responsive. Id.

³⁰ Id.

Although preservation efforts should normally begin far in advance of any discussion between the parties, reaching agreement on the scope of production will allow the parties to narrow the universe of information to be produced while reducing the risk that such narrowing will lead to later allegations of spoliation. This risk can be further reduced by procedures such as the statement of compliance required by the Delaware Standard. Consideration should be given to requiring such a statement of compliance by local courts when drafting supplements to the Rules.

Form of Production. ESI can be produced in many different formats including native (the form in which it was created) and image formats (such as TIFF or PDF). The production format is important because the amount of information included with ESI and the ease with which ESI can be searched vary greatly depending on the format. In native format, ESI contains, or is associated with, application and system metadata which provide information that is not always available when ESI is produced in image or hard copy form (although metadata can be extracted when native ESI is converted to an image).

Amended rule 34(b) allows the requesting party to request a specific production format for ESI, and to request that different types of ESI be produced in different formats.³¹ However, the producing party is not obligated to produce ESI in the format requested although it may not produce ESI in a form less useful or searchable than the form in which it is ordinarily maintained.³² Given the myriad forms in which ESI can be produced, and the difficulties that often arise with respect to reaching agreement on the form of production, local guidelines provide default production formats that govern in the absence of an agreement between the parties.

The Delaware Standard specifies text search image files as a default, with a caveat that the default does not apply if it would be unduly burdensome or cost-prohibitive to comply.³³ However, the Delaware Standard does require the producing party to preserve the integrity of the underlying ESI (the original formatting, metadata and revision history).³⁴ In Delaware, after the initial production, a party must demonstrate “particularized need” for the production of ESI in native format.³⁵

Although the Kansas Guidelines do not provide a default form of production, they do direct the parties to discuss the availability of metadata and whether it will be requested or should be produced.³⁶

While the Maryland Protocol provides that, in the absence of agreement between the parties, ESI shall be produced as static image files, it directs that load files³⁷ be

produced with static images and acknowledges the importance of metadata.³⁸ Indeed, even where load files were not created in the process of converting native files to static images, Maryland directs that they be produced if they can be created without undue burden or cost.

With respect to metadata, Maryland divides metadata into three types: embedded, substantive and system.³⁹ The Protocol provides that embedded metadata is generally discoverable and should be produced in appropriate cases, although substantive metadata need not be routinely produced except by agreement of the parties, or upon a showing of good cause.⁴⁰ The parties are directed to consider the production of system metadata and encouraged to produce system metadata when such production will not unnecessarily or unreasonably increase costs or burdens.⁴¹

Due to the myriad formats in which ESI may be produced and the varying utility of different forms of ESI depending on format, local courts should carefully consider the default form or forms in which they will direct ESI be produced absent agreement of the parties.

Recommendations. The differences between the Delaware Standard, the Kansas Guidelines, the Maryland Protocol and the Ohio Standard highlight the need for counsel to be conversant not only with the amended Rules but also the particular provisions of the local district court in which a case is pending. These local district courts provide specific guidance for the purpose of facilitating understanding of, and compliance with, the amended Rules.⁴²

Unfortunately, as is the case with the Ohio Standard’s format provision,⁴³ this specificity may in certain instances remove any incentive for the parties to fully utilize the unique characteristics of ESI to comply with Rule 1’s mandate that the Rules be “construed and ad-

data. *The Sedona Conference Glossary: E-Discovery & Digital Information Management* (The Sedona Conference Working Group Series May 2005), available at www.thesedonaconference.org.

³⁸ D.Md. Protocol at 3.C.

³⁹ Embedded and substantive metadata are two different types of the “application metadata” described *supra*. The Maryland Protocol defines “embedded metadata” as “the text, numbers, content, data, or other information that is directly or indirectly inputted into a Native File by a user and which is not typically visible to the user viewing the output display of the Native File on screen or as a print out.” D.Md. Protocol at 3.A. “Substantive metadata” is defined as “data that reflects the substantive changes made to the document by the user.” *Id.* at 11.B.

⁴⁰ *Id.* at 11.E.

⁴¹ The Maryland Protocol notes that production of metadata may be subject to cost-shifting under Fed.R.Civ.P. 26(b)(2)(C). *Id.* at 11.

⁴² See, e.g., D. Md. Protocol at 1 (“The purpose of this Suggested Protocol for Discovery of Electronically Stored Information (the ‘Protocol’) is to facilitate the just, speedy, and expensive conduct of discovery involving ESI in civil cases, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without court intervention.”)

⁴³ The Ohio Standard, a near facsimile of the Delaware Standard, inexplicably provides a default production format of non-text searchable image files for ESI, failing to take advantage of ESI characteristics that allow for more efficient searching and retrieval of relevant information. N.D. Ohio Standard at 6.

³¹ Fed.R.Civ.P. 34 Advisory Committee Notes, 2006 Amendment, subdivision (b).

³² *Id.*

³³ D.Del. Standard at 6.

³⁴ *Id.*

³⁵ *Id.*

³⁶ D. Kan. Guidelines at 4(d).

³⁷ A load file is a file that relates to a set of scanned images and indicates where individual pages belong together as documents. A load file may also contain data relevant to the individual documents, such as metadata, coded data and the like. Load files must be obtained and provided in prearranged formats to ensure transfer of accurate and usable images and

ministered to secure the just, speedy, and inexpensive determination of every action.”⁴⁴

However, even for counsel not practicing in one of these jurisdictions, the guidance offered by these courts can provide a useful road map for counsel negotiating agreements tailored to the particular needs of different

cases and clients. Similarly, even where not required, appointment of an ESI coordinator should result in more efficient communications concerning electronic discovery issues between the parties and with the court. Finally, these local guidelines can provide a useful road map for courts considering promulgating specific guidance on the use of ESI in litigation.

⁴⁴ Fed.R.Civ.P. 1.