The Sedona Conference Journal

Volume 8 2007

Not Your Mother's Rule 26(f) Conference Anymore

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Recommended Citation: Moze Cowper & John Rosenthal, *Not Your Mother's Rule 26(f) Conference Anymore*, 8 SEDONA CONF. J. 261 (2007).

NOT YOUR MOTHER'S RULE 26(F) CONFERENCE ANYMORE

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I. INTRODUCTION

On December 1, 2006, the way we conduct federal litigation (and in many instances state litigation) dramatically changed in that we are now required to preserve, collect and produce all forms of electronic documents (*e.g.*, e-mail, MS Word, MS PowerPoint, databases), or as referred to under the new Federal Rules, "electronically stored information" or "ESI." For the first time, all parties will be under an affirmative obligation to understand and litigate technical issues concerning ESI.

Perhaps no change in the Federal Rules is more dramatic than the one associated with the changes to the meet and confer requirement of Rule 26(f). Litigants and their counsel that fail to heed the significance to the changes in Rule 26(f) will not only be doing their clients a disservice, they may dramatically increase the litigation costs and potential risks faced by their clients regarding the discovery of ESI.

This article addresses the implications of the changes to Rule 26(f) and provides you guidance regarding best practices to prepare for and conduct the Rule 26(f) Conference. We attempt to do so by taking into account two different perspectives: (i) the inside counsel responsible for the corporation's preservation, collection and production of electronic records; and (ii) an outside counsel responsible for implementing e-discovery response plans, including the preparation for and conduct of the Rule 26(f) Conference.

II. CHANGES TO FED. R. CIV. P. 26(F) AND THEIR IMPLICATIONS

One of the primary changes to the Amended Federal Rules are to require parties to focus upon and discuss the discovery of ESI early in the litigation process through Amended Rules 16(b) (regarding the discovery planning conference with the court), 26(a) (regarding the initial disclosures) and 26(f) (regarding the obligation to meet and confer in developing, among other things, a discovery plan). The intended goal of these amendments is to encourage, if not mandate, parties to work together in addressing the difficult and complex issues regarding the preservation, collection, review and production of ESI.

Federal Rule 26(f) requires parties to confer "as soon as practicable," but in any event at least 21 days before a scheduling conference is held or a Federal Rule 16(b) scheduling order. There are three primary changes in the Amended Rule. First, the parties are required to discuss the issue of preservation of potentially relevant records. This obligation applies not only to ESI but also to all "documents" as that term is defined within the Federal Rules. This is the first time the obligation to discuss and address preservation has ever been expressly set forth in the Federal Rules. Second, the

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parties are required to discuss the disclosure of ESI and, specifically, the format production of ESI. Finally, the parties are required to discuss the issue of privilege in the context of inadvertently produced documents.[2]

III. IMPLICATIONS OF THE CHANGES

Historically, Federal Rule 26 Conferences have been *pro forma*, accomplishing little if anything of significance in terms of the conduct of the case. Essentially, counsel for each side showed up at the meet and confer, which everyone knew in advance would take about fifteen to twenty minutes. In the meeting, the parties agreed to a general discovery schedule, but agreed to disagree on everything else relating to discovery.

Why were these meet and confers of little significance? The answer is very simple: defendants (typically larger corporations) had little to gain in the Rule 26(f) Conference. In other words, the meet and confer was usually an opportunity for the plaintiff to engage in unfettered discovery with little upside for the defendant corporation. The result is what one federal judge refers to as the "drive-by" discovery conference, where little if anything was accomplished.

Most commentators agree that the changes to Rule 26(f) will dramatically transform the initial meet and confer process from a meaningless *pro forma* meeting in which little or nothing is achieved to a substantive meeting whose results will directly impact the conduct of the entire litigation. There are several reasons behind this dramatic transformation.

First, defendants (particularly large corporations) now have something to gain from the meet and confer by negotiating down the scope of the discovery of ESI and, thus, the associated risks and costs. For example, the conference can now be used to limit the time period, the systems and the number of custodians at issue. In a larger case, this can result in savings in the tens of thousands.

Second, plaintiffs also have something to gain. It is expensive not only to produce ESI but also to review ESI. The more sophisticated plaintiffs understand that if they are unreasonable in the scope of their request, they may just get their worst nightmare – what they asked for. Plaintiffs, therefore, have an incentive to negotiate down a reasonable scope of the discovery of ESI that will, in turn, limit the costs associated with the document review. This is particularly true where both the plaintiff and defendant are corporations and, thus, unreasonable and overbroad discovery requests they issue are likely to be put into the word process and turned back onto them.

Third, the Rule 26(f) Conference is a means to frame the issues for the Rule 16 Discovery Planning. It is important to set out a reasonable position in the face of an unreasonable requesting party in order that the Rule 16 Conference can be used to obtain some limitations on the scope and amount of the ESI to be discovered.

IV. PREPARATION FOR THE RULE 26(F) CONFERENCE

It is axiomatic that prior planning prevents poor performance. This is true both in life and in the context of the Rule 26(f) Conference. If the goal is to have a productive Rule 26(f) Conference that will address preservation, scope of production, production format and privilege, both inside and outside counsel need to take the time to educate themselves regarding: (i) the information technology systems at issue; (ii) where and on what systems the ESI is located; (iii) who are the

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2 Federal Rule 26(f) provides:
The parties must…confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Federal Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning…
(3) any issues relating to disclosure of electronically stored information, including the form or forms in which it should be produced;
(4) any issues relating to claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert such claims after production - whether to ask the court to include their agreement in an order…
Fed. R. Civ. P. 26(f).

custodians/owners of the data; (iv) the steps undertaken by the party to preserve the relevant data; and (v) the scope of production that the party is willing to undertake (*i.e.* will search terms or date restrictions be used to narrow the universe of documents?); (vi) the ultimate form of production (TIFF, PDF, *et cetera*); and (vii) privacy considerations (*i.e.*, is the data located outside of the U.S.?).

How do you obtain this knowledge? In the perfect world, the party has undertaken steps before this litigation to understand and, at some level, to inventory its computing systems and the ESI maintained on those systems. Regardless of the existence of such inventory, inside and outside counsel are going to have to work with the information technology, records management and/or compliance departments (collectively the "e-discovery" or "litigation response" team) to obtain an understanding of these issues as a general matter and, significantly, in the context of the particular litigation. We recommend that in larger- to medium-sized cases that the e-discovery team meets in-person in advance of the Rule 26(f) Conference to discuss these very issues and begin the process of preparing for the meet and confer. We find that this meeting pays for itself a hundred times over in terms of the ultimate cost savings that can be obtained through using the Rule 26(f) Conference to limit the scope of the case.

V. GROUND RULES FOR THE RULE 26(F) CONFERENCE

The success of the Rule 26(f) Conference will often depend upon certain basic ground rules. Here are ours:

1. To get something, you have to be willing to give up something – in this case, information about your ESI. In other words, if the Rule 26(f) Conference is to be meaningful, the parties must be prepared to engage in a good faith exchange of certain basic information about their respective ESI. This may also include exchanging detailed information about your custodians (*e.g.*, organizational charts) or computing systems.

2. People play much nicer when you are "off-the-record." The parties will have to decide whether their Rule 26(f) Conference discussions will be on- or off-the-record. Our experience is that these conferences are far more productive when the parties feel they can engage in conversations and exchange information without the fear they will be quoted back to the court. Regardless of which way you choose to go, it is important to have a clear understanding with your opponent prior to the Rule 26(f) Conference.

3. Lawyers may not always be the most important participants. Many lawyers do not have the requisite technical understanding of either e-discovery or the computing systems at issue in the litigation. In some instances, a member information technology department or an outside e-discovery consultant may be better equipped to understand and address the preservation, collection and production of ESI than the trial attorney. In other instances, it may make sense to have a national e-discovery coordinating counsel that can attend or manage the Rule 26(f) Conference. A strategic decision will have to be made as to who, beyond trial counsel, should attend and whether they will attend to provide advice to the trial attorney or as active participants in the Conference.

4. Set out the expectations in advance. The Rule 26(f) Conference will not be productive unless you set out the ground rules and topics for discussion in advance. Send the opposing counsel a letter outlining: (i) the ground rules; (ii) the topics to be addressed and possibly your preliminary position on certain topics; (iii) what materials the parties should be prepared to bring and exchange (*e.g.*, organizational charts); and (iv) who will be in attendance and their anticipated roles.

5. Days of the "drive-by" Rule 26 Conference are over. If the Rule 26(f) Conference is to be successful, it will probably take more than one meeting. The parties will have to meet and confer on several different occasions in order to reach meaningful

agreements on preservation, scope of production, production format and privilege. Our recent experiences indicate that in larger cases, these meet and confers can stretch out over a month or two. This, of course, assumes that both parties are willing to work in good faith to achieve a reasonable compromise on the scope of the e-discovery to be conducted.

6. To adapt a famous quote, "keep your friends close, and any document agreements with your adversary closer." The purpose of the Rule 26(f) Conference is to ultimately reach agreements that will reduce the costs of litigation while forcing the parties to pay attention to what they ultimately need to prove or disprove. To this end, it is important that the parties memorialize the agreements resulting from the Rule 26(f) Conference in order that there be no confusion about each side's obligations as they move forward in the discovery process. This can be done either formally by the Proposed Rule 16(b) Order or, alternatively, through a stipulation and agreement.

VI. RULE 26(F) CONFERENCE DISCUSSION TOPICS AND STRATEGIES

Of course, any topic is fair game for the Rule 26(f) Conference, but the following are the ones we feel are the most significant to be addressed as either: (i) mandatory topics under the Rules; and/or (ii) practical consideration in reaching a reasonable agreement on the scope of e-discovery.

1. Preservation

As noted above, preservation of both paper records and ESI is a required subject of the meet and confer. More importantly, you can use the Rule 26(f) Conference as a means to limit the potential exposure to future spoliation claims by reaching an agreement on the scope of the preservation to be undertaken and, specifically, how to limit the scope of the preservation obligations through limitations on: (a) date ranges (both front-end and back-end cut off); (b) specific custodians; (c) specific systems; (d) specific categories or types of ESI; and (e) search terms. Presumably, these very same limitations would ultimately apply to the collection and production of ESI, although the scope of preservation is often broader than the scope of production.

a. Date Range

Opposing counsel often requests information from X date to present. Without a back-end discovery cut-off date, this places a great burden on a corporation because its employees must preserve documents as they are created, sent or received during the pendency of the litigation. By obtaining front-end and back-end cut-offs, that burden is substantially reduced because the company then has a defined date range of materials that only need to be preserved and collected once during the litigation. Accordingly, the Federal Rule 26 Conference should be used to secure both a front-end and back-end discovery cut-off for both the preservation and production of ESI. Make it clear that documents before and after that date will not be preserved. If opposing counsel is unable or unwilling to agree to both front-end and back-end cut-offs, then attempt to narrow the scope of those documents for which an open-ended back-end cut-off will apply.

b. Custodians

Custodians are the people who have custody of the potentially relevant documents. During the 26(f) Conference, the parties should attempt to agree on particular custodians for which documents will be preserved and ultimately produced. Limiting preservation to particular custodians will substantially ease the burden of e-discovery. You will also find that most courts think that parties engage in too much discovery and, therefore, the courts are likely to impose a reasonable limitation on the custodians at issue to the extent the parties are unable to achieve a reasonable compromise through the Rule 26(f) meet and confer.

c. Systems

"Systems" refers to the electronic system where electronic data is stored. Possible systems include, but are not limited to: (1) e-mail systems; (2) core office document systems (MS Word, Lotus Notes, MS PowerPoint); and (3) application and databases (*see* further discussions of databases and application *infra*). During the 26(f) Conference, counsel should try to identify particular systems that will be subject to discovery versus those that will be exempt from discovery. Again, it may be necessary to engage in informal discovery or informal exchanges with opposing counsel regarding the parties' respective information technology infrastructure in order to obtain the necessary concession.

d. Categories or Types of ESI

A more difficult issue that should be discussed at the Rule 26(f) Conference is the categories of records to be preserved and produced. It may be possible to agree upon the categories of records to be preserved. Of course, this may be difficult to achieve at the initial Conference because the parties may not have sufficient information to reach an agreement on the potential categories of documents. The parties, however, are generally equipped to agree on the types of ESI that will be subject to discovery. This should include an agreement on specific file extensions that will or will not be within the scope of discovery.

e. Search Terms

Many commentators and some courts have suggested that use of search terms is an appropriate mechanism to limit the burdens of e-discovery. With enterprise search and retrieval technology advances over the last few years, use of search terms is a realistic way to limit the scope of e-discovery. These tools, however, are not inexpensive and may not be readily available within your computing environment. Moreover, the ability to reach an agreement on topics or search terms is dependant upon the level of cooperation of the parties, and whether it is practical at the early stages in the case to identify the potentially relevant search parameters. Finally, search terms parameters have to be carefully crafted and multiple levels of searches may be required to identify truly relevant ESI. For example, a string search of 200 terms may recall so many records that even if the parties were able to agree on those terms, the results of the search are so massive that use of search terms in that context may not reduce or eliminate the burden.

2. Accessibility of Data

Federal Rule 26(b)(2)(B) now creates two tiers of ESI: (i) accessible data; and (ii) "not reasonably accessible" data. ESI that is not reasonably accessible need not be produced in the first instance, absent a showing of "good cause" by the requesting party. It is important to note that Rule 26(b)(2)(B) is a rule of production, ***not preservation***. Accordingly, preservation obligations may apply to ESI, even if the ESI may not ultimately have to be produced based on inaccessibility. The Federal Rules do not define the specific types of data that are "not reasonably accessible." Commentators generally agree that inaccessible data includes: (i) fragmented data; (ii) deleted data; and (iii) some back-up tapes.

While there is no obligation to either discuss or disclose at the Rule 26(f) Conference the categories of ESI that a party is claiming to be "not reasonably accessible" (such an obligation implicitly arises in the context of the Rule 34 response to request for the production of documents), we recommend that you use the Rule 26(f) Conference to attempt to reach an agreement, as to what data is "not reasonably accessible," and the extent to which such data should be preserved. Counsel should be prepared to demonstrate why the data in question is "not reasonably accessible," including discussing the costs and burdens associated with preserving, searching for and producing such data.

3. Production

Under Rule 26(f), the parties are required to discuss the scope of production and the production formal.

a. Scope of Production

The scope of the document production should be limited through a discussion of the very same topics outlined above relating to preservation. It should be noted that the scope of preservation is likely to be broader than the scope of what is ultimately produced.

b. Production Format

Production format is required to be addressed under Federal Rule 26(f). To understand this issue, it is necessary to explain the changes to Amended Rule 34(b) regarding procedures for requesting ESI and responding to requests for ESI.

Under Amended Rule 34(b), a request may "specify the form or forms in which electronically stored information is to be produced." The responding party may object to the requested form. If the responding party objects to the requested form (or if the request does not specify the form), the responding party must state the form or forms that it intends to use. However, the responding party must produce the information in the form in which it is "ordinarily maintained" or in a "reasonably usable" form. In other words, like other forms of discovery, the production of ESI is subject to "requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party." (Committee Notes to Amended Rule 34(b)).

Production format discussions raise a very hot issue – the production of data as TIFF/PDF images versus native productions. A native document is the document as it sits on the computer system with its associated metadata. In the past, responding parties have generally resisted producing documents in native format for several technical reasons: (i) production numbers cannot be affixed on each page; (ii) confidentiality designations cannot be affixed per page; and (iii) information cannot be redacted.

In hearings on the then proposed Amended Federal Rules, the Advisory Committee struggled with the format issue. It initially provided that ESI should be produced as "ordinarily maintained," meaning native. There was a great deal of pushback during the hearings due to the technical limitations in producing native documents. For this reason, the Committee added the language in a "reasonably usable form" but it did not define what that means. The only guidance that the Committee provided is that "the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in litigation." (Committee Notes to Amended Rule 34(b)). There was discussion during the hearings that it is not reasonable to take a record that is searchable in its native form and then produce a non-searchable TIFF/PDF image without any metadata. The Committee Notes reflect this discussion by noting, "If the responding party ordinarily maintains the information…in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." (Committee Notes to Amended Rule 34(b)).

Format of production is going to be a significant issue to be addressed and resolved at the Rule 26(f) Conference. In conducting these discussions, it is important to bear in mind that some federal courts will not permit (as they have in the past) a producing party to only produce a non-searchable TIFF/PDF version of ESI. In that case, at least some metadata, and possibly an extracted text searchable version of the document, may have to be produced. In addition, courts are likely to require that at least some ESI be produced in native form because of the inability to read or manipulate the data in a TIFF/PDF format, even one that is searchable.

4. Inadvertent Disclosure of Privileged Material

The revised Rule 26(f) also requires parties to include in the proposed discovery plan, "any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to

include their agreement in an order." Accordingly, the parties should discuss whether or not they would like to propose to the court an agreed upon procedure for addressing inadvertently produced privileged documents. Any such agreement reached by the parties should provide that: (i) upon notification or discovery of an inadvertently produced document, the opposing party should be notified; (ii) all copies of the inadvertently produced document should be returned to the producing party or be destroyed; (iii) any copies of the inadvertently produced privileged document provided to third parties, contained in the discovery record, or filed with the court should be retried and, again, returned to the producing party or destroyed; and (iv) to the extent the receiving party is challenging the assertion of privilege, the receiving party may retain one copy of the inadvertently produced record until the issue of privilege can be timely addressed by the court, and during such time, the inadvertently produced documents shall not be used for any purpose other than challenging the privilege assertion. The discussion should also include whether the parties shall agree that the inadvertent production of ESI shall not constitute a waiver of privilege and, if so, under what circumstances would constitute a waiver.

5. Database/Application Discovery

Discovery of databases or data generated from larger applications is a complex issue that will require further discussion among the parties, and may have to be addressed separately from the discussion of other types of ESI such as e-mail or MS Office documents. In many instances, the database or ESI generated from the application is too large to simply produce the entire database/application. In many other instances, the database/application is proprietary and, thus, the opposition could not read the ESI without the proprietary database/application.

As a general matter, it may be helpful for the parties to exchange a list of the types of data they seek that may emanate from a database or proprietary application. In some instances, it may make sense to exchange a list of cells contained in the database/application or sample reports that can be generated from the database/application.

6. Timing of Production

Depending upon the size of the Legal Matter and the amount of ESI involved, the collection processing and production of ESI can take considerable time. Timing of the production should be addressed at the Rule 26 Conference. Don't over promise. The process of collecting, processing, reviewing and producing ESI takes longer than you think.

7. Cost Shifting

As a general matter, we believe that it is difficult for a large corporation to successfully shift the cost shifting relating to the discovery of ESI, with the exception of data that is "not reasonably accessible" or in the face of overbroad and unreasonable ESI discovery requests. There is, however, no harm in asking for cost shifting and certainly using cost shifting as a means to rein in overzealous e-discovery fishing expeditions.

8. Open Issues to Address at the Federal Rule 16(b) Discovery Planning Conference

It is important to agree on the areas of disagreement. In this way, the issues to be addressed in a Rule 16(b) Discovery Planning Conference can be clearly identified and teed up for the court, assuming the court is willing to address them.

VII. CONCLUSION

As our world becomes dominated by ESI that is stored on distributed computing systems, we need to be more thoughtful about how we litigate complex cases. That is what the changes to the Federal Rules and Rule 26(f) are all about: taking a more thoughtful and surgical approach to litigation so we can focus on what needs to be proved, how to prove it, and doing it in an efficient manner. Rule 26(f) is also about bringing together a diverse team of attorneys, record and information managers, and corporate compliance officers to prepare for and facilitate the meet and confer process, which can no longer be limited to the over-exacting outside litigator. Most importantly, the amended Rule 26(f) is about a fundamental change in dynamics – adversaries working together to facilitate the best interests of their clients by reducing the risks and costs of e-discovery. Those lawyers that adapt to this change will best serve the interests of their clients by applying some of the practices outlined above.