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E-Discovery Under State Court Rules and United States District Court Rules

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Cover Page Footnote

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CONFERENCE ON ELECTRONIC DISCOVERY

PANEL FIVE: E-DISCOVERY UNDER STATE COURT RULES AND UNITED STATES DISTRICT COURT RULES

MODERATOR

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JUDGE HECHT: Now, they say that bees are aerodynamically unsound and cannot fly. And so as we are thinking about engineering a bee here, we have some bees in two districts and a state that we want to talk about, rules regarding electronic discovery, and we will see whether they are flying or not.

There is a Rule in the Eastern and Western Districts of Arkansas.[1] It is Local Rule 26.1, which is an outline for the 26(f) Report.[2]

Then there is a Local Rule 26.1 in the District of New Jersey.[3]

There is a Local Rule in the District of Wyoming,[4] which we are not going to talk about. You have heard some about the Texas Rule

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1. E.D. & W.D. Ark. Appx. R. 26.1.
2. *See* Fed. R. Civ. P. 26(f).
3. D.N.J. Local Civ. R. 26.1.
4. D. Wyo. C.L.R. 26.1, Appendix D.

during the day. The focus is on 196.4.[5] Then, the Mississippi Order is identical except for one important word.[6]

The mission that we have been given is to talk about, first, very briefly, how those different Rules came into being, whose idea they were, how they got adopted, and what the experience, again so far as we are able to tell, has been under them.

Then we are going to turn to hypothetical cases which we have dreamed up and presume that each case was filed in either one of the districts in Arkansas, the District of New Jersey, or in Texas—and assume that Texas has the Federal Rules, which it does not, but we will assume it for these purposes—and how would the issues that relate to electronic discovery and the other issues that we have been talking about today be handled better, or not at all, by the local Rules or state Rules that I have just mentioned to you.

When we do that, we are going to talk a little bit about the hypothetical and the issues it raises, and then go on to another one. So that will be our plan going forward.

First of all then, how did Local Rule 26.1[7] come about in the Districts of Arkansas, Judge Cavaneau?

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5. Tex. R. Civ. P. 196.4.

6. Miss. R. Civ. P. 26 (amended by Miss. Sup. Ct. Order 13, No. 89-R-99001-SCT, May 29, 2003).

7. E.D. & W.D. Ark. Appx. R. 26.1 (Outline for Fed. R. Civ. P. 26(f) Report). The Rule provides:

> The Fed.R.Civ.P. 26(f) report filed with the court must contain the parties' views and proposals regarding the following:
>
> (1) Any changes in timing, form, or requirements of mandatory disclosures under Fed.R.Civ.P. 26(a).
>
> (2) Date when mandatory disclosures were or will be made.
>
> (3) Subjects on which discovery may be needed.
>
> (4) Whether any party will likely be requested to disclose or produce information from electronic or computer-based media. If so:
>
> (a) whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business;
>
> (b) the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business;
>
> (c) the format and media agreed to by the parties for the production of such Data as well as agreed procedures for such production;
>
> (d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise;
>
> (e) other problems which the parties anticipate may arise in connection with electronic or computer-based discovery.
>
> (5) Date by which discovery should be completed.
>
> (6) Any needed changes in limitations imposed by the Federal Rules of Civil Procedure.
>
> (7) Any Orders, e.g. protective orders, which should be entered.
>
> (8) Any objections to initial disclosures on the ground that mandatory disclosures are not appropriate in the circumstances of the action.

JUDGE CAVANEAU: I was dragged into this morass several years ago by my involvement in an antitrust case that we had in the Eastern District of Arkansas, which involved each and every problem that has been talked about today in spades. That case taught me the importance of early disclosure, early exchange of information, and court involvement in the discovery process when you are talking about e-discovery.

Happily, it also led me to Ken Withers, and we did some work together on some seminars. The Local Rule 26.1 in the Eastern and Western Districts of Arkansas is really Ken's brainchild. He helped draft it—or did draft that, I think—and he is sinking down in his seat now. He takes the credit or the blame.

It is a minimal approach. I think that I am kind of here as a representative of the small country mouse because in our district we do have cases that involve these horrible problems from time to time, but the vast majority of the cases do not. So we wanted to adopt sort of a minimal approach.

The purpose of this Rule, first and foremost, is to force our lawyers, or encourage our lawyers, to think about whether they are going to seek discovery of electronic materials in their particular case. We also wanted to encourage them to think about preservation of data early on. And, perhaps most importantly, to let the courts know if there are going to be problems so that we can take a more active role in managing the discovery in that particular case.

So what this Rule does basically is just add some requirements to the reporting under Rule 26(f) of the 26(f) conference. We want to know will there be requests for electronic data and, if so, will those requests be limited to what is reasonably available in the ordinary course of business?

If it goes beyond that, we want to know about scope, cost, and time that may be involved. We want to know if the parties have discussed and talked about the format and media for production, and also the

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(9) Any objections to the proposed trial date.
(10) Proposed deadline for joining other parties and amending the pleadings.
(11) Proposed deadline for completing discovery. (Note: In the typical case, the deadline for completing discovery should be no later than sixty (60) days before trial.)
(12) Proposed deadline for filing motions other than motions for class certification.
(Note: In the typical case, the deadline for filing motions should be no later than sixty (60) days before trial.)
(13) Class certification: In the case of a class action complaint, the proposed deadline for the parties to file a motion for class certification. (Note: In the typical case, the deadline for filing motions for class certification should be no later than ninety (90) days after the Fed.R.Civ.P. 26.(f) conference.)

Id.

procedures for production. We want to know about steps taken to preserve electronic data—in other words, the spoliation and preservation issue that has had so much discussion today.

The adoption of that Rule was met with silence from the bar. We did get some response that was favorable, but really they showed a great deal of disinterest. We are a small state. We have been accused of everybody having the same DNA and so on. You've heard about that.

So we get along pretty well down there. Everybody knows everybody.

But after the Rule was adopted, and in preparation for this conference, I thought it might be a good idea to see if it has any effect at all and, if so, whether it was good or bad.

So we pulled approximately ten percent of cases from the last three years—these are regular civil cases—and I had my courtroom deputy look at those cases. In about twenty-five percent of the cases, there was a meaningful response to the questions that we asked about electronic discovery. I think that shows that in the vast majority of the cases we have—routine products litigation, things like that—the parties either worked it out or didn't have any real problems.

But in looking through the twenty-five percent, there were some trends that I thought were interesting. This was not a scientific study and we didn't really have time to follow up on the cases where there were responses, but I noticed several things about the Rule that I think tell me that it is good for our district; and I think it would be good for others to at least adopt, or maybe the Federal Rules in general, a more stringent reporting requirement on the front end.

First of all, it is apparent from the responses that the lawyers had seriously considered e-discovery issues, and in the majority of cases they had met and conferred and for the most part agreed on various aspects of their production. I will give you three real quick examples.

There was one case involving trademark infringement. It was obvious from the response that the parties had conferred on production of sales and production data, Internet sites, Web pages related to marketing, and had agreed to determine whether the data was reasonably available in the ordinary course of business, and if not to work to determine what the cost of production would be. The parties had also discussed the format for the production, they had ensured that reasonable preservation orders were being taken, and so on.

In another case—well, in two more cases; these are the last two examples—there was obviously data that had been overwritten or somehow altered or destroyed. They had gotten together, decided how to deal with that problem, and had in one case even agreed on a protocol and an expert to resolve it.

So I think in a number of cases that we have had in our district because of this Rule the parties got together early, they exchanged information, and they headed off some problems that would have come to the courts and really been consumptive of our time in dealing with them. So I think from that standpoint the early disclosure and reporting requirement was good.

Another aspect that I noticed was that in virtually all of the responses where electronic discovery was involved, counsel at least stated that reasonable steps were being taken to preserve electronic data. Again, they had discussed and come to an agreement for the most part as to what steps should be taken to preserve that data.

In the case that I initially mentioned, I think we spent hundreds of hours, if not weeks and months, dealing with spoliation issues. That is one of the biggies and it is a real problem, as you have seen from the discussion today. So I think we have headed that off in some cases by reason of this Rule.

The responses also told us that the counsel had really discussed and given thought to whether there would be requests for production of data not available in the ordinary course of business. In most cases, they had agreed that they would not go beyond that, but in the few that they had to go beyond it, they had discussed it and actually reached agreement as to how they would do it, who would bear the cost, and it never came to court.

In most cases, the parties had agreed on the form of production. It was interesting in the early years—you know, most of us barely learned to write with a pencil down there—they agreed that the production would be in hard copy. That trend has kind of shifted now. I don't know if we have enough of a sample to really tell anything from it or not, but now the agreement is more often that they will produce it in some from of electronic media, on a CD-ROM for example, or in native format—we had one case where they had actually agreed to do that and how they were going to do it. So it has kind of flip-flopped.

Lawyers are becoming a little bit more sophisticated—and I am sure this is more true in other parts of the country—as to the problems and the potential for electronic discovery.

Basically, I think our Rule is benign. It has not caused problems in cases that do not involve extensive electronic discovery. If they do not have that problem in their case, they can simply ignore that and tell us so in their response on the 26(f) outline.

I would just like to add to what some people have said earlier today. As far as rulemaking is concerned, I think the people who are making the Rules need to be very careful that you don't set preemptions or things that are going to apply to a wide variety of cases where they just simply do not fit in the ordinary, common, garden variety, day-to-day case that comes up time after time in federal courts, not only in

the Eastern District of Arkansas but in a lot of the smaller districts, and even in the major districts. I'm sure that not every case in New Jersey or New York or Boston involves huge, horrible problems of electronic discovery. We need to keep the flexibility as judges to be able to deal with those without adding a layer of cost that may make it prohibitive to litigate the ordinary case.

I think the best thing that the Rules could accomplish is to ensure that the process starts very early in the litigation.

JUDGE HECHT: All right, thanks, Judge.

Now, the New Jersey Rule has that and does a little more.[8] Judge Hughes, do you want to talk about that, please?

JUDGE HUGHES: Yes. The impetus for the New Jersey Rule, quite frankly, was *Bristol-Myers Squibb,*[9] which I wrote and scared the hell out of everybody in New Jersey, so they decided they better go

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8. *See* D.N.J. Local Civ. R. 26.1 (amended by N.J. Ct. Order 501 (2004)). Subsection (d) of the Rule provides:

> (d) Discovery of Digital Information Including Computer-Based Information
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> (1) Duty to Investigate and Disclose. Prior to a Fed. R. Civ. P. 26(f) conference, counsel shall review with the client the client's information management systems including computer-based and other digital systems, in order to understand how information is stored and how it can be retrieved. To determine what must be disclosed pursuant to Fed. R. Civ. P. 26(a)(1), counsel shall further review with the client the client's information files, including currently maintained computer files as well as historical, archival, backup, and legacy computer files, whether in current or historic media or formats, such as digital evidence which may be used to support claims or defenses. Counsel shall also identify a person or persons with knowledge about the client's information management systems, including computer-based and other digital systems, with the ability to facilitate, through counsel, reasonably anticipated discovery.
>
> (2) Duty to Notify. A party seeking discovery of computer-based or other digital information shall notify the opposing party as soon as possible, but no later than the Fed. R. Civ. P. 26(f) conference, and identify as clearly as possible the categories of information which may be sought. A party may supplement its request for computer-based and other digital information as soon as possible upon receipt of new information relating to digital evidence.
>
> (3) Duty to Meet and Confer. During the Fed. R. Civ. P. 26(f) conference, the parties shall confer and attempt to agree on computer-based and other digital discovery matters, including the following:
>
> (a) Preservation and production of digital information; procedures to deal with inadvertent production of privileged information; whether restoration of deleted digital information may be necessary; whether back up or historic legacy data is within the scope of discovery; and the media, format, and procedures for producing digital information;
>
> (b) Who will bear the costs of preservation, production, and restoration (if necessary) of any digital discovery.

D.N.J. Local Civ. R. 26.1(d).

9. *In re* Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437 (D.N.J. 2002).

and try to get a rule. For purposes of this discussion, it could be subtitled "a pox on both your houses."

What happened in that case, very generally, is that neither side—and very sophisticated parties and attorneys—talked about electronic discovery, and it turned out that the plaintiff, in the traditional, time-honored way, asked for any and all paper documents and got that, and agreed to pay for it at ten cents a page.[10] When it got to be expensive and when they found out that the defendants had an electronic version, they wanted that.[11]

The defendants, on the other hand, never told the plaintiff that they had it available for electronic production and, in addition, were making a twenty-percent profit on the deal because they were blowing back the paper at eight cents a page and they were charging them ten cents a page, so it was kind of an entrepreneurial thing, too.[12]

But in any event, this led to the Rule, and a lot of other factors. Mary Sue will discuss it from the lawyer's point of view. The court, and I think the lawyers, wanted some rule that they could show to their adversary and show to their clients and say, "We have to start seriously discussing these issues."

You will note that the Rule, although it imposes a duty on an attorney to investigate and to designate an IT person and things of that nature, does not provide for resolution of certain issues relating to scope or limitation or preservation.[13] It simply identifies those issues as worthy of discussion, as Judge Cavaneau said, early on in the litigation.

I think that is the most important message that I could give to the Rule makers, is if they are going to change the Rules—and I wouldn't presume to say whether they should or they shouldn't—but I think it should be more for education and awareness, to get lawyers thinking about the case and deciding what real issues they have, rather than create presumptions or things of that nature.

I tell lawyers all the time—and I think, I hope, every judge would agree—that this is not my case, this is your case, that you are trying. I have found that if the lawyers want the judge to make a decision, invariably the judge will make a decision, and it may not be the one that the lawyers want.

I was amazed just in my general practice that most lawyers were computer savvy enough—and this was two years ago—and every year it gets more and more so that they are computer savvy, and their clients certainly are computer savvy, but that this is worthy of an explicit mention I think certainly in the Local Rule, and that is why we

10. *Id.* at 440.
11. *Id.* at 441-42.
12. *Id.* at 439.
13. *See* D.N.J. Local Civ. R. 26.1.

did it, so that they talk about this and they present any problems early in the litigation to the Magistrate Judge or the District Judge or whatnot.

I think when you talk about safe harbor, whether you have an explicit provision or not, I think my proverbial safe harbor at the end of the case is if I say to a lawyer, "Did you talk to your adversary or did you talk to your client; did you discuss measures to have prevented this thing?" that goes a long way in how I am going to resolve a case.

So I think that was the purpose of the Local Rule, and certainly not to hamstring people or to even address issues of cost allocation, which are important issues. But I think that Judge Francis and Judge Scheindlin have gone a long way in identifying factors to handle those things.

From my perspective—I don't want to go off on a tangent—I think one of the most important things is to surgically strike discovery. I would hope that the new electronic revolution can somehow obviate the old "any and all, give me any and all documents," whatever. So I think that is the purpose of the Local Rule.

I think, before Mary Sue talks, I would like to say that if anybody is contemplating a local rule, it was very important to us in New Jersey that we had the lawyers' input on this. This was vetted after a fairly deliberate process through the Lawyers' Advisory Committee. It changed dramatically from the first draft.

I think the first time this was discussed lawyers were concerned that they would be given an added duty, and they have enough work as it is, but they have seen this Rule as help to them to be able to talk to their clients, impress upon them that this is not the lawyer's idea, this is the Court Rule, that they have to preserve or come up with a plan in order to be able to discuss preservation or inaccessibility or all the issues that you have talked about today. And I think that it has actually helped lawyers.

That's pretty much my spin on it.

JUDGE HECHT: Mary Sue, add to that, please.

MS. HENIFIN: Let me just comment a little bit on the process.

The judges actually brought a proposed rule to the Lawyers' Advisory Committee to the Federal Courts and asked the Lawyers' Advisory Committee to consider it. There was a subcommittee appointed. I chaired the Lawyers' Advisory Committee at that time.

There was a lot of controversy about the draft as it first existed. I would say the sentiment of the lawyers, and these represented a variety—plaintiffs' and defendants' lawyers, various size firms, different kinds of cases that they handled—but the concern was that there would be no new obligations imposed.

So the drafting task of the Lawyers' Advisory Committee was to come up with a rule that met the concerns of the judges that had to manage discovery—and in my experience, no judge likes to look at spoliation motions; it's not fun; it doesn't really advance the long-term course of the litigation—to avoid some of these problems by addressing what we called "electronic discovery" at first, but learned was really too specific a term, early on in litigation. And so this draft rule changed substantially based on the input from the lawyers.

The first change was to deal with "information management systems,"[14] because we were very aware through our experiences that discovery and the way information is kept and managed is changing dramatically.

And so our Rule, which is a Local Rule—and I will not really address the merits of having the balkanization of the Federal Rules through Local Rules—but our Rule addresses information management systems, so that it is broader than just e-discovery. And we don't just talk about "data"; we talk about "computer-based information" and "other digital information."[15]

And then, what the Rule really does is before the first discovery conference, which occurs very early in New Jersey after the issues are joined, it requires the attorneys to review with their client, which is an obligation in any event, the information management systems, including of course e-discovery, e-type systems, and then to determine who has information.

That part was a little controversial, as long as there was a requirement that an IT-type person be designated as a person "knowledgeable" about those systems.[16] But the Rule was changed so that it just has to be "counsel shall also identify a person or persons with knowledge about the client's information management systems . . . with the ability to facilitate"—and this was very important—"through counsel, reasonably anticipated discovery."[17]

The way the Rule was originally drafted, there was concern that there could be some kind of IT-nerd-to-IT-nerd-type communication. Well, that of course would not be acceptable to attorneys in litigation.

Then, of course, the next issue that was addressed was the need to look at the categories of information sought, and then to address attorney-to-attorney in the first instance all the kinds of things that have caused problems in the courts, including inadvertent production of privileged information, cost and who is going to pay for the cost, and whether there is a real issue with restoration of data.

14. *See* D.N.J. Local Civ. R. 26.1(d)(1).
15. D.N.J. Local Civ. R. 26.1(d)(2).
16. *Id.*
17. *Id.*

So those issues have to be addressed by the attorneys, and if there are problems, they can be brought at the first case management conference to the Magistrate Judge. In New Jersey, the Magistrate Judges manage discovery.

In an informal survey that I have taken since this Local Rule has gone into effect, there have not been problems. In fact, most attorneys work out these issues at the onset of litigation and make a report to the Magistrate Judge as to what they have agreed upon. But it does avoid delaying thinking about the issues, and it does require the attorneys to think about them from day one.

So I think as a beginning place for considering what needs to be done it is a very good place. We'll let you know, because we have a formal mechanism through the Lawyers' Advisory Committee to monitor the response to this Rule, we can let you know in a year or two if it is really working the way it is intended to.

So that is the experience in New Jersey, where in my experience in litigation in my cases the majority of documents are not paper anymore. Some documents are in cyberspace, there are now offshore companies that are involved in litigation, and the time has come to have a practical mechanism to address these things within the context of our Rules, which are very well developed.

JUDGE HECHT: Mary Sue, how long has that Rule been in effect?

MS. HENIFIN: It has been in effect—the recommendation was made to the Board of Judges, it was unanimous, from the Lawyers' Advisory Committee; it was adopted; and it has been in effect now since October 6, 2003. In every new case that comes before the Magistrate Judges, these issues have to be addressed.

JUDGE HECHT: And your Rule, Jerry, is about two years?

JUDGE CAVANEAU: Three years, end of 2000.

JUDGE HECHT: In Texas, we don't have in state practice a 26(f) report unless one party requests it, so the Texas Rule is a little different.[18] Steve helped write it. Steve, tell us about it.

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18. Tex. R. Civ. P. 193.3. The Rule provides:

193.3 Asserting a Privilege. A party may preserve a privilege from written discovery in accordance with this subdivision.

(a) Withholding privileged material or information. A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state—in the response (or an amended or supplemental response) or in a separate document—that:

(1) information or material responsive to the request has been withheld,

(2) the request to which the information or material relates, and

(3) the privilege or privileges asserted.

(b) Description of withheld material or information. After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that

MR. SUSMAN: Well, what they've got in Arkansas and New Jersey I would call "rules." I mean, just talk to the other side, okay. What we've got in Texas is a real rule.

It began in 1995 when the Texas Supreme Court asked its Advisory Committee to undertake rewriting all the Discovery Rules. The whole idea, what we set about in 1995, is discovery takes too much time, costs too much money, and produces too little outcome-determinative results; let's greatly restrict the scope of discovery.

It began in 1995, when we first came up with this Electronic Discovery Rule, it was debated for several years, then it went to the whole Advisory Committee, and then eventually became part of our Discovery Rules that went into effect on January 1, 1999.

Our main focus in revising the Discovery Rules was depositions, which we perceived to be much more expensive and useless than document production. We didn't make many changes in the document production rules.

One we did make dealt with the way that a party asserts a privilege as to documents. I mean, you don't put some junk in your response to the document request and assert some privilege. If you don't withhold anything on privilege, you don't say anything. If you

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the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:

(1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and

(2) asserts a specific privilege for each item or group of items withheld.

(c) Exemption. Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative—

(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

(2) concerning the litigation in which the discovery is requested.

(d) Privilege not waived by production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if — within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made — the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

Id.

withhold something, you've got to say you withheld something and identify it.

Another change we made was if you produce a privileged document, you do not waive the privilege unless you intend to do so.[19] The minute you discover that you have produced a privileged document without intending to do so, you can ask for it back, and if you do so promptly you get it back without question.[20]

The final change, of course, dealt with the subject of electronic discovery. Our Rule was written in the mid-1990s, without much experience with e-discovery disputes and nothing to go on—I notice that Mississippi copied us verbatim last year. We didn't copy anyone, I don't think—maybe we did.

We wanted to make it very clear that if you want something special regarding e-discovery, either what you were asking for or how you want what you were asking for produced, the burden is on you to specify what it is you want and how you want it.[21]

The second thing we wanted to make clear was if you ask for something that the other party does not normally have available in the ordinary course of its business and it requires more than reasonable efforts to retrieve it and produce it in the form requested, then you may object. If the court overrules your objection, it must order the other side, the requesting party, to pay for any extraordinary steps to retrieve the documents or produce them in the form requested.[22]

Again, the whole purpose of our Rule was to curtail discovery, to limit discovery, and that is why we put those caveats in the Rule.

Did we succeed? I believe so. Since the adoption of our Rules on January 1, 1999, I have found no cases reported in Texas dealing with our Electronic Discovery Rule, which is pretty amazing.

In preparation for this program, I surveyed all the state trial judges in Dallas and Houston by e-mail and found out—I was really surprised—that very few have had to adjudicate e-discovery disputes, and none of them had any problems with the Rule as it exists.

I think the important lesson we learned in Texas is that any rule, if you are going to write a rule, should be written in a way to make it clear that e-discovery is not the norm, that it should not be sought in every case, and that before you seek it you should consider that you may have to pay a huge amount of money for a lot of useless information. Once the bar gets that message, you just aren't met with many requests for e-discovery, and I think that is probably the way it should be.

19. Tex. R. Civ. P. 193.3(d).
20. *Id.*
21. Tex. R. Civ. P. 196.4.
22. *Id.*

JUDGE HECHT: All right. There you have comments on these Rules.

Now we are going to go to these hypotheticals in the hope that by looking at how each Rule would address the problems that are raised we can see what they cover, what they don't cover, where they work, where they don't work, and so on.

Earlier we talked about addressing Main Street, not just Wall Street, and I think these examples are meant to show more of the mainstream of litigation that seems to be out there in the federal courts.

First of all, a suit by a general contractor against a subcontractor. They each claim breach of contract and fraud against the other. They each seek $1 million damages. One is a little larger than the other. The general contractor, though, has only one employee who troubleshoots computer problems, and doesn't have an IT person. The subcontractor relies entirely on outsiders or vendors. The general contractor's lawyer has had a little experience. The other lawyer has not had any.

Each discusses the subject with the client like they are supposed to under 26(f), but, because of the large amount of inexperience and ignorance that has been built up over the years, they do not get very far with a plan. It just kind of says, "Well, there might be; we're not sure." And they talk a little bit, and each agrees to produce paper, because they feel more comfortable with paper, but also documents on CDs.

One of them is smart enough to realize that if he produces the material in a .tiff or .pdf format, he strips out a lot of useful stuff, so that is what he does. The other fellow just copies it off the hard drive onto a CD and turns it over. When one realizes that he has given up more than the other, he objects, says that he should get his unstripped data back. The other side says that nobody ever talked about this before.

Jerry?

JUDGE CAVANEAU: I think that lawyer probably needs to call his liability carrier and put him on notice.

In the Eighth Circuit at least, I believe the outcome on that would be pretty clear: he has waived the privilege for any work product production at all because he hadn't taken reasonable steps, he has let it go, and it is gone.

MR. SUSMAN: In Texas, obviously, our Rule would create the opposite result, because the production was inadvertent;[23] he had no idea this data was there.

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23. Tex. R. Civ. P. 193.3(d).

But I would like somebody to explain to me how metadata can contain attorney-client information or work product information, because I can't figure it out. Nor can I figure out, if you were in Texas—because to get it back you've got to specify what it is—so how is this dude going to specify what is attorney-client privilege or work product about this metadata without having it all blown out? I mean it's ridiculous.

JUDGE HUGHES: Now I know why there haven't been any cases in Texas.

Mary Sue, how familiar are the lawyers with being able to talk about this?

MS. HENIFIN: It varies all over the place. Metadata, of course, can contain attorney-client, particularly in transactional-type documents where lawyers are dictating what gets changed in various versions, which usually is part of transactional work.

But in any event, I think in New Jersey this problem would be avoided because the parties would be required to try to come to some agreement about inadvertent production and it would get them thinking about the issue.[24]

In the last case where I have discussed this with opposing counsel, we agreed that we would return, because we had a lot of electronic data that we would return if we inadvertently produced. That really helps you sleep at night.

JUDGE HECHT: One of the effects of the New Jersey Rule, I hope, is to level the playing field, as it were, between people who are less sophisticated with respect to the technical aspects of these things and address these at a meaningful 26(f) meeting.

The other thing that this Rule I hope accomplishes is to provide specific areas that they have to discuss, one of which is the format and how they are going to turn it over and so forth, so that it doesn't become a problem later on down the road where, as was mentioned this morning, somebody may put it in a version that the requesting party doesn't want or is unhelpful to them and they will ask him to do it over again, which multiplies the cost factor and gives the judge another headache.

So the important thing is—and we all live in the real world and we know that there are different 26(f) meetings, and some of them last thirty seconds on the phone and some of them are a little longer—but the purpose of adding a separate section on computer-based discovery, or digital information, whatever it is called, was to have the attorneys focus on this and realize that at the Rule 16 conference they are going to have to report on what they had to do with respect to each of these precise items.

MR. SUSMAN: Under Texas Rules, another issue presented by

24. D.N.J. Local Civ. R. 26.1(b).

this problem is—well, there are no sanctions imposed against the lawyer who stripped out the metadata, because I don't think the request was specific enough—but the more interesting question is whether, under Texas Rules, could you have gotten the metadata in the first place? Absolutely, no question, because it doesn't require extraordinary effort to make it available.[25] It's there. And is it reasonably available to the producing party? Yes.

Someone just showed me how. I did it for the first time on my laptop today. You press on a document, you hit the right key, you get properties, that's the metadata. So of course it's reasonably available.

So a proper request would get all that information in Texas at no cost.

25. *See* Tex. R. Civ. P. 196.4.

Notes & Observations