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Data Maps: A best practice for the meet-and-confer

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Abstract— **Rule 26(f) of the Federal Rules of Civil Procedure (FRCP) provides for a meet-and-confer conference between opposing counsel in any civil litigation case. Among other things, the FRCP requires, without waiting for a discovery request, disclosure of a copy or a description by category and location of all electronically stored information and the costs incurred to produce it. In effect, this requirement is tantamount to requiring each party to produce a data map. Recent cases have tended to support this position. This paper reviews recent cases indicating a trend toward courts requiring data maps to satisfy the Rule 26(f) mandates.**

Keywords: ESI, data map, data mapping, meet-and-confer, electronic discovery

I. Electronically Stored Information

Electronic Stored Information (ESI) is doubling every three years. According to a study conducted at Berkeley in 2003, more than five exabytes of information were stored electronically. Five exabytes of information would equal 37,000 libraries the size of the Library of Congress. [1] They further predicted that based on past growth rates ESI is doubling every three years. [1] With this much electronically stored information, how much is enough to be discovered in a case? Giving too much information is known as data dumping and requesting too much information can cause exorbitant costs and turmoil in the discovery process. With all of this accumulating electronic data, and to prevent discovery chaos and serial contempt motions such as the five discovery motions (four of them dealing with the issue of electronically stored information) in the Zubulake v Warburg [2], new Federal Rules of Civil Procedure were adopted by the U.S. federal judicial system. The Zubulake opinions are known as Zubulake I, [2] Zubulake III [3], Zubulake IV [4] and Zubulake V. [5] This case became the catalyst for change of the electronic discovery rules in United States and most of the common law countries including the United Kingdom, Australia and South Africa. In the Zubulake case, Judge Scheindlin issued rulings that would serve as guidance in the new reality of terabytes of electronic data. This particular case began as a gender discrimination case but quickly became first authoritative case in the United States on electronic discovery issues. The Zubulake case forced the legal community to review the rules of civil procedure and make the necessary changes to the Federal Rules of Civil Procedure to include specific instructions concerning electronically stored information.

One of the most significant changes in the FRCP is Rule 26 that requires litigants to meet and confer within 99 days of the commencement of a lawsuit. Further, it requires the following:

f) Conference of the Parties; Planning for Discovery

(2) Conference Content; Parties' Responsibilities.

In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. [7]

The amended Rule 26(f) provides that electronic evidence must be discussed at the meet-and-confer and that the information exchanged must include: (1) the preservation of discoverable information; (2) issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced; and (3) issues regarding claims of privilege or protection. In essence, that means the litigators must be prepared to reveal everything about their electronically stored information including location, type, source, and format of data.

Secondly, attorneys must come to the meet-and-confer prepared and fully aware of the client's ESI. If the attorney does not have a true understanding of ESI in general and his or her client's ESI, he or she must bring a forensic expert with them to the meet-and-confer. Further, the attorney must understand the nature, variety and kinds of electronic storage media involved, how to retrieve data, what types of electronic data exist, the format in which the electronic data is stored, and the expense and backing up of the systems. Again, if the attorney does not have that knowledge, he or she must bring someone to the meet-and-confer who understands how to retrieve the data. Further, attorneys must be prepared to demand the type and format of ESI they need and want to complete their discovery planning.

In 2010 when defendants in the Cartel case did not provide specific information regarding ESI storage, the

number of backup or archiving systems in place, or the capability to retrieve information because they claimed it was too burdensome, the court stated that e-discovery "has simply become too expensive and too protracted to permit superficial compliance with the 'meet and confer' requirement" under the Fed.R.Civ.P. [8] and further, the court endorsed the Sedona Conference Cooperation Proclamation. [9]

In July 2008, the Sedona Conference, a non-profit legal think tank, made up mostly of judges and lawyers, is known for its series of Sedona principles regarding Electronically Stored Information in civil litigation. In 2008 the Sedona Conference published its Proclamation of Cooperation. The proclamation states that:

The costs associated with adversarial conduct in pretrial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information (ESI). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial. [9]

In another 2010 case involving Campbell's Soup the court sanctioned the plaintiff when its discovery demands covered a three-year period and included 55 key words and 50 custodians to search. The experts estimated that this discovery request would produce approximately 474,456 documents for one year alone. After repeated directions by the judge to reduce its requests, the court denied the plaintiff's discovery requests and ordered the plaintiff's to pay defendants' attorney fees. [10]

In an earlier 2008 case, Judge Paul Grimm ruled as follows:

Discovery must be initiated and responded to responsibly, in accordance with the letter and spirit of the discovery rules, to achieve a proper purpose, and be proportional to what is at issue in the litigation, and if it is not, the judge is expected to impose appropriate sanctions to punish and deter.

The court continued and ordered the parties back to a meet-and-confer session and to devise a plan in good faith and to report back to the court with their plan. [11]

Rule 26 also contains a requirement and provides a guideline for a discovery plan:

26 f (3) Discovery Plan.

A discovery plan must state the parties' views and proposals on:

a) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

b) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

c) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

d) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

e) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

f) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). [6]

In a recent case the defendant avoided discovery requests by claiming it was an undue burden and harmful to business. The defendants did not provide specific information regarding ESI storage, the archiving systems, or the capability to retrieve information. The court found the defendant's claims of undue burden were too general in nature to be sustained and ordered the defendants to supplement their discovery responses. The court also asserted that electronic discovery "has simply become too expensive and too protracted to permit superficial compliance with the 'meet and confer' requirement." [8]

In an earlier case Judge Grimm warned litigants "failure to abide by Rule 26(g), requiring particularized facts for a discovery objection, was one reason for the excessive costs of discovery." [11]

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As evidenced by the foregoing discussion of recent cases, the courts have become less tolerant of attorneys who do not comply with the spirit of the meet-and-confer as in the Campbell Soup case noted above. The cases are clear and judges are adamant that attorneys and litigants must come prepared to the meet-and-confer and use the time productively. The courts have little sympathy for attorneys who have not used the meeting to resolve discovery issues.

In another 2010 case the court was frustrated with the defendant who was not prepared for electronic discovery and was late in providing documents. Even though the defendant had provided 21,000 documents, the court found the time for "don't worry, we'll get it to you" had passed, especially given the original discovery deadline of November 2009. The court ordered the parties to a meet-and-confer to discuss the production of ESI to be produced in a "searchable" format. Although, the court denied sanctions, the court wanted the decision to be a "wake-up call" to "tighten up their discovery practices."[11] The court demanded the parties to work through "disagreements amicably whenever possible" as the court "has neither the time nor the resources to resolve every discovery agreement that surfaces in this or any other case."[11]

II. DATA MAPS

In reality, to be in compliance with the Federal Rules of Civil Procedure and to be prepared to discuss a corporate client's ESI at the meet-and-confer, companies must prepare data maps long before litigation is a reality or threat. A data map is a listing of all of the ESI in the company by category, location, and custodian. In addition, the data map must include how the ESI is stored, its accessibility and the company's retention and deletion policy. Attempting to complete this map after litigation has commenced is an impossibly difficult task.

In the Covad case, the attorneys came to the meet-and-confer unprepared; neither had a data map, nor did either know what he or she wanted or how he or she wanted it. As a result, neither party received what it wanted or the format in which it was wanted. [15] Both parties brought motions to compel discovery, and John Faccola ordered:

… the courts have reached the limits of their patience with having to resolve electronic discovery controversies that are expensive, time consuming and so easily avoided by the lawyers' conferring with each other on such a fundamental question as the format of their productions of electronically stored information. [15]

The difficult and complex character of data mapping means that this process can take a year or more to complete. The process requires the cooperation of all of the potential custodians of data and searching all potential data sources. Rule 26(a)(1)(A) specifies that parties must provide each other with "a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses." Additionally, information must be provided on "each individual likely to have discoverable information." [16]

The only practical and efficient way to comply with Rule 26 is to create a data map long before litigation begins and make certain that it is updated regularly. While the costs of creating a data map are not insignificant, the benefits of creating one far exceed the costs of preparation. The data map will ease the electronic discovery process, decrease discovery response time, lower costs of litigation and prevent sanctions for production of untimely and incomplete responses to discovery requests.

Furthermore, attorneys must learn about and fully understand ESI, digital storage, accessibility, and their clients' data resources. One attorney's failure to understand a computer archive system resulted in the court ordering sanctions. The court found that the plaintiffs' attorney "did not understand the technical depths to which electronic discovery can sometimes go" and noted that counsel has an obligation to search for sources of information to understand where data is stored. Further, the court found that if plaintiff's counsel would have spoken with key figures at the client company regarding the computer and archiving systems in place, the forensic search and subsequent motions would have been unnecessary. [17]

III. CONCLUSION

In conclusion, data mapping emerges as an imperative to having companies prepared for compliance with the e-discovery requirements of Federal Rules of Civil Procedure in general, and Rule 26 in particular. Indeed, it is a best practice for the meet-and-confer. The data map must include all the sources, locations, formats and uses of the business' records and the corresponding written and unwritten retention policies and practices. The data map must include relevant ESI that may be found in less "active" sources, deleted sources, and backup systems. Attorneys must educate their clients of the necessity of having a data map long before litigation occurs. It is difficult for litigants to be in compliance if the data mapping does not start until litigation is commenced. In addition, once clients have prepared a data map they must keep them current by regular periodic updates.

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