E-Discovery Legislative and Judicial Update

By Corey Reitz

FRCP Rules on E-Discovery

The main federal rules dealing with electronic discovery are: Fed. R. Civ. P. 16, Fed. R. Civ. P. 26, Fed. R. Civ. P. 34, and Fed. R. Civ. P. 37. Each of these rules and their accompanying advisory committee notes should be read and reviewed on a regular basis. A sub set of these rules are highlighted here to draw attention to some key items to keep in mind as you deal with electronically stored information while participating in the discovery phase of litigation.

Initial Disclosures

Fed. R. Civ. P. 26(a)(1)(A)(ii)

> (ii) 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, unless the use would be solely for impeachment;

This rule explains that as part of initial disclosures, either a copy of electronically stored information or a description of that information should be provided to the other party. Creating a "data map" can be an excellent way to fulfill the requirements of this initial disclosure. A data map is a listing of the custodians placed on legal hold and a list of locations where the party believes related data may be stored. Common locations to list in a data map include the corporate e-mail system, the network storage locations used by the custodians, and servers that are believed to contain related information (database, file, application, and web servers). These disclosures happen either at the 26(f) Conference or within 14 days of the 26(f) Conference (see Fed. R. Civ. P. 26(a)(1)(C)).

Basis for Initial Disclosure, Unacceptable Excuses

Fed. R. Civ. P. 26(a)(1)(E)

> (E) A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

This rule points out the expectation that early in the litigation each party will have a good handle on the key issues in dispute and the evidence in the matter to sufficiently provide the evidence they plan to use in support of their claims and defenses. Implementing and following a data organization and analysis process helps to ensure that the attorney has had early opportunities to analyze the evidence and will be able to make accurate representations at the 26(f) Meet and Confer.

Specific Limitation on Electronically Stored Information

Fed. R. Civ. P. 26(b)(2)(B)

> (B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

This rule points out a key defense that can be raised by a party where producing electronically stored information in a matter would be too expensive or burdensome to provide the data. This situation can occur when the only source of information is on backup tapes that can be costly and time consuming to access or where information was created in an old application that is needed to make sense of the data, but the application

is no longer in use and the operating environment (hardware and operating system) no longer are easily obtainable. In order to argue that a source is not accessible due to burden or cost, it is helpful to have evidence that illustrates the high cost or burden. For large companies, creating and tracking e-discovery cost/effort metrics can become a key source of this evidence.

Additional Limitations on Discovery of Electronically Stored Information
Fed. R. Civ. P. 26(b)(2)(C)

> (C) On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

This rule can protect a party where they have been asked to produce largely duplicative data from numerous sources and where the amount in controversy is worth less than the amount it would cost to produce the electronically stored information. In some cases a cost-sharing arrangement can be made where the parties share the costs of providing the information if the information is perceived to have great value in the matter.

Claw Back
Fed. R. Civ. P. 26(b)(5)(B) *Information Produced.*

> (B) If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return,

sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Due to the volume, it is much easier to inadvertently send privileged or work-product protected electronically stored information out than it is in paper discovery. In the event that this occurs, this rule provides a mechanism for either getting the file back or having the file reviewed under seal by the court.

Fed. R. Evid. 502(d) *Controlling Effect of a Court Order*.

(d) A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

Note that it can be advantageous to get an agreement captured in a court order early in the matter that references Fed. R. Evid. 502(d). This rule states that inadvertent disclosure doesn't constitute a waiver, so that the information cannot be used in any later proceeding (federal or state).

Discovery Plan

Fed. R. Civ. P. 26(f)(3)

(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).

It is critical that the attorney be prepared to discuss electronic discovery as a key part of creating the Discovery Plan. In some cases it will be important to bring an IT person to assist the attorney to accurately represent the information technology environment, the preferred disclosure format, and any potential issues for ultimately producing the information. The attorney should attempt to persuade the other parties to tailor discovery to address the specific claims and defenses of the case so that the parties are not overwhelmed with the amount of data that they will have to review. One recommended approach is to gain agreement from all parties that the scope of discovery will initially only include information from key individuals, filtered using mutually agreed upon key words, date ranges, and specific file types. To help gain buy-in from the various parties, the agreement should leave open the opportunity to later expand the scope of discovery if it is later needed.

Scope of Requests

Fed. R. Civ. P. 34(a)

(a) *In General*. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;

There really is no limit to what a party can request if the information is nonprivileged, relevant to a party's claim or defense, and is reasonably calculated to lead to the discovery of relevant evidence Fed. R. Civ. P. 26(b)(1). The types of information described here are just examples of what is discoverable. As technology continues to develop, these new formats and mediums of communication will presumably fall within the scope of this rule and be discoverable.

Form of Production

Fed. R. Civ. P. 34(D)

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

The requesting party can request a certain format from the responding party when producing electronically stored information. The responding party has the opportunity to object to the requested form and inform the requester of the form it intends to use for the production as long as it is in a reasonably usable form. It is recommended that the format for producing data is captured in the 26(f) Discovery Plan so that there is no confusion surrounding what will be provided and received by the parties. Common production formats include native files, searchable PDF files, and TIFF images. Native files can be very useful since you have the ability to look at the metadata of the file, but the common practice of labeling and bates stamping the files is not possible without converting the files into a format such as PDF or TIFF. Some organizations will provide the TIFF images of the production along with the text of the files and metadata in a load file that can be imported into a document review platform (i.e. Concordance, Summation, and Relativity). This makes it possible to produce files that include bates stamps and the metadata to the requester.

Safe Harbor

Fed. R. Civ. P. 37(e)

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

A court should not impose sanctions on a party for an inability to produce electronically stored information that was deleted, where the party was not in reasonable anticipation of litigation and was merely following a records retention schedule that was not placed on litigation hold. Where a party is in reasonable anticipation of litigation, the party should prevent the loss of information by placing a litigation hold on the data or system and ensuring the mechanisms that normally delete this data are halted until the resolution of the litigation.

Pretrial Conferences: Scheduling Management
Fed. R. Civ. P. 16(b)(3)

(3) *Contents of the Order.*

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

The attorney should ensure that all agreements regarding discovery generally, and electronic discovery specifically, are captured in the judge's Rule 16(b) order.

Agreements about scope, form of production, deadlines, claw back, and other items unique to the specific case should all be within the order.

State-Specific Rules

The New Mexico state rules of civil procedure primarily dealing with electronic discovery are Rules 1-016, 1-026, 1-034, and 1-037 NMRA. The rules were modified based on the recommendations of the New Mexico Rules of Civil Procedure for the District Courts Committee in 2009.

Limitations

Rule 1-026(B)(2) NMRA

(2) Limitations. The court shall limit use of discovery methods set forth in this rule if it determines that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(c) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

This rule can be a useful defense when the costs of responding to a discovery request are burdensome or costly. In order to reinforce a claim that the requested discovery is too burdensome or costly it is helpful to have time and cost metrics.

Scope of Discovery

Rule 1-026(B)(3) NMRA & Rule 1-026(B)(5)

(3) Witnesses and exhibits. Parties may obtain discovery of the identity of each person expected to be called as a witness at trial, the subject matter of the witness's expected testimony and the substance of the witness's testimony. Parties may also discover the name, address and telephone number of each individual likely to have discoverable information that another party may use to support its claims or defenses as well as the subjects of such information. Parties may obtain a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that a party may use to support its claims or defenses.

(5) Trial-preparation materials. Subject to the provisions of Subparagraph (6) of this paragraph, a party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable under Subparagraph (1) of this paragraph and prepared in anticipation of litigation or for trial by or for another party or that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement that the party made concerning the action or its subject matter. Upon request, a person not a party may obtain without the required showing a statement that the person made concerning the action or its subject matter. If the request is refused, the person may move for a court order compelling production of the statement. The provisions of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement is:

(a) a written statement signed, adopted or approved by the person making it, or

(b) a contemporaneous, substantially verbatim recital of an oral statement by a person.

These rules permit an opposing party to gain a copy or description of all electronically stored information that a party may use to support its claims or defenses. Rule 1-026(B)(5) allows for the discovery of trial-preparation materials from the opposition to allow the party to prepare their case where there is a substantial need and the party would incur undue hardship. This rule still protects attorney work-product.

Claims of privilege or protection of trial preparation materials
Rule 1-026(B)(7)(b)

(b) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

This rule provides a "claw back" opportunity for situations where privileged or protected information is turned over to another party.

Scope of Requests

Rule 1-034(A)(1) NMRA

(1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test or sample any designated documents, electronically stored information any tangible things which constitute or contain matters within the scope of Rule 1-026 NMRA and which are in the possession, custody or control of the party upon whom the request is served; or

This rule permits a party to request and gain access to any electronically stored information, not privileged, which is relevant to the subject matter involved in the pending action. Note that this standard is slightly different than the standard under the Federal Rules of Civil Procedure.

Form of Production

Rule 1-034(B) NMRA

B. Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within thirty (30) days after the service of the request, except that a defendant may serve a response within forty-five (45) days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection. If objection is made to part of an item or category,

the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 1-037 NMRA with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders,

(1) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one form.

This rule outlines that procedure for determining the form of production of electronically stored information. It is recommended that the form of production is determined at the outset of the litigation and captured in an order obtained under Rule 1-016(B) NMRA.

Pretrial Conferences; Scheduling; Management

Rule 1-016(B) NMRA

B. Scheduling and planning. Except in categories of actions exempted by local district court rule as inappropriate, the judge may, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time:

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order shall also include:

(4) provisions for disclosure or discovery of electronically stored information;

(5) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production;

(6) the date or dates for conferences before trial and a final pretrial conference;

(7) a trial date not later than eighteen (18) months after the date the scheduling order is filed; and

(8) any other matters appropriate in the circumstances of the case.

The pretrial scheduling order shall be filed as soon as practicable but in no event more than one hundred twenty (120) days after filing of the complaint. A scheduling order shall not be modified except by order of the court upon a showing of good cause.

If a pretrial scheduling order is not entered, the court shall set the case for trial in a timely manner, but no later than eighteen (18) months after the filing of the complaint.

For good cause shown, the court may extend the time for commencement for trial beyond the time standards set forth in this paragraph or may modify the scheduling order.

A scheduling order may be entered by the judge and this order should include provisions for the disclosure or discovery of electronically stored information.

Some key differences between the New Mexico state and federal rules of civil procedure include the following:

1) No automatic initial disclosures in the New Mexico state rules (no equivalent to Fed. R. Civ. P. 26(a)(1)).
2) No explicit safe harbor for information lost as result of the routine deletion of electronically stored information (no equivalent to Fed. R. Civ. P. 37(e)). The Committee Commentary for the 2009 Amendments states "The committee is of the view that nothing in the nature of discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules."

3) The judge *may* issue a scheduling order under Rule 1-016(B) NMRA. Under the federal rules, with few exceptions, the judge or magistrate *must* issue a scheduling order under Fed. R. Civ. P. 16(b).
4) No explicit limits on the discovery of electronically stored information in New Mexico. The New Mexico Rules of Civil Procedure do not contain the limits imposed in Fed. R. Civ. P. 26(b)(2)(B). Instead the Committee Commentary for the 2009 Amendments states that "discovery of electronically stored information should be subject to the same provisions in these rules for motions to compel discovery and motions for protective orders that currently govern the discovery of non-electronic information."

How Much Weight do the Sedona Principles Carry?

The Sedona Principles (Second Edition) are a set of 14 recommended principles intended to assist the bench and bar to implement a reasonable and practical approach to e-discovery. The principles are presented as a work in progress, and are designed to be further developed and refined over time. The principles were originally published in 2003 and have been very influential as the body of law in this area has grown. Particularly of note is the fact that the principles were influential in the 2006 drafting of the revised Federal Rules of Civil Procedure. In addition, The Sedona Principles have been referenced in many judicial opinions including the landmark Zubulake case (Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)), and a handful of 10th Circuit Court of Appeals cases including Regan-Touhy v. Walgreen Co., 526 F.3d 641 (10th Cir. 2008) and Cache La Poudre Feeds, LLC v. Land O'Lakes Inc. 244 F.R.D. 614 (10th Cir. 2007). The principles address issues such as what electronically stored information (ESI) reasonably should be preserved, the expected level of collaboration between counsel regarding the scope of e-discovery, which party should pay the costs of e-discovery, and when sanctions for spoliation are appropriate. In short, The Sedona Principles provide an excellent guide for how e-discovery should be approached by a practitioner and should be the ideal that litigators should strive for when dealing with electronic evidence.

There is a movement towards a more collaborative approach to discovery in general, and e-discovery in particular. Many feel that using e-discovery as a tactical tool to gain advantage

through gamesmanship is not proper (or within the spirit of the federal rules of civil procedure). The overall sentiment is that cases should be decided on their merits, not on the threat of expensive and protracted discovery.

The Sedona Conference released a Cooperation Proclamation in late 2008 that is a call to lawyers to approach discovery with "forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery" (The Sedona Conference Cooperation Proclamation, pg. 3). The proclamation went on to challenge the bar to "refocus litigation toward the substantive resolution of legal disputes" *Id.* The spirit of the document is that it is more efficient and therefore cheaper for clients if attorneys identify the relevant data in their possession and openly share what they have instead of using access to the data as part of their adversarial strategy. If the data is openly shared, then the attorneys for each side can focus on creating their best legal strategies and positions based on the facts as represented in the data.

This collaborative approach appears to be gaining support within the judiciary. In *William A Gross Constr. Assocs. Inc. v Am. Mfrs. Mut. Ins. Co.* 2009 WL 724954 (S.D.N.Y. Mar. 19, 2009), Judge Andrew Peck stated that "[e]lectronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI." In the same opinion, the judge stated that the court "strongly endorses The Sedona Conference Cooperation Proclamation" *Id*. Within the 10th Circuit, one court has stated the following:

> "Civil litigation, particularly with the advent of expansive e-discovery, has simply become too expensive and too protracted to permit superficial compliance with the "meet and confer" requirement under Rules 26(c) and 37(a)(1) and (d)(1)(B)…This court has endorsed *The Sedona Conference Cooperation Proclamation* (2008) (available at http://www.thesedonaconference.org/content/tsc-cooperation-proclamation) and its call for "cooperative, collaborative, [and] transparent discovery." In my view, the *Cooperation Proclamation* correctly recognizes that while counsel are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner.... Cooperation does not conflict with the

> advancement of their clients' interests-it enhances them. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict. Counsel are on notice that, henceforth, this court will expect them to confer in good faith and make reasonable efforts to work together consistent with well-established case law and the principles underlying *The Cooperation Proclamation.*" *Cartel Asset Management v. Ocwen Financial Corp.* slip op., 2010 WL 502721 (D.Colo., Feb. 8, 2010).

Recent Relevant Federal and State Court Rulings

Scope of Search

***I-Med Pharma Inc. v. Biomatrix, Inc.,* 2011 WL 6140658 (D.N.J. Dec. 9, 2011)**

In *I-Med Pharma Inc. v. Biomatrix, Inc.*, 2011 WL 6140658 (D.N.J. Dec. 9, 2011), the underlying dispute is over a breach of contract between two pharmaceutical device companies. During the course of the discovery phase, Plaintiff I-Med Pharma had agreed to search, perform a privilege review, and produce relevant files from the unallocated file space of their computers. The search terms used were very broad, the search was not limited to certain custodians or time periods, and the area searched was large, thus resulting in "64,382,929 hits" representing an "estimated 95 million pages of data" *Id.* Upon realizing the magnitude of the task before them to review these results for privilege and produce the remaining documents, the Plaintiff requested relief and the judge allowed the Plaintiff to hold back files located in the unallocated space of their computers. The magistrate judge granted the relief because "the burden would outweigh any potential benefit that might result", to which the Defendant appealed *Id*. In the appeal the court agreed with the magistrate judge, but the court scolded the Plaintiff for not performing due diligence before entering into such a poor agreement. In addition, the court provided sound advice for future cases via five factors that all should consider when evaluating search protocols. The following are the five factors:

> "(1) the scope of documents searched and whether the search is restricted to specific computers, file systems, or document custodians; (2) any date restrictions imposed on the search; (3) whether the search terms contain proper names, uncommon abbreviations, or other terms unlikely to occur in irrelevant documents; (4) whether operators such as

"and", "not", or "near" are used to restrict the universe of possible results; (5) whether the number of results obtained could be practically reviewed given the economics of the case and the amount of money at issue" *Id.*

Focus on Key Documents

***DCG Sys., Inc. v. Checkpoint Techs., LLC,* 2011 WL 5244356 (N.D. Cal. Nov. 2, 2011)**

The two parties in the *DCG Sys., Inc. v. Checkpoint Techs., LLC,* 2011 WL 5244356 (N.D. Cal. Nov. 2, 2011) patent infringement case, appear to be nearly perfect models of cooperation and attention to e-discovery details. The parties participated in a 26(f) Meet and Confer and agreed to "a detailed protocol "addressing many (even if not all) of the ESI issues that often plague complex (and especially patent) cases, including document format, unitization, confidentiality, source information, and system metadata. The parties also address production of paper documents and the obligation to identify responsive documents or information that are not reasonably accessible." *Id.* The only item the parties could not agree upon was whether they should use the "Model Order" available within the District or not.

In this particular district, a Model Order had been created for patent cases that divided discovery into two phases. The first phase directed the parties to exchange "core documentation concerning the patent, the accused product, the prior art, and finances" *Id.* In the second stage the parties could request e-mail, but the parties were limited to five key words to be run against the data of only five custodians. The Model Order had been created as an attempt by the judiciary to reign in the high costs of discovery because "[g]enerally, the production burden of expansive e-requests outweighs their benefits" *Id*. In rendering his decision the Judge further illustrated his point by referring to an analysis that stated that in general ".0074% of the documents produced actually ma[k]e their way onto the trial exhibit list-less than one document in ten thousand" *Id.* The Court ultimately concluded that the parties should start by trying the Model Order, and then readdress the issue if the limits needed to be modified based on any special circumstances in the case. Although a Model Order of this type may not be available in the jurisdiction of a particular case, the wisdom of tailoring discovery and e-discovery in particular to focus on the most persuasive documents sends a powerful message.

Understand the Clients' Environment; Manage E-Discovery with a Plan, Sanctions

Atlas Resources v. Liberty Mutual, CIV 09-1113 WJ/KBM

In *Atlas Resources v. Liberty Mutual*, CIV 09-1113 WJ/KBM, the Plaintiff Atlas Resources contracted with Defendant Liberty Mutual to provide workers' compensation insurance and claims administration. The two companies had a falling out and the Plaintiff ultimately decided to hire a different insurance company due to issues with the reserve required for the insurance. In the final period of the contract, communication between the two parties fell apart and the result was a lawsuit claiming misrepresentation, unfair trade practices, unjust enrichment, and equitable estoppel. This matter resulted in three motions for sanctions against Defendant Liberty Mutual as a result of the Defendants subpar responses to requests for production. Initially Liberty Mutual did not even respond to some of the requests for production, and Atlas had to get a motion to compel to gain any hope of a response. Liberty Mutual eventually responded, but produced over 14,000 documents in the TIF format "without any indication as to the claim file with which each document was associated. Moreover, without the use of a specialized software program, [the] TIF files are not searchable" *Id*. As a result of the worthless production, similar issues with an interrogatory, and a lack of communication on the part of the Defendant, the Judge ordered Liberty to produce the information "in hard copy, in separate folders, indexed and labeled all at Liberty's expense" *Id*. It is interesting to note that the parties later divulged that they had not discussed discovery of electronically stored information during their 26(f) Meet and Confer. Had the parties addressed electronically stored information at that meeting, this issue might have been avoided. Ultimately, Atlas received attorney's fees of $1,912.00 in response to their first motion for sanctions.

The second and third motions for sanctions were based on additional issues resulting from incomplete, irrelevant, and tardy productions of electronically stored information. Liberty Mutual neglected to provide responsive e-mail from one of its Vice Presidents due to an error made in their document review platform. They failed to locate relevant information within their proprietary software until the last moment before a deposition that had to be rescheduled, and

then ultimately dumped 28,000 pages of information on the Plaintiff. To top things off, Liberty Mutual produced legal files that were found to be relevant to the dispute a year after the Court ordered production. In response to all of these abuses the court stated

> "It is clear that no discovery plan was in place (i.e., developing a systematic approach to document retrieval; identifying and communicating with the client representatives who are responsible for key areas of inquiry; keeping track of documents produced by the client to the attorneys; and producing the documents in a reasonably usable form to opposing counsel. It is also clear that counsel abdicated its responsibility to exercise oversight of the discovery process" *Id*.

Perhaps one of the most telling statements by the court was that "Parties cannot be permitted to jeopardize the integrity of the discovery process by engaging in halfhearted and ineffective efforts to identify and produce relevant documents" *Id.* Ultimately, the court awarded the Plaintiff Atlas all of its attorney fees and costs incurred in preparing and defending their second and third sanction motions, with the payment to be split by the Defendant and Defendant's attorneys. The court also allowed the Plaintiff to recover costs and fees to obtain the production of information that was delinquent and to cover costs for any additional depositions needed to ensure that they received all relevant information. Finally, the court awarded a fine equal to 30% of the recoverable attorney fees tied to the effort spent to obtain the information from the proprietary software and legal files to Atlas.

This case teaches several important lessons. First, this case illustrates the importance of working with the client to identify the various places that information related to the matter is stored. Second, it shows the need to work closely with the client to identify and review the specific information located at each source that is relevant to the case. Third, the value of creating a plan for organizing the information, preferably in a document review platform, and how the information will be produced. Fourth, the importance of coming to a Meet and Confer prepared to discuss the details about the electronic evidence in the client's environment. It is especially key to focus on identifying the production format, pin down the scope of information that will be relevant in the case (key custodians, key words, date ranges, key data sources), and capture all of these decisions in the plan presented to the judge. Fifth, treat each case as if it is a mini project.

Create a plan based on the key dates in the case and ensure that the evidence has been reviewed for relevance and privilege within the deadlines established. Keep tabs on the progress of the review and if deadlines begin to slip, take action to ensure that the project gets back on schedule.

Computer Assisted Review

***Da Silva Moore, et al., V Publicis Groupe & MSL Group*, 11 Civ. 1279 (ALC)(AJP).**

Da Silva Moore, et al., V Publicis Groupe & MSL Group, 11 Civ. 1279 (ALC)(AJP) is a gender discrimination employment case where five female plaintiffs sued a large advertising agency and their United States subsidiary. The case involves approximately three million electronic documents that need to be culled down and reviewed. The parties could not agree on a protocol for using predictive coding in the case and turned to the court for guidance. The magistrate judge assigned to the case is Andrew Peck, a well-known speaker and author in the area of electronic discovery. In an opinion and order issued on February 24, 2012, Judge Peck stated that "computer assisted-review is an acceptable way to search for relevant ESI in appropriate cases". This is the first case to acknowledge the use of advanced computer technology to perform the heavy lifting associated with the document review stage of discovery.

The opinion defines "computer assisted review" or "computer assisted coding" as leveraging "sophisticated algorithms to enable the computer to determine relevance, based on interaction (i.e., training by) a human reviewer" *Id.* The judge further explains how computer assisted coding works by quoting an article that he wrote for Legal Technology News. In that article Judge Peck stated:

> "By computer-assisted coding, I mean tools (different vendors use different names) that use sophisticated algorithms to enable the computer to determine relevance, based on interaction with (i.e., training by) a human reviewer.
>
> Unlike manual review, where the review is done by the most junior staff, computer-assisted coding involves a senior partner (or [small] team) who review and code a "seed set" of documents. The computer identifies properties of those documents that it uses to

code other documents. As the senior reviewer continues to code more sample documents, the computer predicts the reviewer's coding. (Or, the computer codes some documents and asks the senior reviewer for feedback.)

When the system's predictions and the reviewer's coding sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents. Typically, the senior lawyer (or team) needs to review only a few thousand documents to train the computer.

Some systems produce a simple yes/no as to relevance, while others give a relevance score (say, on a 0 to 100 basis) that counsel can use to prioritize review. For example, a score above 50 may produce 97% of the relevant documents, but constitutes only 20% of the entire document set.

Counsel may decide, after sampling and quality control tests, that documents with a score of below 15 are so highly likely to be irrelevant that no further human review is necessary. Counsel can also decide the cost-benefit of manual review of the documents with scores of 15-50" *Id.*

The Judge then goes on to explain that if there were challenges to the results of the computer-assisted coding, he would review the process and the results to determine if the approach was acceptable on a per case basis. The remainder of the order addresses what custodian data and data sources are ultimately to be searched, the details of the steps to use to engage predictive coding, and objections that had been raised.

Seminal Cases

Although not recent, the following are some citations to seminal cases that will help the reader to gain additional insight into this area of electronic discovery law.

Zubulake v. UBS Warburg, 220 F.R.D. 212, 218 (S.D. N.Y. 2003).
Cache La Poudre Feeds v. Land O'Lakes, 244 F.RD. 614, 628 (D. Colo. March 2, 2007).
Pension Comm. v. Banc of America Securities, 685 F. Supp. 456, 471 (S.D. N.Y. May 28, 2010).
Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 523 (D. Md. 2010).