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THE E-DISCOVERY Standard™

Applied Discovery's Electronic Discovery Newsletter | SUMMER 04

## SPECIAL JUDICIAL FOCUS

FEATURE STORY

# Rule 26(a)(1) Disclosures: Kansas Court Offers Guidelines

By Hon. David J. Waxse

Fed. R. Civ. P. 26(a)(1) imposes upon each party "a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement."[1] Specifically, subparagraph (B) of Rule 26(a)(1) requires that each party, "without awaiting a discovery request, provide to other parties . . . a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party that the disclosing party may use to support its claims or defenses." Rule 26(a)(1) also requires that each party "makes its initial disclosures based on the information then reasonably available to it." The Rule states that the party "is not excused from making its disclosures because it has not fully completed its investigation of the case or because

[1] Fed. R. Civ. P. 26 advisory committee's note, subdivision (a)(1993).

CONTINUED ON PAGE 2 >

## CASE LAW UPDATES

### Judgment entered for failure to surrender computer evidence.

**QZO, Inc. v. Moyer, 594 S.E.2d 541; 2004 S.C. App. LEXIS 71 (S.C. Ct. App. 2004)**

In a dispute between former business partners in an ambulance service, the striking of pleadings and entry of a judgment against a party was affirmed because there was evidence to support the trial court's finding that the party wilfully violated the court's TRO requiring the immediate surrender of a computer. The computer was not turned over until seven days after receipt of the TRO. An expert determined the hard drive had been reformatted the day before the computer was turned over, effectively erasing any information it contained.

### Texas rule requires specificity in electronic discovery request.

**In re Lowe's Companies, Inc. and Lowe's Home Centers, Inc., 2004 Tex. App. LEXIS 4432 (Tex. App., May 18, 2004)**

During a deposition in a personal injury action filed by a customer who was struck by a sink falling from an upper shelf, a company representative was instructed by counsel not to answer questions about a company database of falling merchandise accidents. The trial court issued an order directing the representative to bring the database to her deposition or to provide access to the database during the deposition. The trial court was directed to vacate its order concerning the database because it required access to data in the database without limitation as to time, place, or subject matter. The court added a note that a party may not be compelled to produce what it has not been asked to produce, and, "to obtain discovery of information that exists in electronic form, the requesting party must specifically request production of electronic data and specify the form in which it is to be produced. Tex. R. Civ. 196.4."

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## FEATURE STORY (continued from page 1)

it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures."

The primary objective of Rule 26(a)(1)'s initial disclosure obligation is "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information."[2] This objective is consistent with the stated scope and purpose of Fed. R. Civ. P. 1, requiring that the Federal Rules of Civil Procedure be "construed and administered to secure the just, speedy, and inexpensive determination of every action."

Rule 26(a)(1)(B) indicates that "data compilations" are subject to the initial disclosure requirements, and the 1993 Advisory Committee Note makes clear that "data compilations" include "computerized data and other electronically-recorded information."[3] The term is borrowed from Fed. R. Civ. P. 34(a), which was amended by Congress in 1970 to provide for the discovery of "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Although the language of the amendment is somewhat obscure, the 1970 Advisory Committee Note explains that the revision was made to "accord with changing technology."[4] Since adoption of the 1970 amendment, and in accordance with the Advisory Committee's intention, courts have consistently held that electronic communications and information are discoverable under Rule 34(a).[5]

Since the promulgation of the initial disclosure provisions of Rule 26 in 1993, courts have similarly found electronic information subject to initial disclosure requirements.[6] One of the first cases to address electronic information in the context of Rule 26(a)(1)(B) disclosures is *Kleiner v. Burns*.[7] Kleiner involved a claim of copyright infringement arising out of the display of photographs taken by the plaintiff.[8] The copyrighted photographs were posted on a web page hosted by the Internet service provider Yahoo! without the plaintiff's permission.[9] The plaintiff sued Yahoo!, among others, and moved to compel Yahoo! to make certain initial Rule 26(a)(1)(B) disclosures, including, but not limited to, data compilations in its possession.[10] In response, Yahoo! claimed not to have any data compilations relevant to the lawsuit.[11]

Given the nature of Yahoo!'s business, the court found that Yahoo! was not taking its disclosure obligations seriously,[12] and found it implausible that Yahoo! did not have any relevant data compilations.[13] The court granted the plaintiff's motion to compel and ordered Yahoo! to meet specific disclosure obligations.[14]

Although courts, attorneys, and legal commentators alike agree that computerized data and other electronically-recorded information are subject to the Rule 26(a)(1)(B) initial disclosure requirements, many issues remain unsettled. As a preliminary matter, the scope of electronic information that qualifies as "computerized data and other electronically-recorded information" can be enormous, encompassing voicemail; email; deleted voicemail and email; data files; program files; backup files; temporary files; system history files; website information in textual, graphical, or audio formats; website files; cache files; "cookies"; and other electronically-stored information. Additionally, discovering the sources of electronic information is often an overwhelming task.

Attorneys seeking to manage such a potentially daunting process need practical tips. Keeping in mind the universe of electronic information potentially subject to the Rule 26(a)(1)(B) initial disclosure requirements and the distinction between traditional paper and electronic information, the District of Kansas has adopted Electronic Discovery Guidelines with specific instructions for attorneys regarding discovery of electronic information.[15] To bring those guidelines to the attention of counsel, the Initial Order Regarding Planning and Scheduling advises attorneys as follows:

> Electronic information falls within the definition of "documents" or "data compilations" in Fed. R. Civ. P. 26(a)(1)(B) and Fed. R. Civ. P. 34(a). Prior to the Fed. R. Civ. P. 26(f) conference, counsel should carefully investigate their clients' information management systems to determine whether discoverable information exists in electronic form. If such information exists, counsel should review the Electronic Discovery Guidelines on the court's website [www.ksd.uscourts.gov].

As the guidelines explain, attorneys must be able to understand their clients' computer systems and how

CONTINUED ON PAGE 10 >

2 Fed. R. Civ. P. 26 advisory committee's note, subdivision (a)(1993).

3 Fed. R. Civ. P. 26 advisory committee's note, subdivision (a)(1)(B) (1993).

4 Fed. R. Civ. P. 34 advisory committee's note, subdivision (a) (1970).

5 *See, e.g., Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93 (D. Md. 2003); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D. N.Y. 2002); *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D. D.C. 2001); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000); *Playboy Enter., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999); *Daewoo Elec. Co. v. U.S.*, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (D. Utah 1985).

6 *In Re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 441-42 (D. N.J. 2002); *Kleiner v. Burns*, 2000 U.S. Dist. LEXIS 21850, 48 Fed. R. Serv. 3d (Callaghan) 644 (D. Kan. 2000) (Waxse, J.).

7 *Kleiner v. Burns, supra.*

8 *Id. at *1.*

9 *Id.*

10 *Id. at *3.*

11 *Id.*

12 *Id.*

13 *Id. at *4.*

14 *Id. at *4-5.*

15 *See http://www.ksd.uscourts.gov/attorney/electronicdiscoveryguidelines.pdf.*

GUEST ARTICLE

# Putting Your Best Foot Forward:

## Representing Your Client's Electronic Discovery Interests to the Court

By Kevin F. Brady, Esq. and Matthew I. Cohen, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

There is no doubt that electronic discovery has dramatically altered the landscape of the discovery frontier. In order to adequately represent clients involved in litigation where the discovery of electronic data is at issue, lawyers must master the often complex technical issues associated with the preservation, collection, review, and production of electronic documents—all within a technology framework evolving at breakneck speed.

While successfully negotiating (or persuading the court to define) the scope of electronic discovery may turn, in the first instance, on the facts of the particular case, there are a number of other key issues at play. Some of these are beyond the lawyer's control—for example, being before a judge who has dealt with and understands electronic discovery, versus being before a judge who neither understands nor has the time to learn and deal with what are often complicated technical issues. Lawyers do, on the other hand, have control over one critical factor—how they present their client's position regarding the feasibility, scheduling, and burden of the various aspects of electronic discovery—clearly and persuasively—to their opponent and to the court.

In contrast to traditional discovery disputes, where technical sophistication is generally not required, lawyers dealing with discovery disputes about electronic discovery must have a baseline understanding of the technical issues in order to be able to articulate their client's position. Moreover, given the unsettled nature of the law in many jurisdictions governing electronic discovery, lawyers must not only be well versed in the rules and caselaw applicable in the jurisdiction where the case is pending, but they must also be aware of trends in other jurisdictions. A lawyer's understanding, or lack of understanding, of the technical and legal issues related to electronic discovery will not only have an impact on the outcome of any discovery dispute, but may well have an impact on the outcome of the case.

Lawyers who are not well versed in the technical issues should consider retaining an electronic discovery consultant to assist either behind the scenes or as an expert witness. While lawyers routinely retain experts to educate themselves and the court about complex medical, scientific, and economic issues, the trend is just beginning to emerge in the world of electronic discovery. When appropriate, lawyers may also consider asking the court to appoint a neutral third party, such as a special master, to guide the parties down the electronic discovery trail. While the decision to retain an expert or to seek the appointment of a neutral third party must be made within the framework of each case, the cost of obtaining expert guidance is a good investment in cases where the stakes warrant the expense.

**The following suggestions should serve you well in representing clients in cases where electronic discovery is at issue:**

- **Take Time to Fully Understand the Technical Issues**
  It is imperative that you understand the technical aspects of any electronic discovery issues in the case, and be able to explain them in a way that is easily understood by your opponent and the court. While some judges have experience with electronic discovery, others are considering these issues for the first time.

- **Be Reasonable**
  Tailor your discovery demands to fit the issues in the case, and be reasonable in objecting to your opponent's discovery demands. Judges are more likely to favor the more reasonable approach when the law and the facts do not clearly dictate the dispute's outcome.

- **Be Certain of the Accuracy of Any Representations You Make**
  Be very careful to ensure that any representations you make to your opponent or to the court concerning your client's computer systems and policies (such as its backup and document retention policies) are accurate. There are many more shades of gray in the new world of electronic discovery than there were in the old paper world. If you make representations to your opponent or to the court that later turn out to have been inaccurate, you risk not only losing your credibility, but you or your client may face sanctions.

- **Disclose Any Limitations**
  Be up front with your opponent and the court about any limitations on what you, your client, and any vendors retained to assist in the matter can accomplish. Managing expectations is as critical when dealing with opponents and the court as it is in the area of client relations. Make sure you understand, and then communicate to your opponent and the court, how long it will take to collect, process, review and produce electronic data.

CONTINUED ON PAGE 10 >

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# When Should I Produce in "Native Format"?

**Dear Miranda,**
The judge in our case is considering a request from the opposing party to order us to produce all electronic files in "native" format. Our opposition claims this is the only way they can search through the files in an efficient manner. How can we educate the judge about what this really means to our review and production strategy?

Stephen S.
New York

**Dear Stephen,**
I'm glad you asked. In February, I wrote a column on developing a strategy around document production. I referred to the option for producing files in native format, but recommended this be handled in its own column. Your question is timely!

There are really two questions here: "When do you have to produce files in native format?" And, "If it's not negotiable, what challenges do you need to account for?" With regard to the first question, I refer you to this edition's *Tech Tips* column, where Ken Withers, Senior Judicial Education Attorney at the Federal Judicial Center in Washington D.C., discusses legal considerations when determining form of production.

The opposing party in your case seems to want to argue that it will not be able to efficiently search the electronic production unless the files are produced natively. This is simply not true. As long as the full text of the original files is extracted and indexed in a database, the search functionality of a quality online review application will be much greater than any rudimentary "search" or "find" features in standard software applications.

If you are ordered by the court to produce native files ("native" production generally refers to any computer file that is delivered in the same format in which it was created, such as Microsoft® Word®, Excel® or Outlook®), there are several tricky issues that you must consider. Below are the four most frequently asked questions:

### 1 How do I ensure I don't spoliate the files?

I'd recommend reviewing the *Tech Tips* column from the EDS April 2004 newsletter entitled "How to Safely Copy Data for Use in E-Discovery." This subject is covered in detail there. In summary, it is very risky to handle native electronic files as part of your production set. Meta data tags including "author" and "date created" can be altered by an act as simple as opening a native file.

### 2 How do I track native files that have been produced to opposing counsel?

Traditionally, page-level Bates numbers are assigned to responsive documents. Bates numbering native files has proven quite challenging for anyone who has tried to manage the process. Creating the format, applying it across different file types, and then tracking those files in a database can pose a huge challenge.

Although it's a challenge, that doesn't mean it can't be done—with some creativity and patience. The most common approach people adopt when forced into this situation is to use the file naming convention route. In short, one uses the file name as the "Bates number." While this precludes a page-level approach to Bates number, it can meet basic production requirements.

### 3 Can I brand a native file with confidentiality stamps?

Assuming there is no issue with "spoliating" the native file by opening it and altering it with a stamp, there are a few utilities that allow creation of brands to be applied to native files. Generally speaking, these aren't scalable and they can be time intensive ("batch branding" isn't easy in a native file format, particularly given the differing margin settings, layouts, etc.).

Once again, there are alternatives. Some people use a folder level name designation in lieu of stamping individual documents (e.g., designating a "trade secrets" folder).

### 4 Can I redact native files?

This is another case when it's important to come to mutual agreement around what, exactly, this means. As there is no reliable method to truly redact native files, there are really only two options. In the first option, the judge agrees that files with information that requires redaction are, in fact, delivered as TIFFs or PDFs with redactions in place. In the second option, as copies of the original files are delivered in discovery, some parties opt to actually delete material from the production copy as the "redacted" version.

Native file production is an option best left for file formats that do not easily translate to a PDF or TIFF rendition, such as spreadsheets or database entries. All in all, producing in native file format has its challenges, and is not advised for production of entire responsive data sets.

***Miranda Glass** is Educational Programs Manager at Applied Discovery. She answers questions from readers in each issue of* **The E-Discovery Standard**. *You can submit a question to her at miranda.glass@applieddiscovery.com.*

# Considerations for Selecting a Form of Production for Electronic Discovery

By Kenneth J. Withers, Esq.

When it comes to electronic discovery, the form of production is not a simple matter governed by a flat rule, but is a balance of a number of considerations.

Unless the attorneys for the producing parties argue otherwise, "form of production" is governed by Fed. R. Civ. P. 34, that requires "documents," including "data compilations," be produced "as they are kept in the usual course of business" or organized to correspond to the specific requests. There is a strong argument that the default form of production be in "native format," which is the way they are created and kept in the usual course of business. In native format, they can be searched and sorted to correspond to the specific requests[1], so the second option is covered. Paper or electronic images (TIFF or PDF) are derivatives from the original. As such, they represent a deviation from the default form of production. That doesn't make them unacceptable. If the parties agree or a counter-argument is raised, a court may order an alternative form of production.


The legal grounds for ordering an alternative form of production are not found in Rule 34, however. They are found in Rule 26, specifically Rule 26(b)(2) and Rule 26(c). And the touchstone for all discovery under Rule 26(b)(1) is relevance. That means that in the electronic discovery context, the question of "form of production" is, in the first instance, a question of "relevance."

This is difficult to explain unless you let go of the concept of "electronic document" as simply a digital version of a paper document. That old concept is an example of what we call "protodigital" thinking. It is like thinking of an automobile as a horseless carriage. Today's "electronic document" is more than what meets the eye when printed on paper or displayed on a screen, just as today's automobile is more than a carriage with an alternative means of propulsion. An electronic document is actually a mini-database, which presents different information depending on how it is rendered. The different forms of production show us different aspects of the document. One form shows us what would be apparent if it were printed out on paper. Another might reveal metadata, another might reveal formatting or embedded edits, and an inspection of the hard drive itself using computer forensics tools might reveal deleted data on the same sectors as the document and more.

The form of production appropriate to the case depends on the information being sought, and that is a question of relevance. In most cases, what is relevant is what was communicated by the document in the ordinary course of business—how it appeared on paper or on a screen. In a few cases, the metadata may be relevant to the claims and defenses of the parties, for instance, when the date or source of a particular document is in dispute. In rare cases, embedded edits might be relevant. In the rarest of cases, perhaps when sophisticated computer fraud is alleged, the relevance analysis might call for a mirror or bitstream image of the hard drive as the appropriate form of production.

So the first question one should ask when determining the most appropriate form of production is the question of relevance. The discovery rules, and all the caselaw and commentary, demand that the form of production, like discovery requests, be narrowly tailored to achieve the desired ends.

But once the requesting party has met the burden of Rule 26(b)(1) and made a case for a form of production that meets the relevancy test, Rules 26(b)(2) and 26(c) allow the responding party to raise questions of logistics, costs, and burdens. There are three very legitimate objections to native format that could trigger consideration of TIFF, PDF, or other static image formats. These are:

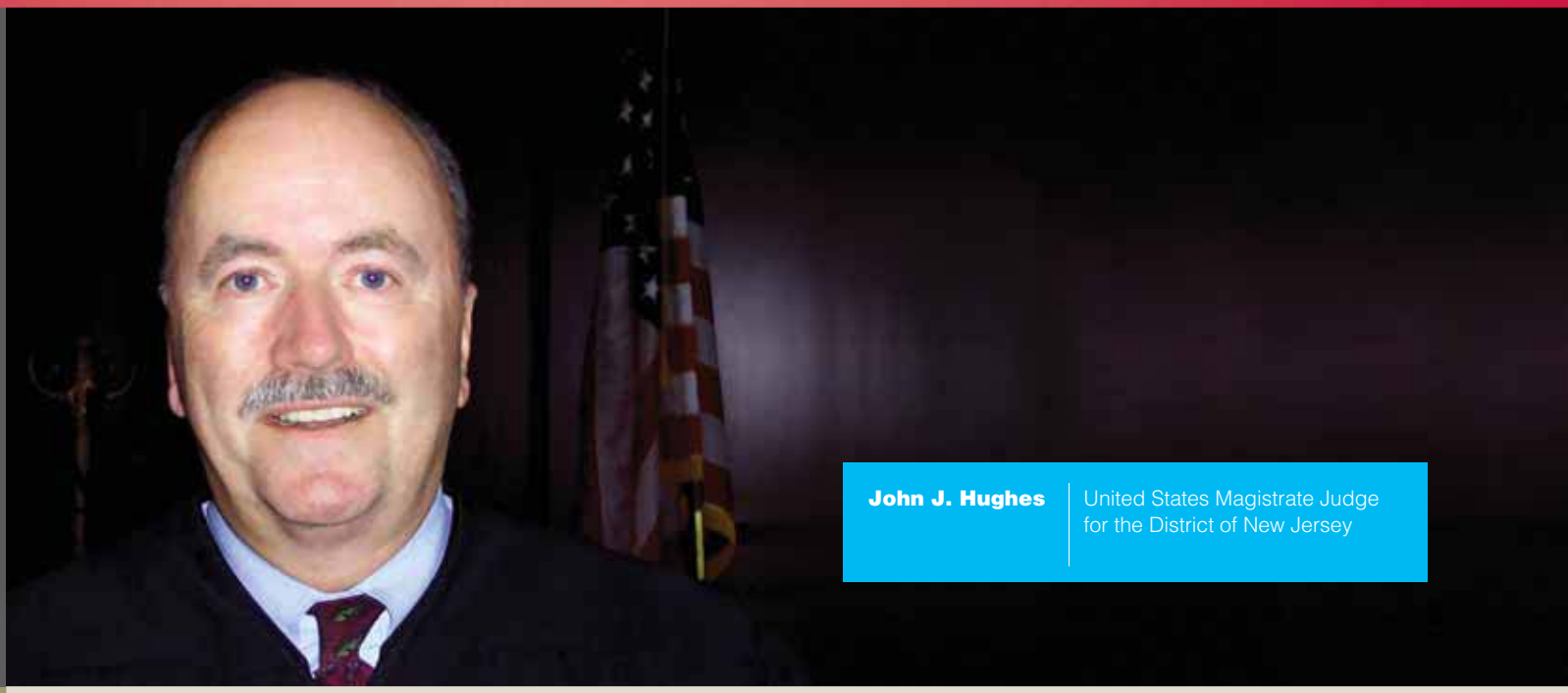
1. Ability to remove or redact privileged information;
2. Security, integrity, and authenticity of the documents; or
3. Prosaic as it might seem, the ability to "Bates" or sequentially number the documents in the production.

[1] Many common electronic file formats provide rudimentary search capabilities with "find" features that enable users to locate words or terms within a document. However, these abilities are limited to searches within the same file format. A user cannot, for example, search through email messages and their attachments at the same time in native file format. To enable searches across multiple original file formats, the documents must be rendered to a common file type such as PDF, and their full text must be indexed for searching.

CONTINUED ON PAGE 7 >

*Kenneth J. Withers is Senior Judicial Education Attorney at the Federal Judicial Center in Washington D.C., the research and education agency of the United States Courts. The opinions expressed are those of the author and do not necessarily reflect the views of the Federal Judicial Center or the Judicial Conference of the United States.*

# New Jersey Local Rule Mandates Common Sense Approach



**John J. Hughes** | United States Magistrate Judge for the District of New Jersey

John J. Hughes is a United States Magistrate Judge for the District of New Jersey, and is the author of the well-known electronic discovery opinion from In re Bristol-Myers Squibb Securities Litig., 205 F.R.D. 437 (D. N.J. 2002). The cases in Judge Hughes' courtroom are subject to District of New Jersey Local Rule 26.1(d), which sets forth specific procedures for the handling of electronic information prior to and at the Rule 26(f) conference.

**The E-Discovery Standard (EDS):** The New Jersey Local Rule 26.1(d) went into effect in October 2003. What kinds of changes, if any, have you noticed in your courtroom since then?

**Judge John Hughes (JH):** This rule forces lawyers to talk early and often. It requires them to get together and go over specific topics in advance, including preservation and production of digital information; procedures for dealing with inadvertent disclosure of digital information; the necessity of restoration of deleted digital information; the scope of discovery and whether it covers backup or other historical or legacy data; the media, format, and procedures for producing digital information; and the assignment of the cost of preservation, production, and restoration (if necessary) of any digital discovery. The main thing I've noticed about electronic discovery situations is that each one is different from the others. There are different problems involved with retrieval, different preservation policies to deal with, and different cost factors to assess. Judges must handle electronic discovery on a case-by-case basis and not look for a "one-size-fits-all" approach.

**EDS:** Do you believe that local rule changes like this one are a better or more efficient way of handling changes in discovery than amendments to Federal Rules 26 or 34?

**JH:** The New Jersey Local Rule simply requires lawyers to address the problems; it doesn't seek to provide answers to case-specific problems or give any guidelines for specific issues such as cost allocation, preservation, spoliation, etc. It wouldn't hurt to have a similar provision in the Federal Rules, just so lawyers can point to it with adversaries and with clients. It would educate everyone that these things must be discussed and would make it easier for lawyers to know what they need to do at the outset.

**EDS:** How have practitioners responded to the new Local Rule 26.1(d)? Have there been any surprises from your perspective?

**JH:** It's probably still too early to tell. This is similar to the experience we had with the initial disclosure rules change in 2000. The response has been favorable so far because lawyers appreciate being able to look to a particular place to define what their obligations are with regard to electronic discovery. So far, we have had positive feedback.

**EDS:** In your opinion, what are the most common mistakes attorneys make with regard to electronic discovery?

**JH:** The biggest problem is that lawyers discuss electronic discovery issues too generally at the Rule 26(f) conference. They are not maximizing the benefits of the conference. They should discuss the specifics there, including cost allocation, scope of electronic information that will be requested, form of production, preservation efforts that will be taken, etc.

Doing this in advance can avoid a lot of disagreements along the way, and can also put the parties in a much better position in the court's eyes.

Another issue I see is that lawyers are focused on educating their clients about how the courts are handling electronic discovery, but they sometimes forget to educate the judge about the potential problems and issues that may arise in a particular case. Lawyers should use the Rule 16 conference and any subsequent case management conferences to proactively address these issues.

**EDS:** If you could give practitioners a few "best practices" tips for being better prepared for electronic discovery issues in the courtroom, what would you recommend?

**JH:** I would start with these recommendations:

- Lawyers must get together early to discuss electronic discovery. Don't try to avoid it or you will only run into trouble.
- Lawyers should streamline and clarify electronic discovery requests—the days of using "any and all" language are over.
- Effective communication and disclosure are the keys. Lawyers must discuss what they want from the adversary and what their own client has that might be responsive. These statements should not be generalizations, but should include details about systems and networks in place, preservation steps that will be taken, etc.

In summary, I would say that lawyers should not be wary of electronic discovery. It really gives them an opportunity to demonstrate skills and professionalism to resolve the problems at hand and work together. Judges are very appreciative of lawyers coming to court prepared and working together cooperatively. Lawyers cannot forget that civility and professionalism are valuable trial skills that serve clients well. Electronic discovery offers a prime opportunity to demonstrate those skills in a new way to benefit both lawyers and their clients in court.

**IN THEIR OWN WORDS...**

*Applied Discovery was named one of the "best websites for cases and commentary on electronic discovery."*

***- ABA Section of Litigation "Technology for the Litigator" Newsletter | Spring 2004***

**TECH TIPS** (continued from page 5)

These logistical considerations, and perhaps others, counsel in favor of the use of static images in most electronic document productions, particularly if the static images are organized in an image base, linked to a detailed index or text base, and if metadata and other relevant non-apparent elements of the electronic documents are preserved and useable.

In any given litigation, and especially in large or complex cases, different forms of production may be appropriate for different discovery requests. There is no "one-size-fits-all." For instance, in one case, the bulk of document production will be in PDF or TIFF format with good search capabilities, a relational database may be produced in native format, and one or two employee laptops may be subjected to forensic analysis. The judge will not be in a position, especially at the start of the case, to determine for the parties what the most appropriate form of production will be. Only the parties know that, and it is incumbent on the parties to meet, confer, and present the judge with a discovery plan that anticipates these variances. And if there is disagreement between the parties, the requesting party needs to show why the requested form of production is relevant to the claims and defenses in the suit under Rule 26(b)(1), and the responding party needs to show why a modification is appropriate under Rule 26(b)(2) or Rule 26(c). What the judge intends to do is reach a decision, if called upon, which furthers the goal under Rule 1 of a "just, speedy, and inexpensive determination" of the action.

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- **November 17**
  New York City
  Keynote Speaker: U.S. Magistrate Judge John J. Hughes (D. N.J.)

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# Practice Tips from the Bench:

## Come to Court Prepared

By Hon. John M. Facciola

There are a handful of things lawyers can do to help put their client in the best possible position with regard to electronic discovery issues, no matter what the facts of the particular case.

1. **Use the Rule 26(a)(1) mandatory disclosures and properly prepare for the Rule 26(f) conference.**
Don't be lazy and waive all the obligations you and your opponent have under Rule 26(a)(1). Instead, have a comprehensive electronic discovery plan prepared *before* you see the judge.

2. **Recognize that electronic documents are different.**
For the most part, lawyers are still operating in a paper-driven world and don't even refer to documents in their "electronic" form. The only real change we have seen across the board in discovery is a change in the boilerplate document request language that includes any available "electronic copies" of documents requested. That is utterly insufficient and ignores all the real problems, such as form of production. Do you really want 10,000 paper documents when you can get a CD-ROM that contains searchable documents?

3. **Get to know the technical nuts and bolts of your case.**
Lawyers must be completely informed by their client's IT administrators about the capabilities of the systems in question. Lawyers should be in a position to describe quite specifically the email systems, word processing systems, backup systems, other networks, or communication systems in place. Lawyers must have all of this information and be ready to tell the judge whether he or she has discussed with opposing counsel the options for how this information can be discovered. The acceptability of keyword searches, the use of outside consultants, the methodology for review, the form of production, and other practical matters must be considered. The judge may end up ordering a review and production methodology that no one wants if the lawyers are not prepared to create one.

4. **Do not make a "canned" argument that electronic discovery is unduly burdensome.**
Judges around the country are increasingly sophisticated about what can and cannot be done in electronic discovery, and arguments that are not backed by very specific factual information and affidavits are unlikely to succeed.

5. **Consider a stipulation for document preservation early in your case.**
This should be worked out very precisely in terms of departments or employees in question, time frames for relevant information, networks and servers involved, etc. This request should be addressed early in the case to avoid later claims of spoliation.

6. **Take proactive steps to avoid e-discovery sanctions.**
Sanctions are most commonly issued when a party underestimates the time it will take to do something. You must keep the judge advised of all roadblocks and delays you encounter. You should never let a deadline come and go without advising the judge in advance of anticipated delay.

Many people argue that electronic discovery is more difficult than paper discovery, but the advantages of full-text searching, the ability to sort and organize, and other electronic review functions make it much easier than paper review. Lawyers should embrace this unique opportunity to develop a valuable new skill set and define the way the practice of law will take shape in this nascent area.

**"Many people argue that electronic discovery is more difficult than paper discovery, but the advantages of full-text searching, the ability to sort and organize, and other electronic review functions make it much easier than paper review."**

John M. Facciola is a United States Magistrate Judge in the U.S.D.C., District of Columbia, and is the author of the well-known electronic discovery opinion in *McPeek v. Ashcroft*, 202 F.R.D. 31, 32 (D. D.C. 2001).

***IN THEIR OWN WORDS...***

*"As the stress of the case mounted, our Account Manager was always able to provide a moment of sanity, and present us our options."*

***- AmLaw Top 50 Law Firm | November 2003***

# Practice Tips from the Field:

## Evaluating Electronic Data for Rule 26 Disclosures

By Scott A. Carlson, Esq. and Patrick E. Zeller, Esq., Seyfarth Shaw LLP

Electronic data is involved in virtually every case and has been for many years. In the past, however, few attorneys appreciated the value it could bring to proving or defending a case. These days, more attorneys appreciate its value and electronic discovery has accordingly become a more important issue.

Rule 26(a)(1)(B) specifically states that "a party must, without awaiting a discovery request, provide to the other parties…data compilations…that the disclosing party may use to support its claims or defenses." The requirement to produce relevant electronic data has been a part of the federal rules since 1970 and was first required in Rule 26(a)(1) disclosures in 1993. Until recently, the issue was largely ignored.

**"Understanding the source and location of your client's electronic data is the key to complying with Rule 26."**

### Sources of Electronic Data

The sources of relevant data are commonly thought to include email, spreadsheets, word processing documents, and databases. However, as technology has advanced, so too has the vast amount of electronic data that exists as well as the wide variety of sources where it may be found.

Determining the source alone is not enough. Given the increased interconnectivity of computer systems from home networks to companywide systems, as well as the widespread use of high speed Internet access, the data you see on your computer often does not exist on that computer but instead resides elsewhere. In the large corporate context, data may reside in locations including network servers, local work stations, on backup media such as data storage tapes, and in countless other locations. Relevant data may also be located at third-party locations such as Internet service providers, text-paging services, and data storage companies.

### Practical Considerations

***Take an inventory—make sure the data is there before you disclose it.***

It is critical to conduct physical inventories of backup tapes and other storage media before disclosing what your client possesses. Do not rely merely upon the company "policies" regarding backing up of data. IT personnel will often make additional backups beyond their policies when performing work on systems. Sometimes a new backup system will be utilized and the old tapes will never be discarded. Instead of backups covering a period of several months, your client may have several years' worth—despite what a written policy may say. Conversely, equipment may fail and backups may not be done as often as the policy dictates.

***IT personnel are concerned with "disaster recovery"; litigation is concerned with "recreating events as they occurred at some point in the past."***

IT personnel preserve data for one purpose: disaster recovery. In the event of a problem, they seek to restore the system to replicate the way it looked that morning, or the night before. They do not generally care how the system looked a year ago. Older data is of little use to IT personnel. This "IT purpose" for data retention presents a trap for the unwary practitioner. For example, if most IT personnel were asked whether their email system is backed up, they would likely respond that it is backed up to tape every day and they can recover information from that tape, if necessary. What is often left out of that conversation is that the tapes are routinely overwritten as time passes. Some companies do not store email for more than 7 days; others maintain it for years.

***Be thorough in your search for data.***

In many scenarios, the email server is not the only source of email data. Depending on the type of system being utilized, copies of emails may be stored in "folders" on a user's individual hard drive and may not actually reside on the network server. The "folders" may turn out to be the only place the email resides if it has been deleted from the sender's "sent items," the recipient's "received items," and each user's "trash." Accordingly, even daily backups of a network server often will not obtain all emails present in the company at any particular moment.

Understanding the source and location of your client's electronic data is the key to complying with Rule 26. Furthermore, your early consideration of these issues will ensure you are on your way to an appropriate preservation plan and the avoidance of sanctions for spoliation.

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their clients use technology and electronic media in order to be prepared to answer questions about their clients' use of backup or archival tapes, use of DVD storage media, searches on individual computers, etc. For example, if a client is accused of failing to search backup or archival tapes, it is important to know whether the client ordinarily utilizes such a procedure. Without this information, an attorney will not be able to represent to the court that the client has met its Rule 26 obligations. To make that obligation clear, the guidelines provide as follows:

> **Duty to disclose.** Disclosures pursuant to Fed.R.Civ.P. 26(a)(1) must include electronic information. To determine what information must be disclosed pursuant to this rule, counsel shall review with their clients the clients' electronic information files, including current files as well as back-up, archival, and legacy computer files, to determine what information may be used to support claims or defenses (unless used solely for impeachment). If disclosures of electronic information are being made, counsel shall also identify those individuals with knowledge of their clients' electronic information systems who can facilitate the location and identification of discoverable electronic information.[16]

Finally, attorneys need to remember that the Federal Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action."[17] Although Rule 26(a)(1)(B) requires every party to make full disclosure of electronic data that may be used to support its claims or defenses, the parties should consider the costs and burdens of disclosing each category of electronic data. To narrow the scope of the disclosures and agree on the sequence and costs of disclosures, these issues should be discussed at the Rule 26(f) meeting, and, if necessary, at the Rule 16 conference. Finally, it may be necessary to file a motion for protective order to balance the disclosure requirements with the need to provide a speedy and inexpensive process.[18]

Simply put, attorneys must determine the existence of relevant electronic information to be disclosed. Only in the rarest of cases should an attorney represent that his or her client has no germane electronic data to disclose—an implausible response in this age of computers.

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16 *See http://www.ksd.uscourts.gov/attorney/electronicdiscoveryguidelines.pdf.*

17 Fed. R. Civ. P. 1.

18 The Advisory Committee Notes to Fed. R. Civ. P. 34, which apply to requests for production, provide guidance in balancing mandatory disclosure of computerized records against the burdens placed on the respondent: "The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs." Although the Advisory Committee Notes apply to Rule 34 requests for production, the policy considerations behind it apply equally to Rule 26(a)(1)(B) disclosures.

***David J. Waxse** is a United States Magistrate Judge for the U.S.D.C. in Kansas City, Kansas, and the author of Kleiner v. Burns, 2000 U.S. Dist. LEXIS 21850, 48 Fed. R. Serv. 3d (Callaghan) 644 (D. Kan. 2000). Judge Waxse would like to acknowledge with thanks the contributions of his law clerks, Barbara Harmon, Melissa Taylor, and Brenda Yoakum-Kriz, to this article.*



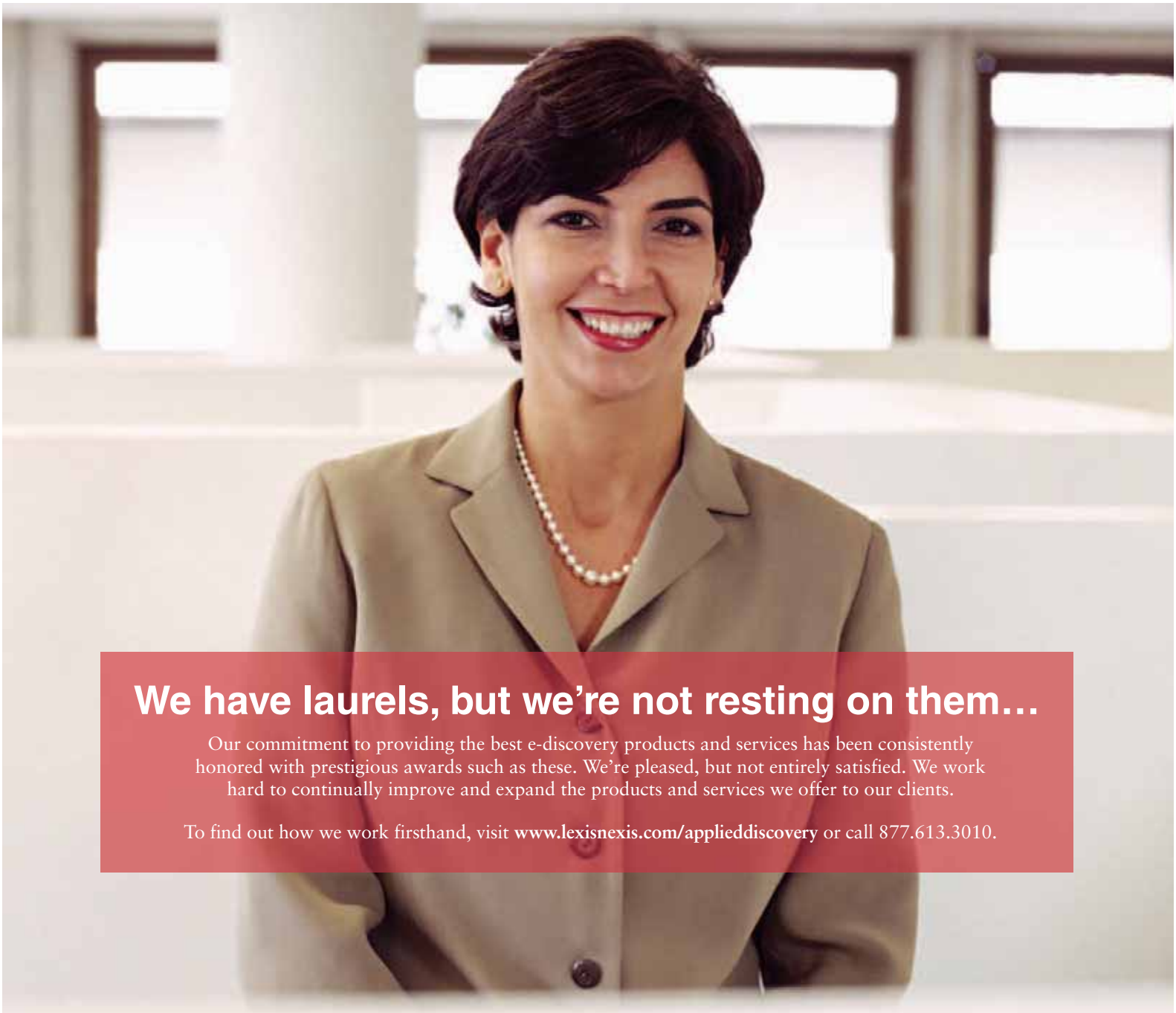
- **Don't Overplay the Burden**
  Do not exaggerate the burden (in time or expense) required to respond to a request for the production of electronic data. While producing thousands of emails or electronic documents is not quite as simple as pushing a button, it is not an effort that rivals launching a space shuttle. You will quickly lose credibility with the court if you overstate the burden of preserving, collecting, reviewing and producing electronic documents.

- **As in the Paper World, Relevance Is a Threshold Issue in Electronic Discovery**
  Do not overlook relevance arguments when objecting to the breadth of a request that calls for the production of electronic data. The need to establish the relevance of the information stored in electronic form seems to get lost in the electronic discovery world. While a request calling for the production of every interoffice memorandum in a party's files seems ludicrous on its face, it is not uncommon for parties to request the production of every email contained in an opponent's email system. Like paper documents, documents stored in electronic form are not discoverable simply because they exist.

- **Begin a Dialogue About Electronic Discovery with Your Opponent as Early as Possible**
  As soon as is practical, you should engage in a dialogue with your opponent about the parameters for the preservation and production of electronic data. Recent amendments to the Federal Rules of Civil Procedure, local rules enacted recently in several U.S. District Courts, and a handful of state civil procedure rules encourage or require early "meet and confer" conferences to discuss discovery, and—in some instances—specifically require the parties to address electronic discovery. Given the potential costs of electronic discovery, it makes sense to take any and every opportunity to try to define the parameters of what data your client will preserve, what data it will collect and review, and how it will produce responsive information.

- **Establish the Production Format Before Beginning Review**
  One of the first issues parties should raise with their opponents, and the court if necessary, is the form of production for documents maintained electronically. Resolving the production format is not as easy as choosing between paper and plastic at the supermarket. There are a number of formats in which electronic documents can be produced, including TIFF, PDF, HTML, "native" and last, but not least, simply printed to paper. Each format has unique attributes that may make it more appropriate than others for a particular case. The form of production will dictate how the review is conducted. It is imperative that the parties agree to—or obtain an order from the court dictating—the form of production before review begins.

While lawyers and their clients traveling the electronic discovery trail for the first time face a number of new challenges, these challenges can be overcome. Well informed and well prepared lawyers can assist their clients by being able to articulate their client's position in a way that their opponents and the court can understand. They will then be in a better position to negotiate with their opponents, or if necessary, to assist the court in setting reasonable parameters for the discovery of electronic data.



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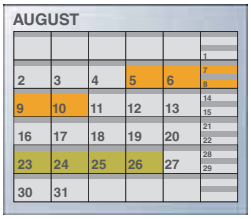


AUGUST

**American Bar Association Annual Meeting**
Georgia World Congress Center / Atlanta, GA
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**LawNet 2004: 27th Annual Educational Conference**
Desert Ridge Resort & Spa / Phoenix, AZ
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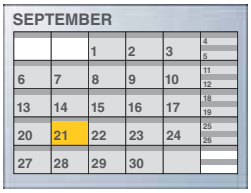


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by Virginia Llewellyn, Esq., Applied Discovery
Richmond Journal of Law & Technology, University of Richmond
Spring 2004

**"Effective Electronic Discovery"**
by Dan Goldwin, Esq., Applied Discovery
Facts & Findings
May 2004

**"Effective Electronic Discovery: Implementing a Response Plan"**
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