The Battle For Bytes: New Rule 26 And The Return Of The Judges

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Rule 26 now sets forth fundamental principles regarding discovery of "electronically stored information" which, according to the Advisory Committee Note to Rule 34, is intended "to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments." When I think about preservation, production, and privilege with respect to electronically stored information, the words that now first come to my mind are "confer and meet." I am, of course, referring to the conference with the client, before meeting with opposing counsel. The changes to Rule 26(f) advance the timing of meaningful preparation for substantive discovery of electronically stored information by the client and its litigation counsel. For prudent potential litigants, they impose what should be a one-time obligation to design a digital document discovery strategy to be followed by a vigilant coordination and maintenance program marked by effective communication with, and education of, litigation counsel.

For judges who loathe e-discovery wars, new Rule 26 creates the opportunity to retake control of the litigation process and return order to the e-discovery universe. Indeed, involved judges represent the force necessary to make new Rule 26 work to satisfy Rule 1: to foster the "just, speedy, and inexpensive" determination of every action.

THE CHANGES TO RULE 26(f) AND 16(b)

Rule 26(f) requires parties to confer to consider the nature and basis of their claims and defenses, consider settlement, make or arrange for disclosures required by Rule 26(a)(1), and develop a discovery plan. The discovery plan contemplated by Rule 26(f) contains new paragraphs (3) and (4) to provide the district court with the parties' views and proposals concerning:

> *(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;*

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order.

Because electronically stored information has the ability to disappear automatically due to auto-delete or recycling programs, new Rule 26(f) adds another item to the litany of subjects to be considered by counsel: "to discuss any issues relating to preserving discoverable information."

Proceeding sequentially to the Rule 16 scheduling order, the proposed amendments add new paragraphs (b)(5) and (6) that permit the Rule 16 Scheduling Order to include in parallel: "(5) provisions for disclosure or discovery of electronically stored information"; and "(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production."

The e-discovery amendments were conformed to Rule 26(a)'s disclosure obligations as well. Unless otherwise stipulated or directed by order and unless solely for impeachment, a party still must, without awaiting a discovery request, provide to the other parties

(a) the identity of "each individual likely to have discoverable information" and the subject of the information, and

(b) "a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses."

These disclosures are due at or within 14 days of the Rule 26(f) conference unless a different time is set by stipulation or court order, or an objection is made in the Rule 26(f) discovery plan for the district court's consideration at the Rule 16 conference.

The standard for making disclosures has not changed under Rule 26(a)(1). "A party must make its initial disclosure based on the information then reasonably available to it and is not excused from making its disclosure because it has not fully completed its investigation or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures."

Nor has the certification obligation changed. Under Rule 26(g), the Rule 26(a)(1) disclosures must be signed by an attorney of record and that signature represents a "certification that to the best of signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." If "without substantial justification," the certification is made in violation or Rule 26, the district court, upon motion or its own initiative, "shall impose" an "appropriate sanction" on the attorney and its client.

The Rule 26(f) scheduling conference "must" occur "as soon as practicable and in any event at least 21 days before a scheduling conference" under Rule 16(b). Rule 16(b) does not establish the date for the scheduling conference, but it does establish the deadline for issuance of the pretrial scheduling order. "The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on the defendant." The "appearance of a defendant" will occur within 20 days after service by way of motion or answer and possibly earlier if a notice of appearance is filed. That will start the 90-day clock. If a district court desires at least ten days after the scheduling conference to prepare the scheduling order, the Rule 26(f) conference of counsel must occur at the latest by, roughly, day 59 after the "appearance of the defendant." Practically, however, many judges set the Rule 16 conference at an earlier date,

meaning that the Rule 26(f) conference will more likely have to occur within 40-60 days after the "appearance of the defendant." Add in the time between service and "appearance" and that's how much time a defendant will have to get its e-discovery domicile in order.

THE CHANGES TO RULE 26(b)(2)(B)

New Rule 26(b)(2)(B), the focal point of the cost-shifting case law, incorporates the "accessibility" concept from *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003). It establishes the procedure to address electronically stored information that is "inaccessible" because of "undue burden or cost":

> *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 such discovery.*

The Civil Rules Advisory Committee's Report accompanying the e-discovery rules' changes gives examples of sources of electronically stored information that may qualify as "inaccessible":

> *Examples from current technology include back-up tapes intended for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was "deleted" but remains in fragmented form, requiring a modern version of forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information.*

http://www.uscourts.gov/rules/Reports/ST09-2005.pdf (hereafter, "Adv. Comm. Rept."), Rules App. C-42.

The Advisory Committee suggested that the current practice is that "parties simply do not produce inaccessible electronically stored information" and regarded the amendment requiring the identification of sources not searched as an "improvement over present practice" because it "clarifies and focuses" the issue for the requesting party. Adv. Comm. Rept., Rules App. C-44. As long as reasonable judicial supervision occurs, the goal of "fair play" should prevail over the fear of a "fishing expedition."

While the "proportionality" limitations of Rule 26(b)(2)(C) are applicable to discovery of accessible electronic sources, if electronically stored information is inaccessible because of undue burden or cost, to evaluate good cause, and to specify conditions for such discovery (e.g., limits on the amount, type, or sources of information, cost-shifting, privilege protocols), Rule 26(b)(2)(C) is the guiding light for the district court:

> *The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that:*
>
> *(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;*

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

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

The Committee Note to the Rule lists other "appropriate considerations" that the district court may consider in evaluating whether the burdens and costs of discovery of electronically stored information that is not reasonably accessible "can be justified in the circumstances of the case":

1. the specificity of the discovery request;
2. the quantity of information available from other and more easily accessed sources;
3. the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
4. the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
5. predictions as to the importance and usefulness of the further information;
6. the importance of the issues at stake in the litigation; and
7. the party's resources. Adv. Comm. Rept., Rules App. C-49.

CONFER AND MEET: IF YOU LOSE AN HOUR IN THE MORNING YOU SEARCH FOR IT THE REST OF THE DAY

This Chinese proverb aptly describes the potentially daunting digital dilemma facing litigants. To comply with the new Rule 26, time is of the essence. Auto-delete programs recycle electronic information routinely. In the e-mail era, every individual is a file keeper and every individual has a delete key on the keyboards of the myriad of devices with storage media the individual may be using. Litigants that do not pay meaningful attention to preservation, production and disclosure obligations place themselves in sanctions jeopardy. Just ask Morgan Stanley. *Coleman (Parent) Holdings, Inc., v. Morgan Stanley & Co., Inc.*, Case No. 502003 (15th Jud. Cir. Fla. 2005) (March 1) (adverse inference instruction among other sanctions for certification violations and sluggish discovery and production) and (March 23) (entry of a default judgment directing that the liability allegations of the complaint "shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action"). Given the sanctions, it was perhaps not a surprise that the jury awarded plaintiff $604,334,000 in compensatory damages and $850,000,000 in punitive damages. http://www.lexisnexis.com/applieddiscovery/lawlibrary/CHP_MorganStanley_VerdictForm.pdf. Whatever the outcome on appeal, this case illustrates the life-changing impacts of e-discovery disorganization.

So let's look at best management--sanction-avoidance--practices for litigants and courts alike.

Getting Organized

Electronic document production requires organization and coordination. Let's not get carried away. Scalability is important. A company that has been involved in litigation on average once every three years

should react differently than companies involved in litigation on average once every three months or once every three days. The small municipality with one computer system will react differently than the police department with five separate computer systems or the county with several divisions each with their different software systems and storage protocols.

The future may bring numerous electronic document preservation and retrieval options that do not exist today. Today, apart from monitoring the development of such options, getting organized means, at a minimum, the following for entities involved in litigation frequently enough that the benefits of organization outweigh its costs:

1. Identify an electronic document team.
2. Within the team, have a spokesperson. By spokesperson, I am referring to a person who, should it ever become necessary, can comfortably and confidently explain to a court in live testimony what steps the litigant took to meet its electronic discovery obligations such that, after the testimony is concluded, the court will say, "under the circumstances, what you did was reasonable." Educating is important.
3. Have a qualified backup spokesperson.
4. Know your electronically stored information geography such that when any new suit is brought by you or against you, you need only to look at your electronically stored information geographic map to know where your electronically stored information is located. If you have to start the electronically stored information hunt with every new action, you are not organized.
5. Determine what of your electronically stored information falls into the "inaccessible" category because of "undue burden or cost." Inventory your backup tapes. Properly label them. Know where they are. Do this once--correctly--and then keep it up. And ask yourself: "do I really need all of this stuff?" Don't keep what you don't need.
6. Develop a storage-media policy for employees. Archiving e-mail on hard drives of office computers; copying documents to flash drives; e-mailing documents to home e-mail accounts; use of laptops or home computers; employee backups of their own computers; maintenance of prior versions of a final document; saving voice mail or instant messages—the list can go on. What are the habits of your employees and do you want them to change relative to your litigation profile? Whatever your document management protocols turn out to be, make sure they are followed.
7. Evaluate the manner in which you handle privileged electronically stored information. Quick peek and clawback agreements will be available, but a potential litigant's goal should be to manage one's privileged documents in a manner that eliminates the need to even have to consider such agreements, not to mention avoid the costs associated with privileged document determinations that gave rise to creation of such agreements.
8. If a third-party vendor is involved in your electronically stored information architecture, consider what contractual language is necessary to fairly articulate each party's obligations relative to litigation.
9. If you have the right to obtain documents from third parties by contract or otherwise such that the third - party's documents are within your "possession, custody, or control," include those third parties on your electronically stored information geographic map.
10. Stay current. Mergers and acquisitions; sales of a factory, division, or subsidiary; employee departures singly or as part of a reduction in force; plant shutdowns; computer conversions; software upgrades and additions; and, for entities with overseas operations, international rules on document disclosure and preservation, are among the reasons why your electronically stored information geographic map may need to be redrawn, expanded, or contracted.

With this foundation properly constructed, educating litigation counsel should be smoother and cost-effective.

Coordination Among and Communication with Counsel

Think hub and spokes. The electronic document team is the hub and each law firm handling litigation for the entity represents a spoke. The information provided in each case must be consistent. What is inaccessible in one case must be inaccessible in every case. As long as the conditions constituting "undue burden or cost" remain the same, the same factors controlling "undue burden or cost" should be articulated.

Litigators have to be educated so that they fairly and consistently represent a litigant's electronic document production capabilities. But litigants should seek feedback from counsel because local practice can adversely affect even the most reasonable discovery plan.

Pattern litigation—hundreds or thousands of actions involving, say, an alleged defective product—likely will involve a national coordinating counsel thereby minimizing the likelihood that inconsistent statements or positions will be made or taken. Similarly themed lawsuits in different jurisdictions may not involve a national coordinating counsel, increasing the importance of coordinating the discussion of electronically stored information among different counsel. Unrelated litigation in different jurisdictions involving the same electronically stored information systems will present the greatest educational and coordination challenge to litigants. Counsel of record sign the Rule 26(g) certification; they have to be in a position to vouch for what has been done.

And remember that every e-discovery step a litigant takes has the potential to be replayed in an evidentiary hearing over inaccessibility claims, cost-shifting, or sanctions. So litigants must recognize each e-discovery decision or judgment represents another line in the script that will become the supporting affidavit or courtroom testimony.

The Duty to Preserve

The e-discovery rules changes do not affect the duty to preserve. Because electronic documents can disappear with a key stroke, a litigant that reasonably anticipates litigation must take steps to preserve documents before a complaint is served. And when a litigant will be found to have reasonably anticipated litigation may be earlier than the litigant believes and, of course, long before the Rule 26(f) conference. *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001) (a school board was on notice of potential litigation "arguably" when the applicant made contact with the school principal and assistant principal and made inquiries about the interview process and submitted an information request for hiring records, but certainly by the time of filing of a charge of discrimination with a state human rights commission). *See*, generally, Barkett, *The Prelitigation Duty to Preserve: Look Out!* (Section of Litigation, ABA Annual Meeting, August 5, 2005, Chicago, IL)

However, whether the duty to preserve attaches before or after a complaint is received, the e-document team should be following its e-document preservation protocol. If a significant preservation question arises, there may be value in securing an opinion of outside counsel regarding the reasonableness of a particular decision. Rule 26(f) contemplates that preservation issues will be discussed with opposing counsel. Parties with such issues should frame them fairly and present them at the Rule 26(f) conference in a manner that, failing agreement with opposing counsel, will be defensible at the Rule 16 conference.

Preparing for the Rule 26(f) Conference

Parties should always remember these four keys:

- key dates
- key players
- key data
- key words

Key dates include the relevant time period for the litigation, the time periods that data remain accessible or potentially retrievable within a client's e-document architecture, and litigation deadlines under court-scheduling orders.

Key players represent the likely material witnesses or the persons with knowledge or information relevant to a party's claims or defenses. These may include third parties over whose documents the document producer has custody, control, or possession. The document generation and storage habits of key players must be comprehended in sufficient detail to articulate a Rule 26(f) position. The key player interview checklist must include questions about usage (currently and formerly) of, or storage on or of: office computers; laptop computers; home computers; personal digital assistants; flash drives; zip drives; internet storage services; text messages; instant messages; e-mail; CD, DVD or floppy disk media; voice mail or other voice files; and videoconference or teleconference recordings.

Key data constitute the electronically stored information that one would expect to be relevant to the claims or defenses asserted. Unquestionably, e-mail systems must be fully comprehended. What software files fall into the category of key data? The choices include, among others, word processing (e.g., WORD or Word Perfect); spreadsheet (e.g., Excel); database (e.g. Access, customer relationship software); project, accounting, human resource-specific systems; computer-aided design (CAD) or computer-aided manufacturing (CAM) files; or proprietary software that may exist for various applications.

Cost, space, and duplication, among others, are reasons why backup tapes need not be preserved despite the filing of a lawsuit. Your Rule 26(f) conference checklist would include your proposed electronically stored information document preservation plan for backup tapes. In symmetric cases (where both sides have equal e-discovery burdens), I would expect parties to reach agreement on preservation issues. In asymmetric cases (where one party has a large potential e-discovery universe and the other party has no or easily managed e-discovery issues), I would expect the Rule 26(f) conference to be more lively perhaps leading to court intervention to establish "marginal utility": the value of electronically stored information to the resolution of issues in dispute compared to the cost and burden to retrieve it.

Key data also embrace the form of production, which will not necessarily be the same for different types of data. The choices may include hard copy, a CD or other storage media with the information on it in searchable format, or direct access to the storage media that holds the original electronic information. Production could occur in, e.g., native format (e.g., Excel spreadsheet or Word documents), in TIFF (Tagged Image File Format in which images of documents are created) or in PDF (Portable Document Format) and there will be cost differences among the advantages or disadvantages that should be identified with respect to whatever form of production is proposed. How to uniquely identify each electronic document and preserve metadata also fall under the category of "key data." There should be no surprises here. These are topics for discussion by parties within the contemplation of new Rule 26(f). *See* Adv. Comm. Rept., Rules App. C-76.

Key words will be used to find relevant electronically stored information that is likely to lead to the discovery of admissible, relevant evidence. Rational document producers will recognize that electronically stored information can contain helpful evidence that they will want to find. Rational document requesters will realize that the cost of e-document review will be overwhelming if they are not surgically smart in constructing their e-document demands and that includes the precision associated with the search terms.

As with the differing burdens associated with the asymmetry of e-document production, there is a dollar-in-controversy matrix that will affect the scope and success of the Rule 26(f) conference. In cases where a plaintiff is seeking less than $500,000, e-discovery costs should be kept to the bare minimum without sacrificing due process. Where the amount in controversy is mutually acknowledged to be between $500,000 and $2,000,000, it is incumbent upon the parties to proceed in a measured fashion to ensure that the total costs related to e-discovery do not approach or exceed the amount in controversy. For cases involving claims in excess of $2,000,000, the parties' vigilance should be no less emphasized, but the proportionality factors set forth in Rule 26(b)(2)(C) and sampling techniques as now embraced by new Rule 34 become more prominent. While I have been arbitrary in my line-drawing on the amount in controversy, the point is that the amount in controversy cannot be divorced from sensible approaches to e-discovery.

One of the new Rule 26(f) dynamics is how much to say about inaccessible electronically stored information at the Rule 26(f) conference. From my review of the case law, early communication on inaccessible electronically stored information may prevent later disputes and minimize e-discovery costs. To prepare for the Rule 26(f) conference, conferees should work backwards from the Advisory Committee Note to 26(b)(2). It provides that in response to a Rule 34 request for documents, a responding party "must" identify, "by category or type the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." If an entity has properly organized its electronically stored information management system as outlined above, this will be an easy charge to satisfy.

THE RETURN OF THE JUDGES

The e-discovery rules changes will work great if judges become meaningfully involved. The rules will unreasonably increase the cost of litigation if judges stay on the periphery of e-discovery problem solving. District courts can be expected to be intolerant of counsel who seek to postpone electronically stored information decision making by stipulation because in most cases that is a sign of ill-preparedness that will not likely foster the just, speedy, and inexpensive outcome of every action.

Rational document-requesters should not want any more documents than they meaningfully need. Sampling and cost-shifting can be utilized to balance the legitimate interests of parties in electronically stored information or to control irrational or excessive electronically stored information demands. See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) *and Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) *(*initially sampling a few backup tapes for relevant documents and establishing retrieval costs and thereafter shifting 25 percent of the cost of production to the requesting party)*; Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) (shifting 100 percent of the cost of production to the requesting party); *Wiginton et al. v. CB. Richard Ellis, Inc.*, 2004 U.S. Dist. LEXIS 15722 (N.D. Ill. August 9, 2004) (shifting 75 percent of the cost of production to the requesting party).

Parties that engage in warring tactics on e-discovery and blame the other side for starting the fight should be careful what they wish for. See, e.g., *Evolution, Inc. v. The Suntrust Bank et al.*, 2004 U.S. Dist. LEXIS 20490, *18 (D. Kan. 2004) where, after several unsuccessful attempts to resolve electronic discovery disputes between the parties, the magistrate judge appointed a special master to resolve the dispute. He did so and recommended an allocation of fees, resulting in an allocation of 70 percent of the master's fees to defendant in the "protracted and highly contentious discovery dispute" marked by "mutual" misunderstandings and miscommunications which "exacerbated the amount of work and time spent" by the special master. The changes in Rule 26 to promote communication and cooperation are designed to minimize the likelihood of comparable situations in the future.

Parties that do not take control of the e-discovery process may find that the district court will do so. *In re: Priceline.Com Inc.*, 2005 U.S. Dist. LEXIS 33636, *17 (D. Conn. Dec. 8, 2005) illustrates one court's iterative process in handling production of electronic information. The district court set forth nine "directives" to guide production. Among the directives, defendant was to retain possession of original data through restoration, data management, and document review. In another directive, the district court ordered that restoration of 223 backup tapes (estimated to cost $200 to $800 per tape in addition to the cost of searching the files, culling for duplicate files, and converting responsive files for production) "shall proceed on a measured basis, with cost-shifting determinations made at each step of the process." *Id.* at *11. The parties were ordered to meet and confer "in an attempt to identify which backup tapes should be restored." Defendants were to restore tapes agreed upon and were permitted to file a motion to shift the cost of restoration "either once the restoration has been completed or once a firm estimate of the cost of doing so has been generated." *Id.* at *13. Where the parties could not agree, the district court said it would resolve disagreements by motion. The district court indicated it would be guided by the "justification" for restoring a particular tape. In another directive, the district court directed that all electronically stored information should be produced by defendants in Tagged Image File Format (TIFF) or Portable Document Format (PDF) "with Bates numbering and appropriate confidentiality designations." Defendants also had to produce "searchable metadata databases, and shall maintain the original data itself in native format for the duration of the litigation." *Id.* at *13-14. This directive was applied to information (a) from a snapshot (a backup of servers on a date certain) and departed employee e-mail backup tapes, and (b) restored from backup tapes. *Id.* at *15. Defendants were instructed to record their methodology for excising duplicate files, looking for responsive information, and reviewing responsive documents for privileged documents and to share it with plaintiffs who could argue for "the inclusion of more data if appropriate" and should have input on search terms. "The court will not dictate exactly how defendants should accomplish these tasks, but defendants' choices will be subject to review should they elect to seek cost-shifting relief." *Id.* at * 14. The district court said that if any party seeks relief concerning the scope of information searched or produced, information that is not in dispute should be produced without delay; that status reports were to be filed monthly setting forth the status of production, and that cost-shifting would be governed by the standards contained in Rule 26(b)(2). *Id.* at *15-17.

The district courts may face their largest challenges in dealing with electronically stored information identified as inaccessible. The Advisory Committee appears to suggest that district courts should first evaluate whether it can be demonstrated that all responsive information is available from reasonably accessible information. "Lawyers sophisticated in these problems are developing a two-tier practice in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources." Adv. Comm. Rept., Rules App. C-42. *But see Quinby v. Westlb AG*, 2005 U.S. Dist. LEXIS 33583, *25 (S.D.N.Y. Dec. 15, 2005) (defendant properly focused on backup tapes in

responding to requests for production because the backup tapes contained the most complete source of e-mails while accessible files "only cover a narrow time frame, a limited number of users and the data on these sources can be incomplete").

In evaluating whether electronically stored information is inaccessible due to "undue burden and costs," or even if it is, whether it should be produced with conditions because good cause has been shown, courts will apply a balancing test to determine when a burden "tilts" in favor of the requesting party (e.g., because there is a strong likelihood that material information is located only on the inaccessible storage media) or the producing party (e.g., the overbreadth of the request for information is blatant). The issue of "sources" of inaccessible information will most likely first arise at the Rule 26(f) conference either as a matter of routine or tactically, and the discussion will continue at the Rule 16 conference. It is in this early dialogue that parties will be best able to enlist the district court's assistance in developing a sensible approach to discovery of electronically stored information not reasonably accessible, including, where appropriate, sampling of the sources. Adv. Comm. Rept., Rules App. C-49.

Discovery and a hearing may be necessary. The Advisory Committee Note to Rule 26 recognized

> *that in some cases a single proceeding may suffice both to find that a source is not reasonably accessible and also to determine whether good cause nonetheless justifies discovery and to set any conditions that should be imposed. But it also recognizes that proceedings may need to be staged if focused discovery is necessary to determine the costs and burdens in obtaining the information from the sources identified as not reasonably accessible, the likelihood of finding responsive information on such sources, and the value of the information to the litigation. In such circumstances, a finding that a source is not reasonably accessible may lead to further proceedings to determine whether there is good cause to order limited or extensive searches and the production of information stored on such sources.*

Adv. Comm. Rept., Rules App. C-44. Whether judges take control of this process to ensure fairness and reasonableness will largely determine the cost of e-discovery of "inaccessible" electronically stored information.

CONCLUSION

Prepared parties will have an e-document team in place with electronically stored information retention policies that are reasonable and hold protocols that, when a duty to preserve arises, can be implemented facilely and consistently. They have educated counsel and spokespersons who can educate courts. Scale, however, cannot be overlooked. While this maxim is not limited to e-discovery concerns, the smaller the amount in controversy the greater the burden on the parties and the court to manage the litigation to a speedy and inexpensive outcome without sacrificing justice. Where electronically stored information is the focus of discovery and the stakes are high enough, key dates, key players, key data, and key words will be themes of the Rule 26(f) conference.

Unreasonable counsel should find no solace at the Rule 16(b) conference if judges dissect the claims in issue, comprehend the essence of e-discovery disputes, and use cost-shifting as appropriate to keep the litigation

focused on claim resolution, not discovery battles. In e-discovery, time invested early produces large time savings later.

In the end, the goal of discovery should be to preserve and produce what is relevant in a timely and fair manner at an acceptable cost. In the battle for bytes, communication between client, counsel and the court; meaningful judicial attentiveness; and reasonableness by everyone are the drivers if new Rule 26 is to meet this goal.

/jmb

ABOUT THE AUTHOR

Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude)* and the Yale Law School (J.D. 1975) and served as a former law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental or commercial contexts. He has served or is serving as a neutral in approximately fifty matters involving in the aggregate more than $400 million. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He also consults with major corporations on the evaluation of legal strategy and risk, and conducts independent investigations where such services are needed.

Mr. Barkett serves on the Council of the ABA Section of Litigation after service as the Section's Co-Director of CLE and Co-Chair of the Environmental Litigation Committee. His article, *Help Is On The Way...Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void* was presented at the Section of Litigation Annual Meeting in 2006 in Los Angeles. His article, *The Prelitigation Duty to Preserve: Lookout!"* was presented at the ABA Annual Meeting in 2005 in Chicago. He also wrote, *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, which was presented at the Section of Litigation's 2004 Annual Conference and also appears at 71 Def. Couns. J. 334 (2004). His article, *The Battle For Bytes: New Rule 26*, appears in the Section's special publication, *e-Discovery* (February 2006).

Mr. Barkett is editor and one of the authors of the Section of Litigation's Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002), His paper, *A Baker's Dozen: Reasons Why You Should Read the 2002 Model Rules of Professional Conduct*, was presented at the Section of Litigation's 2003 Annual Conference. His paper, *Tattletales or Crime-Stoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13* was presented at the 2004 ABA Annual Meeting. Mr. Barkett also wrote *The MJP Maze: Avoiding the Unauthorized Practice of Law*, which was presented at the 2005 Section of Litigation Annual Conference. He also wrote *Refresher Ethics: Conflicts of Interest*, for the Section's January 2007 Joint Environmental, Products Liability, and Mass Torts CLE program.

Mr. Barkett is also the author of *Ethical Issues in Environmental Dispute Resolution*, a chapter in the ABA publication, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002) and *The Courtroom of the Twenty-First Century – ADR*, CONFLICT MANAGEMENT (Summer 2002), ADR Committee, ABA Section of Litigation.

Among his other works are a terrorism-related article on torts, entitled, *If Terror Reigns, Will Torts Follow?* 9 Widener Law Symposium 485 (2003); *A Database Analysis of the Superfund Allocation Case Law*, Shook, Hardy & Bacon L.L.P.: Miami (2003); and *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (2004).

Mr. Barkett has been recently recognized in a number of lawyer-recognition publications, including Who's Who Legal 2005-06 (International Bar Association); Best Lawyers in America 2005-2006 (National Law Journal); Best of the Bar, (South Florida Business Journal, April 2004); Legal Elite, (Florida Trend 2004-06), and Chambers USA America's Leading Lawyers (2004-2006). Mr. Barkett can be reached at jbarkett@shb.com.