Electronic discovery limits

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Nearly three years have passed since electronic discovery was formally introduced into the realm of discovery. The scope of electronic discovery is broad—it includes discovery of "any information that can be stored electronically, including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or compilations—stored in any medium from which information can be obtained either directly, or if necessary, after translation by the responding party into a reasonably usable form."[1] However, the discovery of electronically stored information (ESI) is not without its limitations, thus lending comfort to those old dogs who do not want to learn new tricks. This article is aimed at fleshing out what limitations, if any, exist in the black hole of electronic discovery.

It's like looking for a needle in a haystack

Rule 26 of the Federal Rules of Civil Procedure adds ESI to the list of items each party must disclose to the other in their initial disclosures. However, there are specific limitations on what must be produced. Rule 26(b)(2)(B) allows a party to designate certain items of ESI "as not reasonably accessible because of undue burden or cost"[2] and refrain from production absent a court order.[3] The accessibility of the information is the primary factor used to determine if production is unduly burdensome or costly. Examples of inaccessible data include backup tapes and orphaned data.

The party requesting a limitation on discovery has the burden of proving the unduly burdensome or costly standard. However, even if this burden is satisfied, the requesting party may still obtain ESI through showing "good cause."[4] The court considers the following factors in evaluating if good cause is present:

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 parties' resources.[5]

The comments to article 1461 of the Louisiana Code of Civil Procedure indicate that Louisiana adopts the federal balancing language in Rule 26(b)(2)(B) by not requiring parties to produce ESI from sources not reasonably accessible due to undue burden or cost.[6] When a responding party objects to production on the basis of undue burden or cost, the court may consider production under more convenient and less burdensome conditions and with an allocation of the cost of production between the parties.[7]

Hold your horses

Rule 26 of the Federal Rules of Civil Procedure recognizes the innate risk associated with producing large amounts of electronic information and provides a procedure to alleviate the stress and cost associated with guarding against an inadvertent disclosure. Rule 26(b)(5)(B) allows a party who inadvertently discloses privileged information to "claw back" this information by notifying the receiving party of the disclosure and the basis for the privilege.[8] Once notified, the receiving party must promptly return, sequester, or destroy the specified information; not use or disclose it until the claim is resolved; and, if already disclosed, take reasonable steps to retrieve it.[9]

Two weaknesses of Rule 26(b)(5)(B) are that it does not apply to non-parties or to state court proceedings, and federal courts differ as to how to determine when someone has waived a privilege.[10] However, Federal Rule of Evidence 502, effective Sept. 19, 2008, standardizes the federal procedure on privilege waiver following an inadvertent disclosure of information protected by the attorney-client privilege or work-product protection. Under Rule 502 the inadvertent disclosure of attorney-client or work-product information in a federal proceeding would not operate as a waiver of either privilege, provided that: (1) the disclosure was inadvertent, (2) the holder of the privilege took reasonable steps to prevent the disclosure, and (3) the holder promptly took reasonable steps to rectify the error.

Article 1424(D) of the Louisiana Code of Civil Procedure parallels the federal claw back provision[11] by

requiring the receiving party of inadvertently disclosed information to "return or promptly safeguard" the information as long as the sending party took "reasonably prompt measures" to notify the receiving party of the mistake.[12] In addition, article 1424(D) incorporates the procedure set forth in Louisiana Rule of Professional Conduct 4.4(b) by requiring the receiving party to notify the producing party and return the writing if it is clear that the writing is privileged and inadvertently produced, even if the receiving party did not get notification of the mistake from the producing party.[13] Thus article 1424(D) provides more protection than Rule 26(b)(5)(B).

My way or the highway

Rule 34(b) of the Federal Rules of Civil Procedure addresses the format of production of ESI and permits a requesting party to specify the format in which electronically stored information is to be produced.[14] However, the responding party is not without recourse. The responding party may object to the requesting party's format designation;[15] furthermore, Rule 34 does not obligate the responding party to produce the same ESI in more than one form.[16] If the requesting party does not specify the form, the production of ESI is limited to the form in which it is ordinarily maintained or a form that it reasonably usable.[17]

Louisiana Code of Civil Procedure article 1462(A) similarly allows a requesting party to specify the form of production of ESI. In addition, article 1462 provides the responding party with the same ammunition as that afforded by Rule 34(b).[18]

Toe the line

Rule 33(d) of the Federal Rules of Civil Procedure allows a party upon whom an interrogatory has been served to produce ESI in answer to the interrogatory "if the burden of deriving or ascertaining the information for the answer will be substantially the same for either party."[19] This limit is not without a caveat. A party choosing this option must provide "sufficient detail to enable the requesting party to locate and identify [the records] as readily as the responding party could" and allow the requesting party "a reasonable opportunity to examine and audit the records and make copies." Because of the burden associated with producing ESI, this limitation is often not exercised.

La. C.C.P. article 1460 parallels Rule 33(d) by including ESI as part of business records that may be produced in the place of a response to an interrogatory.

Safe and sound

Rule 37(e) of the Federal Rules of Civil Procedure, sometimes referred to as the "safe harbor" rule, provides that "[a]bsent exceptional circumstances, a court may not impose sanctions…on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The protection provided by Rule 37(e) is limited as it applies only to information lost due to "routine operation of an electronic system." According to the Committee Note, "routine operation" refers to the way such systems are "generally designed, programmed, and implemented to meet the party's technical and business needs." In addition, Rule 37(e) provides protection from sanctions only if the operation of the system was in good faith. "The good faith requirement of Rule 37[e] means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." Finally Rule 37(e) applies only to sanctions under the Federal Rules of Civil Procedure. Courts are not prohibited from imposing sanctions based on other rules, statutes or regulations.

Louisiana Code of Civil Procedure article 1471, effective Jan. 1, 2009, similarly provides that sanctions cannot be imposed if ESI is lost as a result of routine, good-faith operation of an electronic information system. Also like the federal rule, article 1471 does not prevent the imposition of sanctions under other rules, such as the Rules of Professional Conduct or tort liability for spoliation.

[1]Fed. R. Civ. P. 34(a)(1)(A).
[2]Fed. R. Civ. P. 26(b)(2)(B).
[3]Fed. R. Civ. P. 26(b)(2)(B).
[4]Fed. R. Civ. P. 26 advisory committee's note, 2006 Amendment, Subdivision (b)(2).
[5]*Id.*
[6]La. C.C.P. art. 1461, cmt. a (2007).
[7]*Id.*; *See* La. C.C.P. art. 1426(A).
[8]Fed. R. Civ. P. 26(b)(5)(B).
[9]Fed. R. Civ. P. 26(b)(5)(B).
[10]*Hopson v. Mayor and City Council of Baltimore*, 232 F.R. D. 228 (D. Md. 2005).
[11]La. C.C.P. art. 1424, cmt. a (2007).
[12]La. C.C.P. art. 1424(D).
[13]La. C.C.P. art 1424, cmt. b (2007).
[14]Fed. R. Civ. 34(b)(1)(C).
[15]Fed. R. Civ. P. 34(b)(2)(D).
[16]Fed. R. Civ. P. 34(b)(2)(E)(iii).
[17]Fed. R. Civ. P. 34(b)(2)(E)(ii).
[15]La. C.C.P. art. 1462.
[19]Fed. R. Civ. P. 33(d).