As society’s reliance on technology increases, and with the immense amounts of electronically stored data dwarfing the amount of data still stored on paper, electronic discovery and the issues surrounding it have assumed an increasingly important role in many litigations. In some cases, disputes over electronic discovery have eclipsed the original cause of action and have resulted in the awarding of adverse inferences, massive monetary sanctions, and, in rare cases, default judgments. Accordingly, lawyers practicing in federal court are becoming increasingly aware of the importance of preserving electronically stored information (ESI) and utilizing e-discovery to their clients’ benefit. Many of their clients, however, remain unaware of the significance of their duty to preserve ESI and how to handle it when litigation is threatened or pending.

In order to provide a structure for lawyers to address e-discovery issues at an early stage of litigation, and to avoid later problems arising from a failure to communicate the importance of retention and production of ESI, members of an advisory committee to the judges in the Western District of Pennsylvania drafted new local rules for the district court that became effective on September 1, 2009. The members of the local bar who worked on the revisions to the rules numbered over 20 in all and included members of small and large firms, the plaintiffs’ bar and the defense bar, and are to be commended for their efforts. The goal of the committee was to fashion local rules that would supplement in a positive way the Federal Rules of Civil Procedure and assist lawyers in fulfilling their duties with respect to ESI matters. The local rules are also meant to help lawyers educate their clients about the steps their lawyer is obligated to undertake with respect to ESI. The purpose of this article is to outline the changes made to the local rules,

In re ESI
LOCAL RULES ENHANCE THE VALUE OF RULE 26(f) “MEET AND CONFER”

By Judge Joy Flowers Conti and Richard N. Lettieri
Two aspects of the new local rules merit comment. The first aspect is the implementation of Local Rule of Civil Procedure 26.2 and the second is a revised Rule 26(f) report that is required to be filed by the parties. The form for the Rule 26(f) report is attached to the Local Rules as Appendix 16.1.A. The appendix is numbered to refer to Local Rule of Civil Procedure 16.1.A because that rule requires the filing of the Rule 26(f) report.

The first aspect—Local Rule 26.2—encompasses three topics. The first topic explicitly refers to the duty to investigate. Local Rule 26.2 provides that counsel, before the Rule 26(f) conference, are to “investigate the client’s [ESI]” in order to discuss how the ESI “can be preserved, accessed, retrieved and produced.” Also, counsel are directed to “identify a person or persons with knowledge about the client’s ESI . . . .”

The second topic covered in Local Rule 26.2 is the ability of the parties, by agreement or order of court, to designate a resource person. The resource person will be the individual “through whom issues relating to preservation and production of [a client’s] ESI should be addressed.”

The third topic covered in the new Local Rule is the duty to meet and confer about ESI at the Rule 26(f) conference between counsel. Included among the topics to be discussed are “[t]he steps taken to preserve ESI,” “[t]he scope of the ESI discovery and an ESI search protocol,” “[p]rocedures to deal with inadvertent production of privileged information,” “[a]ccessibility of ESI,” “[t]he media format and procedures for preserving and producing ESI,” “[a]location of costs” related to ESI discovery matters, and the need for a resource person. These topics are not meant to be exclusive but will set the framework for what the lawyers are expected to address at the Rule 16 initial scheduling conference with the court. The topics also can be used to inform the client about what the lawyer must do in order to be adequately prepared for the scheduling conference.

The members of the committee who drafted the rule changes also included various comments about the changes in order to assist lawyers in understanding the new Local Rules. The comments make it clear that Local Rule 26.2 does not alter any legal obligations with respect to preservation but does require counsel to discuss ESI with their client. The comments recognize that the attorney can be the resource person and that there is an ongoing obligation to supplement the disclosures. The comments also note the possibility that relevant ESI may need to be segregated from the greater body of the client’s ESI as a whole in order for effective preservation.

The form for the Rule 26(f) report, Appendix 16.1.A to the Local Rules, complements the new Local Rule 26.2. The proposed form includes a specific section that reviews the topics that are required to be addressed by counsel at the Rule 26(f) conference concerning ESI. Eight matters require specific answers on the form.

1. The parties must identify whether there will be ESI discovery, and if there is a dispute, the nature of the dispute.
2. The parties are directed to address whether metadata is going to be relevant and whether there is a dispute concerning metadata.
3. The parties must indicate whether the format for production of ESI has been agreed upon, and if not, what format disputes remain.
4. The parties need to advise the court whether they are going to use the default inadvertent production provision specified in the new Local Rules that deals with the ability to claw back inadvertent disclosure of privileged materials, and if the parties are not going to use the default provision, whether there is an alternative provision.
5. The parties need to advise the court whether there is an agreed-upon protocol for review of electronic data, and if so, to describe the protocol, or if not, to identify any outstanding issues.
6. The parties need to report whether there is an agreement with respect to what ESI is “reasonably accessible,” and if not, to identify the dispute.
7. The parties need to advise the court whether there are any outstanding issues relating to preservation of ESI.

8. The parties need to address whether there are any other issues or disputes concerning ESI.

The new Local Rule 26.2 and the new form for the Rule 26(f) report are designed to assist the attorney in discussions with the client so that the client is aware of what is expected by the court and also so that the client might assist in identifying problems early in the litigation. If problems are identified and resolved early, the costs and expenses of later disputes can be avoided. The court expects that the new Local Rule 26.2 will assist lawyers in meeting their obligations under the Federal Rules of Civil Procedure in a positive and efficient manner.

Using the New Local Rules to Add Structure and Educate Clients: 10 Crucial Areas of Preparation

In litigation with large e-discovery elements, attorneys must address e-discovery issues early on, educate their clients about the steps their lawyer is obligated to take under the duty to investigate, and provide their client with practical advice regarding how to successfully achieve these objectives with the help of an e-discovery resource person. In order to best fulfill these duties, attorneys should focus their attention on 10 specific areas dealing with electronic discovery. The first step in approaching these 10 focus areas is to create an e-discovery response team. E-discovery response teams generally consist of an interdisciplinary group of professionals, often including lawyers, management, and IT professionals, who create procedures and policies to manage the corporation’s e-discovery efforts. The response team’s responsibilities include overseeing efforts to search, retrieve, and organize the data relevant to the litigation. In order to be effective, an e-discovery response team must synthesize aspects of law, information science, and data technology. Once a client has created an e-discovery response team, they are in position to address the 10 important focus areas.

1. Counsel should designate a knowledgeable IT person as the e-discovery resource person and member of the e-discovery response team.

While the e-discovery resource person may be an attorney, the size and complexity of the client’s information systems often mean that this position will be best filled by a member of the client’s information technology (IT) staff. A member of the IT staff will have the in-depth knowledge of the client’s information system and the ability to effectively communicate with other IT people within the organization that the position requires. As soon as practicable after the e-discovery resource person has been selected, counsel should meet with him or her to address three important issues.

First, in order to prevent spoliation of evidence, document preservation procedures will need to be created if they do not already exist, revised if necessary, and their consistent implementation throughout the organization needs to be ensured. Second, data collection procedures need to be reviewed to ensure that forensically sound collection procedures are being used to collect data from custodians so that spoliation of evidence is not taking place, metadata is not altered during the collection process, and proper chain of custody procedures are being maintained. The use of outside collection services should be considered unless and until internal staff has been properly trained to accomplish these functions to counsel’s satisfaction.

Finally, litigation hold procedures need to be examined to ensure that they are implemented in a timely fashion with instructions outlining the specific responsibilities of selected custodians. Procedures need to be in place to permit consistent and repeated follow-up to ensure compliance. Depending on the amount of recurring litigation, some corporations have provided instruction on “the responsibilities of a custodian in a litigation hold.” A few have gone a step further and provided this instruction online, requiring the satisfactory completion of a course through passing a test at its completion.

Counsel needs to communicate early and effectively with the designated e-discovery/IT resource person on these three issues. This will demonstrate to opposing counsel and the court at the Rule 26(f) conference and in the subsequent report that preservation of data began at the appropriate time, using proper procedures consistently applied and that the data were preserved correctly, avoiding evidence spoliation.

2. The e-discovery resource person and IT staff should immediately begin work to prepare “data maps” and “application inventories” of current corporate data.

Data maps are schematic diagrams of corporate information systems and they can be very complex or quite simple. Two versions of these maps are commonly used in litigation. The first version involves a complex map depicting an overall layout of a corporate-wide IT system, while the second version is a less complex schematic of the systems and storage devices where data for a particular matter and custodians are described. Application inventories list all the applications used in the corporation’s IT system. After custodians for a particular matter have been identified, it is important to determine which specific applications contain data used by these custodians. By identifying and locating the applications and media where potentially relevant custodian data reside, counsel can make determinations regarding the accessibility of the data. Once created, attorneys can use these data maps and inventories at the Rule...
The e-discovery resource person and IT staff should provide or develop the corporate policies and procedures for records management retention and deletion. In many cases, records management retention and deletion procedures already exist. If they do not, they need to be created as quickly as possible. Sometimes existing procedures need to be updated by adding an electronic document component. Counsel also need to ensure that records management policies have been consistently implemented. If a document outlives its useful business life, it can be destroyed, unless a duty to preserve that document exists due to likely or impending litigation. It is necessary to understand automated deletion policies and procedures to ensure that these procedures are suspended when the duty to preserve attaches. It is also important to understand corporate deletion policies: where and for how long delete cache files exist and how they can be restored, if required. Understanding these policies and verifying that they conform to the legal requirements and have been consistently applied are two of counsel’s key responsibilities prior to the Rule 26(f) conference.

It is necessary to understand a company’s automated deletion procedures to ensure they are suspended when the duty to preserve attaches.

Counsel must meet with and question IT personnel to thoroughly understand the corporate IT systems as the data maps and application inventories are being created.

The driving principle behind this effort is to understand the IT systems well enough to be able to verify through personal investigation that there is no place where data may reside that is not known and understood by investigating counsel. There are two separate phases of this process. First, counsel must review the IT documentation provided by the e-discovery resource person and other IT personnel that describes the IT environment. Second, counsel must question IT personnel and determine whether, from a legal perspective, reasonable efforts have been made to satisfy the legal requirements. For example, a discussion with the IT person responsible for e-mail servers may indicate that there have been recent e-mail hardware and software upgrades and that data from custodians may be on prior versions of software that have not been collected, or that a recent acquisition of a division using a different e-mail system may have resulted in relevant data being omitted from the collection. These facts are crucial to the duty to preserve and may only be discovered via a thorough investigation.

Likewise, in a discussion with the IT person responsible for the tape subsystems containing backup data, counsel may discover that there are nonindexed or catalogued tapes that have accumulated over time that were separate from and not included in the collection because IT was unsure of their contents. In all three of the above instances, it is the responsibility of counsel to question the IT personnel responsible for various IT subsystems to ensure that reasonable steps have been taken to locate, preserve, and designate as accessible or inaccessible all potentially relevant data. Counsel’s thorough knowledge of the client’s IT systems, including a questioning of IT personnel in advance of the Rule 26(f) conference, will prevent IT personnel from making embarrassing disclosures during Rule 30(b)(6) depositions by opposing counsel or, worse yet, in testimony during trial.
for disaster recovery purposes, may provide the only source of relevant data in some instances. In these circumstances, data on tape, which are generally inaccessible due to undue burden and cost, may be sought by opposing counsel. If good cause can be shown why these data must be made available, the court may order sampling of the data to test relevancy and reduce cost, or the court may consider cost shifting. Counsel will want to understand tape backup procedures to support the contention that relevant data are already being produced on accessible media, and that opposing counsel’s discovery requests for information on backup tapes would be redundant and costly. Counsel also will want to have estimates of the costs associated with restoring the data provided by an independent third-party source to overcome any of the opposing counsel’s objections or motions to compel.

The e-discovery resource person and IT staff should provide or develop written policies and procedures for automated deletion and suspension of automated deletion procedures. Counsel needs to become thoroughly familiar with their client’s automated deletion policy, as well as with their procedures for the suspension of that policy. Many corporate IT operations use automated deletion policies designed to delete electronic data after a certain period of time has elapsed (e.g., e-mails older than 90 days) or after the size of a file or folder reaches a certain threshold (e.g., when a mailbox hits 1 or 2 GB of data). Counsel must be aware if the client uses these types of automated deletion policies and must ensure that when the duty to preserve attaches, notice is given to the proper IT manager to suspend these policies and keep them suspended for the duration of the litigation hold to avoid evidence spoliation. Copies of these policies, proof that notification was given, and verification that deletion was suspended will be useful information to have at the Rule 26(f) conference to support counsel’s contention that appropriate preservation practices are in place.

Counsel should confer with opposing counsel prior to or at the Rule 26(f) “meet and confer” regarding the issues and scope of the case; discussion and agreement on the number and names of key custodians, relevant time frame, and search methodology (i.e., keyword approach and terms) should be discussed and agreed to by counsel. Like so many other issues, agreement on the use of the keyword search approach ought to be discussed and agreed upon in writing during the Rule 26(f) conference. Since keyword search has recently come under judicial scrutiny, agreement by the parties in advance and in writing on the keyword search approach, as well as agreement on the actual keywords being used, may prevent costly disagreements from arising later. Determining the scope, whether or not to include the number of custodians (which directly impacts the amount of data that need to be filtered, processed, reviewed, and produced), as well as the time frame (which also directly impacts the amount of data) can all have a significant impact on the cost of discovery. If opposing counsel’s initial e-discovery requests seem overbroad, knowledge gained through the thorough execution of the strategies discussed above will provide a factual basis for arguments to reduce scope and may help defeat a motion to compel made by opposing counsel.

Counsel should come to the Rule 26(f) “meet and confer” with a clear idea of how to address the issue of inadvertent disclosure of privileged information. Due to the vast amounts of data associated with electronic discovery, the costs of privileged review, and the lack of time to review for privilege, an agreement between the parties on how inadvertent disclosure will be addressed is a key element of the “meet and confer” conference. Most courts will encourage the parties to agree on a “quick peek” or “clawback” agreement to resolve this issue early in the discovery process. Under the new local rules, if consensus is not reached, a clawback agreement is the default. Nevertheless, counsel should seek a written agreement on this issue at the Rule 26(f) conference.

Agreement on production format at the Rule 26(f) “meet and confer” will prevent the possibility of an expensive second production. After counsel decide what relevant, nonprivileged data will be produced, they need to know the format in which the data currently reside and determine the format in which to produce the data. This decision has a significant impact on the cost of production. The format decision usually revolves around whether or not metadata will be produced. Metadata refers, among other things, to the data about the data being produced, and it indicates when the file was created, who created it and when, and by whom it was modified. Counsel may want to produce the data in TIFF, a format that excludes the metadata, but opposing counsel may want a native rendering with metadata intact. The question of format can sometimes be decided if the requesting party can demonstrate to opposing counsel that one or several of the 15 to 20 most useful fields of metadata are highly relevant to this particular litigation. Agreement on production format at the Rule 26(f) conference is expected by the court and will prevent the possibility of having to produce the data twice.

Throughout all these discussions, counsel need to assess the costs associated with each of these focus areas and attempt to control costs; agreement should be reached with opposing counsel regarding who will pay for the cost of discovery. Almost every element discussed above has cost implications. Counsel need to understand the implications of each focus area and provide cost estimates from e-discovery providers when
possible. These estimates will be helpful when presenting their position to opposing counsel and the court. While the presumption remains that each side will pay for its own cost of discovery, any cost-sharing discussions and resulting agreements should be put in writing.

**Conclusion**

Many judges still express the view that ESI is a significant issue in very few cases. Recent experience, however, shows that when a dispute about ESI arises, it usually happens later in the litigation and is likely to be the result of a failure of the parties to have adequate discussions early in the case about the costs and methods of ESI preservation, the format in which the ESI will be produced, the protocols for searching it, and how to resolve inadvertent disclosure of privileged materials. The new Local Rules and the requirement to fill out the revised form for the Rule 26(f) report with specificity regarding ESI should direct the attention of counsel and their clients at an early stage of the litigation to these very important issues.

It is expected that the new Local Rules and the information gained by counsel as they fulfill their “duty to investigate” with the help of their e-discovery resource person and the approach outlined above will assist lawyers and their clients to address e-discovery issues early in the litigation, allowing them to reduce costs and keep unnecessary e-discovery issues from becoming a distraction later in the proceedings.


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**Endnotes**

3. Local R. Civ. P. 26.2.B.
4. Id.