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Western District adopts new local rule on electronic discovery

By Susan Ardisson and Joseph Decker

Like many other U.S. District Courts, the Western District of Pennsylvania has now adopted a new local court rule to address the ever increasing number of issues arising out of the discovery of electronically stored information (ESI). Since the 2006 Electronic Discovery Amendments to the Federal Rules of Civil Procedure, more than 40 U.S. District Courts have enacted either specific local rules or issued standing orders and protocols to address issues related to the discovery of electronically stored information. Effective September 1, 2009, Local Rule LCvR 26.2 and the accompanying comment, were the product of the Local Rules Advisory Committee consisting of Chairman Stanley M. Stein, the Honorable Joy Flowers Conti, Laura E. Ellsworth, and approximately 22 lawyers practicing in the Western District of Pennsylvania from Erie to Washington County.

The Committee reviewed numerous local court rules regarding e-discovery and determined that a "flexible" approach to electronic discovery was preferable to the more detailed approach that some courts have adopted. According to Stein, the Committee felt that the Western District's local rule "should express the obligations of

counsel as articulated in case law beginning with the *Zubalake* cases and specifically apprise attorneys of their e-discovery obligations. Attorneys must understand their client's systems of storing and retrieving electronic information." Ellsworth said that one of the key issues that the Committee sought to address with the implementation of LCvR 26.2 was the "creation of a meaningful dialog between the parties about electronic discovery early on in the litigation process."

The three major components of the new Rule LCvR 26.2 include: (1) counsel's duty to investigate the client's ESI; (2) the designation of a "resource person" to "facilitate communication and cooperation between the parties and the Court" regarding ESI; and (3) the duty to meet and confer "and attempt to agree" on eight specifically enumerated issues related to the discovery of ESI, including among others preservation, search protocols, and inadvertent production of privileged information.

Rule 26(f) of the Federal Rules of Civil Procedure mandates that parties "meet and confer" regarding electronic discovery at least 21 days before the initial Rule 16 scheduling conference. LCvR 26.2A imposes on counsel, prior to the Rule 26(f) conference, the duty to investigate his/her client's ESI "in order to understand how such ESI is stored; how it has been or can be pre-

served, accessed, retrieved and produced; and any other issues to be discussed at the Fed.R.Civ.P. 26(f) conference...." In addition, counsel must identify "a person or persons with knowledge about the client's ESI," who, "through counsel," can "facilitate" the preservation and discovery of ESI. Under LCvR 26.2.A.1. ESI includes "e-mail, electronic documents, and metadata, including computer based and other digital systems." Comment 1 to LCvR 26.2.A.1 cautions that the duty imposed on counsel to investigate a client's ESI "does not, in any way, alter a party's and counsel's obligations under the law to preserve evidence, including ESI, when litigation is reasonably anticipated." The comment to LCvR 26.2 additionally directs that "[n]othing in this section precludes a party from moving the Court for an appropriate preservation order."

One of the more seemingly novel provisions of LCvR 26.2 is the "designation of resource person...relating to the preservation and production of ESI." Specifically, subsection B provides that: "In order to facilitate communication and cooperation between the parties and the Court, each party shall, if deemed necessary by agreement under LCvR 26.2.C.7 or by the Court, designate a single resource person through whom all issues relating to the preservation and production of ESI should be addressed."

Comment 3 to LCvR 26.2.B states that the resource person "must have sufficient familiarity with the party's ESI to meaningfully discuss technical issues and provide reliable information relative to the preservation and production of ESI." According to Comment 3, the resource person may be a party, a party's employee, third party, or attorney and "may be the same person who was identified to facilitate the preservation and discovery of ESI under LCvR 26.A.2." Finally, Comment 3 provides that the resource person "is permitted to, and, in fact, encouraged to, involve persons with technical expertise in these discussions, including the client, client's employee, or a third party."

According to Ellsworth, through the requirement that the parties designate a "resource person" knowledgeable about the client's ESI, the Committee sought to avoid delay in the resolution of e-discovery issues with the common response, "I'll have to get back to you on that."

The designation of a single resource

person is similar to the approach of other courts to management and handling of ESI issues. For example, Judge Savage's standing Order Governing Electronic Discovery for the Eastern District of Pennsylvania provides for an "E-Discovery Liaison" to promote communication and cooperation between the parties. Similarly, the Northern District of Ohio's Default Standard for Discovery of ESI specifies that each party shall designate "a single individual through which all e-discovery requests and responses are coordinated ("the e-discovery coordinator")," who must be familiar with the party's ESI and the technical aspects of electronic discovery. According to another jurist who is influential on electronic discovery, Magistrate Judge Paul W. Grimm's Suggested Protocol for Discovery of Electronically Stored Information requires parties to "identify one or more information technology or information systems personnel to act as the ESI coordinator..."

LCvR 26.2.C mandates that the parties "meet and confer" at the Rule 26(f) conference, and upon later request for discovery of ESI, and "attempt to agree" on various enumerated issues relating to ESI discovery. These issues include the preservation efforts undertaken by the parties, scope of electronic discovery, establishment of ESI search protocols, inadvertent production of privileged information, accessibility of ESI, procedures for initial disclosures, cost allocation, the need for a designated resource person, and any other issues related to ESI. The need to discuss and resolve these issues is also reflected in the Rule 26(f) reporting requirement set forth in Appendix LCvR 16.1A. Item 11 contains a "check list" of eight issues to be discussed in the Rule 26(f) report submitted by the parties to the Court, including the consideration of metadata, production format, clawback agreements, and search term protocols. According to Stein, the Committee viewed "cooperation in the development of appropriate search terms" as a key area to be resolved by the parties and counsel.

With the adoption of Rule LCvR 26.2, the Western District now joins at least 40 other District Courts which have local rules or standing orders to address e-discovery issues. The rule will eliminate the notion that e-discovery is something that is happening somewhere else but not in Pittsburgh. The rule's affirmative obli-

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gations to investigate, its provisions for conferring, the use of "resource persons," and its enumeration of specific topic areas for agreement, will foster a better and more efficient discovery process and limit the opportunity for e-discovery gamesmanship.

An electronic copy of the local rules of court, effective September 2009, for the U.S. District Court for the Western District of Pennsylvania is available at www.pawd.us.courts.gov. ■

Susan Ardisson is the CEO of bit-x-bit, LLC, a computer forensic and electronic discovery firm, and a member of the ACBA Technology Utilization Committee. Joseph Decker is a shareholder in the firm Babst Calland Clements & Zornir, P.C., the practice leader of the firm's E-Discovery Department, and member of the ACBA Technology Utilization Committee.