ETHICS: IMPACT OF FRCP RULES CHANGES ON ETHICAL OBLIGATIONS

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The Lawyer's Evolving Role As… IT Specialist?[1]

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INTRODUCTION

Electronically stored information. While the mere sound of those words may cause many reading this article to flip the page in horror, it is no longer a topic we can afford to ignore. With the enactment of the latest amendments to the Federal Rules of Civil Procedure ("FRCP"), Congress has leveled the playing field and mandated that all attorneys join the 21st century and become informed of the technology systems being utilized by modern day clients. A failure to do so will no longer only lead to a sense of empowerment in our tech-savvy children (i-Phone?),

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but it can now lead to severe penalties such as sanctions, breaches of confidentiality, or the dreaded adverse jury instruction.

This article will address the ethical obligations imposed by the latest amendments, discuss some examples highlighting the ramifications of failing to comply, and finally, provide tips for avoiding such drastic penalties.

I. OVERVIEW OF AMENDMENTS

In December 2006, several amendments to the FRCP became effective which were intended to provide a framework for working with the abundance of "Electronically Stored Information" or "ESI." Despite the fact that Congress failed to provide an explicit definition of ESI,[3] without those amendments, attorneys (and their clients) would have continued to have been guided only by their judgment when determining what information had to be produced, what information should be demanded from opponents, and how such information should be produced. The results were, at best, inconsistent, because attorneys across the board had varying degrees of technological acumen, ranging from technophile to technophobe.

With the latest amendments, Congress has not clarified what we as attorneys need to know, but has only mandated that we must know. The amendments relevant to this article are those which apply to the initial disclosures required under FRCP 26(a), the categories of information explicitly excluded from initial disclosures under FRCP 26(b), and the meet-and-confer requirements under FRCP 26(f).

a. FRCP 26(a)(1)(B)

FRCP 26(a) governs those disclosures which must be provided to opposing counsel

[3] See, Fed. R. Civ. P. 34(a) Advisory Committee Notes on 2006 Amendments. "The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information." The Notes further cite e-mail as an example, and broadly refer to ESI as "information stored in any medium."

without awaiting a discovery request, and now includes, in relevant part:

> … [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 and defenses, unless solely for impeachment.[4]

As amended, this rule exponentially expands the universe of information counsel must become informed about and provide to opposing counsel. As it is likely these disclosures will have to be made before counsel is informed of the scope of the claims, it is easy to understand how such a mandate can lead to either under-production or over-production of data. Moreover, since Congress amended this rule with the intention of mirroring amended FRCP 34(a), it merely references amended FRCP 34(a) when defining "electronically stored information."[5]

b. FRCP 26(b)(2)(B)

While FRCP 26(a)(1)(B) specifies what disclosures must be provided, FRCP 26(b)(2) sets forth limitations on those mandatory disclosures. As amended, and in relevant part, FRCP 26(b)(2)(B) now provides that:

> 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.[6]

FRCP 26(a)(1)(B) provides somewhat of a safe haven to the broad disclosures required by FRCP 26(a)(1)(B). This rule recognizes that while electronic storage systems often make it easier to locate and retrieve information, some sources of "ESI" can only be accessed with

[4] See, Fed. R. Civ. P. 26(a)(1)(B) (emphasis added).

[5] See, Fed. R. Civ. P. 26(a) Advisory Committee Notes on 2006 Amendments.

[6] See, Fed. R. Civ. P. 26(b)(2)(B).

substantial burden or cost.[7] It is interesting to note that not only must the producing party provide all reasonably accessible and non-privileged information, it must also identify the sources it is not searching that may contain relevant and discoverable information.[8]

If the parties are unable to agree whether the "not reasonably accessible" sources should be searched for relevant data, the requesting party may resort to traditional motion practice compelling discovery.[9] While the burden of proving that the information is not reasonably accessible rests with the producing party, the Advisory Committee notes that the requesting party may need to conduct discovery to test these assertions.[10] The result is that the producing party may have to conduct a "sampling" of the identified sources – which leads to the ironic result that the party still may have to spend time and money accessing and analyzing the very systems it identified as being not reasonably accessible.[11]

c. FRCP 26(f)(3)

FRCP 26(f) states that the parties must meet-and-confer to discuss potential discovery plans prior to the FRCP 16 conference. As amended, the rule now includes the following as a topic that mandates discussion at this meeting:

> …[a]ny issues relating to the disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.[12]

Similar to FRCP 26(a)(1)(B), this rule now requires that counsel be prepared to discuss all issues relating to electronically stored information at the forefront of the action. As stated in

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[7] See, Fed. R. Civ. P. 26(b)(2) Advisory Committee Notes on 2006 Amendments.

[8] Id.

[9] Id.

[10] Id.

[11] Id.

[12] See, Fed. R. Civ. P. 26(f)(3).

the rule, these discussions are not limited to what types of information will be subject to disclosure, but also what form the information should be produced in. This puts the onus on counsel to become familiar with their clients' systems almost immediately. Failure to assert what form a party wants information to be produced could be devastating because the producing party may then state the form they want to produce the information in – and the result could be a form that the requesting party has little ability to inspect.[13] Counsel must also be prepared to discuss privilege and the inadvertent waivers thereof. As much of the ESI includes metadata and hidden files, which if produced could waive valued privileges, counsel who appears at these conferences uninformed does so at their own (and their clients') peril.

II. PERILS OF NON-COMPLIANCE

Although the latest amendments did not become effective until December 2006, judges' lack of patience for "electronically uninformed" attorneys has been brewing for many years. For example, in GTFM, Inc. v. Wal-Mart Stores, Inc., besides granting the plaintiffs' motion to compel outstanding discovery, the court further ordered that the defendant pay all plaintiffs' expenses and legal fees expended as a result of the defendant's failure to adequately search for ESI.[14] In GTFM, Inc., the plaintiffs' request for production included a request for computer printouts reflecting defendant's purchase and sale of particular products pre-dating the action by three years.[15] Defendant objected to the request as being unduly burdensome, asserting that "[defendant] does not have the centralized computer capability to track the purchase and sale of

[13] See, Fed. R. Civ. P. 26(f) Advisory Committee Notes on 2006 Amendments

[14] GTFM, Inc. v. Wal-Mart Stores, Inc., 2000 U.S. Dist. LEXIS 3804, at *1 (S.D.N.Y. Mar. 28, 2000).

[15] Id. at *3-4.

locally produced goods."[16] Notably, defendant's counsel indicated that he based his belief on a statement made to him by a senior executive, not an employee in the MIS department.[17]

Despite numerous court conferences and further attempts by plaintiffs to secure the requested documents, the plaintiffs at last deposed a vice-president in defendant's MIS department.[18] During this deposition, plaintiffs learned that defense counsel was misinformed, and that defendant's systems could in fact track the requested information.[19] The court emphasized that defense counsel should have spoken with an employee of the MIS department at the outset, and the inquiry he made of the senior executive was "certainly deficient."[20] The court subsequently granted plaintiffs' motion for sanctions because they were highly prejudiced by the delay, and sanctions would serve the three purposes enunciated by the court in [Update Art].[21]

Similarly, in Housing Rights Center v. Sterling, the US District Court of the Central District of California imposed harsh penalties on the defendant for numerous discovery violations relating to ESI.[22] The court found that defendant's employees failed to search their computers for relevant ESI[23] and failed to search backup tapes for e-mails,[24] among numerous other discovery violations. In so doing, the court emphasized that "[t]he conduct of Defendants and their counsel falls well below the standard required by this Court. Their attitude toward the

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[16] Id.

[17] Id.

[18] Id. at *4-5.

[19] Id. at *5.

[20] Id. at 6 (emphasis added).

[21] Id. at * 6. The three purposes of sanctions under FRCP 37 are: (1) to ensure that a party will not benefit from its own failure to comply; (2) they are specific deterrents and seek to obtain compliance with the particular order issued; and (3) to serve a general deterrent effect on the case at hand and on other litigation, provided that the party against whom they are imposed was in some sense at fault. Id. at *3.

[22] No. CV-03-859, 2005 U.S. Dist. LEXIS 44769, at *1 (C.D. Cal. Mar. 3, 2005).

[23] Id. at *16-17.

[24] Id. at *20-21.

litigation process and their discovery obligations is even more troublesome."[25] The court granted plaintiff's motion for an adverse jury instruction and the imposition of monetary sanctions,[26] which were determined in a subsequent proceeding to be in excess of $4.9 million.[27]

Most recently, in Peskoff v. Faber, the United District Court for the District of Columbia was asked to evaluate the sufficiency of the defendant's search for electronically stored information.[28] In Peskoff, the plaintiff was a former managing partner of defendant's company, and was alleging financial injury as a result of fraud and breach of contract, among numerous other allegations.[29] Plaintiff was seeking the production of numerous e-mails drafted while an employee of defendant's, an issue the court had already once ordered compliance with.[30]

Defendant's counsel responded by affidavit saying that it produced all e-mails on "plaintiff's Outlook account," and a replica of his computer's hard drive.[31] The court held that defendant's search for relevant ESI was inadequate because it failed to search any e-mail systems outside of Outlook,[32] and the information produced contained significant and unexplained gaps in e-mails.[33] The court chastised defendant, and noted that "under the new [FRCP], it cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary."[34] The court ultimately ordered

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[25] Id. at *7-8.

[26] Id. at *22-29.

[27] Housing Rights Center v. Sterling, No. Civ-03-859, 2005 U.S. Dist. LEXIS 31872, at *29 (C.D. Cal. Nov. 2, 2005).

[28] No. 04-Civ.526, 240 F.R.D. 26 (D. D.C. Feb 21, 2007).

[29] Id. at 27.

[30] Id.; see also Peskoff v. Faber, No. 04-Civ.526, 2006 U.S. Dist. LEXIS 46371, at *1 (D. D.C. July 11, 2006).

[31] Id. at 29.

[32] Id. at 30.

[33] Id..

[34] Id. at 31.

defendant to conduct a more thorough examination of the systems by a date certain, ordered that defendant produce a statement by the "examiner," under oath, detailing the extent of the search, and set a date for an evidentiary hearing at which the "examiner" must be present.[35]

III. TIPS TO HELP AVOID SANCTIONS, OR WORSE

There are some simple steps we can take to ensure our compliance with the amended Rules, most of which require nothing more than two skills we have already spent our careers developing: preparation and listening.

a. Become Your Clients' IT Specialist's Best Friend

In the modern business world, we no longer work in a vacuum, and we cannot afford to foster the problem of "the left hand not knowing what the right hand is doing." Attorneys will be doing their clients, and their practices, a substantial injustice if they attempt to litigate cases without an understanding of what systems their clients use, and how they maintain their ESI. In the very early stages of litigation, counsel must be prepared to discuss what ESI is not reasonably accessible, what form it is maintained in, how it will be produced, and in what form ESI should be produced to them. However, counsel will be woefully unprepared to accomplish any of these tasks, and risk the penalties highlighted above, if they do not have a working knowledge of their clients' systems. A broad "I'll send you copies of all their e-mails" will no longer suffice. Counsel must assume that their opponents will be prepared to discuss these issues and plan accordingly. The way to accomplish this is to understand that IT Specialists are just human beings, not machines like the ones they spend their days working on. Do not be afraid to speak with them, and schedule time to do so the instant an action is commenced.

[35] Id.

b. Learning Begins In-House: Become Your Own IT Specialist's Best Friend

Attorneys must remember that it is not the clients' IT Specialist's responsibility to teach them what a computer is. Clients will expect you to be prepared, and have a fundamental understanding of the technology systems used in the workplace. More importantly, clients will lose faith in your abilities to successfully defend them if you cannot take the time to grasp concepts that to them, are mundane and routine. Any time spent having to be "trained" by your clients is wasted time.

Speak with your own IT Specialists, and if you do not employ one, pick up a copy of *Popular Science* or *Windows for Dummies*. Sit down with the IT Department and have them explain to you how your own systems work, what the "norms" are around the business world, and identify some issues you should look out for when discussing technology with outside people. This process will not only demystify the world of information technology and provide you with a basic framework you can then bring to the litigation table; it will also get you more comfortable talking to "IT People," so that you will not be doing it for the first time when you are in a client's office.

c. Prepare In Advance

There is very little that will start the litigation off on the wrong foot more than appearing at your initial discovery conference unprepared to discuss ESI. Due to the wide variety of systems and file formats, you cannot presume that you will instantly understand your clients' systems. This means that if you attempt to first sit down with your clients' IT employees the day before the meet-and-confer, you run the significant risk of not being able to comprehend what you need in the time required.

The answer is to prepare in advance. As stated above, as soon as an action is commenced, you should make arrangements to meet with the client's IT Department to learn how they operate. This will give you sufficient time to learn what you need to learn, ask what you need to ask, and focus on the other issues you will need to discuss. Like any other stage of the action, preparing in advance will give you an advantage over opposing counsel who failed to do so. Expect the terms and concepts to be foreign, and give yourself enough time to learn them. Just as you would not be able to explain personal jurisdiction to an IT Specialist in one hour, nor could he explain macros and metadata to you in the same timeframe.

d. Prepare To Learn Everything Again Next Year

Now that you have heeded my advice and learned all these great new catchphrases, beware – everything you have learned will be obsolete within eighteen months. You cannot afford to rest on your laurels, and assume that what you spent an hour learning today will have any place in litigation you will be involved in two years from now. The nature of technology is that it is perpetually evolving, and doing so at a much faster rate than we can keep up with. Do not be intimidated by this. Accept this truth and be prepared to evolve along with the technology, otherwise you risk becoming obsolete along with your newfound knowledge. Technology is not much unlike the law – both are constantly changing and subject to many different interpretations and applications. You have spent a whole career developing your ability to adapt, there is no reason you cannot apply those principles to evolving technology as well.

CONCLUSION

As we continue along this electronic revolution, we as attorneys must train ourselves to evolve along side with it. While working hand in hand with the IT Specialists, taking steps to learn the lingo and understand the systems may seem like a daunting task, Congress has ensured

that we can no longer hide our collective heads in the sand. The secret is to anticipate and to plan ahead – the judges, and your clients, will be grateful you did.

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Joseph Ortego has approximately twenty-seven years of litigation and business experience. Mr. Ortego has tried over 100 cases to verdict for major corporations ranging from automotive to chemical companies, including Fortune 100 commercial, environmental, and toxic tort cases. He focuses in the areas of commercial disputes, toxic tort, environmental, employment, intellectual property, and product liability matters. He serves as national trial counsel for a number of clients who desire a consistent approach to lawsuits filed in multiple states, and represents small, mid-size, and publicly traded companies.

A frequent author and speaker both domestically and internationally, as well as legal consultant on network television, Mr. Ortego heads a comprehensive American Bar Association academic and trial practice re-education session for some of the nation's top attorneys. He has authored numerous publications and has been the regular featured toxic torts columnist in "Mealey's Emerging Toxic Torts." By invitation of the American Board of Trial Advocates, Mr. Ortego was selected as a member of the faculty at the National Judicial College in Reno, Nevada, a diverse program combining the latest technology with the country's top trial lawyers as faculty members and personal mentors, along with Supreme Court justices, professors, and trial judges form state and federal courts. Mr. Ortego has earned the Martindale-Hubbell Law Director's AV rating, the Directory's highest accolade.

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