Ten Tips Leading to Efficient and Effective eDiscovery for the Small Law Firm

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Amendments to the Federal Rules of Civil Procedure relating to electronic discovery became effective on December 1, 2006. Along with the new rules came significant challenges for the small firm plaintiff lawyer, who now has to deal with the burdens created by the new electronic discovery rules. The amendments present difficulties for smaller plaintiff law firms with limited financial resources, for several reasons. First, it may become very expensive for the plaintiff firm to obtain needed electronic discovery because of the possibility of cost shifting in the new rules that may force the plaintiff to pay the defendant for the requested discovery if the defendant establishes that the discovery is not reasonably accessible. Second, the defendant may intentionally swamp the plaintiff with unnecessary discovery to increase the costs and deplete the plaintiff firm's financial and personnel resources. Third, a plaintiff firm is now required to hire forensic computer experts to assist in narrowing the scope of the search and to consult with the plaintiff lawyer to address what discovery should be easily accessible, and in what format the discovery should be produced. In this article, we propose ten fundamental cost cutting and time saving tips to assist small plaintiff firms in dealing with the new electronic discovery rules.

Reasonably Accessible Documents and Information

The new rules specifically permit the discovery of electronically stored information. As part of the rule changes, Rule 26(b)(2)(B) was amended to permit defendant's responding to discovery to designate certain discoverable electronically stored information as "not reasonably accessible." This means that the information may exist, but it is too much of a burden to produce so that the expense of finding and producing the information and documents requested should fall on the plaintiff. In that case, the defendant must identify the existence of the documents and information requested, but is not required to produce it until the court determines whether the information is reasonably accessible. Although this sounds reasonable, it will undoubtedly be used by defendants as a tool to thwart discovery by increasing the cost of discovery and by creating another road block for the plaintiff attorney to overcome before getting the relevant and necessary discovery to win the case. Once the defendant states that the requested discovery is not reasonably accessible, a two-step analysis is required by the court. This is commonly referred to as the "two-tiered approach." Under the two-tiered approach, the first tier is challenging an opponent's designation of electronically stored information as not reasonably accessible and conducting limited discovery on the issue. The defendant has the burden of proving the information is not reasonably accessible.

The second tier comes into play if the court agrees that the defendant's electronically stored information is not reasonably accessible. Once this occurs, the requesting party must show "good cause" for the discovery. This means that the plaintiff lawyer will have to show that the discovery falls within the scope of discovery and is sought in good faith.

Once that determination is made, then the court may order the defendant to produce the documents, but may require the plaintiff to pay for the costs of producing the documents. Under Rule 26(b)(2)(C) the court may shift the costs of the discovery to the requesting party "of part or all of the reasonable costs of obtaining information."

First Cost-Cutting Tip: Plan Your Discovery by Taking a Global View and Pinpointing Your Needs

What do you really need to win your case? This is the question you must ask yourself as you prepare your general discovery plan. How does electronically stored information help your case? Will you get the same "bang for your buck" from traditional depositions or from paper discovery? Is it really worth having a computer forensics expert restoring electronically stored information and performing labor-intensive, high-cost procedures to obtain the information?

The only way you will know the answers to these questions is to plan your discovery appropriately. Just like an architect/engineer cannot design a building without a plan for the foundation, using concrete, steel, and wood for support, your case cannot be built without a foundation. Just like a building, if the foundation is weak, the case will crumble. The components of the foundation for your case are the discovery tools available to you: depositions, interrogatories, requests for production, requests for admission, and inspections. Before venturing into electronic discovery, determine whether you need it, and if so, how it fits in your overall discovery plan. Ask yourself: "Do I need electronically stored information to build the foundation of my case?"

Limiting electronic discovery to what you really need will greatly reduce your costs and preserve your resources. Request only the electronic discovery necessary to your comprehensive discovery plan. This will greatly reduce your potential costs, the time you spend fighting over these issues, and the vast amount of time that you will spend reviewing information that may be totally irrelevant to your case.

Second Cost-Cutting Tip: Educate Yourself on the Various Methods and Formats of Electronically Stored Information

Cut your costs by learning the ways that electronic information is transmitted and stored. You need to understand fully what electronically stored information may be available to you in discovery, including how the information is stored, the format it is stored in, and the methods of searching electronically stored information. Knowledge is power, and knowing how electronic information works will allow you to effectively and efficiently obtain the necessary discovery in a cost- and time-efficient way.

A low-cost way to learn about electronically stored information is to search the Internet. There is a vast array of vendors seeking your money to conduct and consult on electronic discovery issues. Use their websites to understand the terminology and the electronic discovery universe you will be entering. Speak with your technologically savvy friends and family members and have them educate you on how electronic discovery works.

Hire a consultant or look for a former employee of your opponent's company so that you may find out what information was stored electronically, what format it was stored in, what the retention policy of the information was, and where the information was stored.

Once you are armed with the knowledge from your own research and have an idea of what information to seek, consult with your information technology (IT) consultant. Ask the IT expert to explain the various types of backup systems, how email is stored, what happens to files when they are deleted, and other relevant information. Explain your case to the expert and tell her about the information you think may be available, and come up with inexpensive ways to obtain the information. Create an inexpensive plan to retrieve the information.

Conducting your own research, using your client or former employees to focus your discovery, and using the expertise of your IT professional are low cost, minimal effort methods that will lead to excellent results in obtaining the valuable information and documents you need.

Third Cost-Cutting Tip: Finding an Affordable Local IT Expert

A low cost and effective way to educate yourself and successfully obtain electronically stored information is to retain an IT expert from your local talent pool. Your local IT talent pool may include community college adjunct and full-time professors, IT personnel for medium- to large-sized companies, and graduate students from local IT colleges and vocational and technical schools. Do not overlook these low cost resources. These individuals will likely be willing to work on a part-time basis at a rate lower than a traditional "litigation computer forensics expert." You may want to use them as a nontestifying expert. Use their practical knowledge and experience of business practices to efficiently obtain the information you need from your opponent's electronically stored information.

Fourth Cost-Cutting Tip: Hire a Computer Systems Forensics Expert

Once you have gained a basic understanding of information systems and what types of information you are seeking, make a cost saving investment by hiring a competent, but affordable, computer forensics expert. This investment is counterintuitive to cutting costs; however, spending a little on a forensics expert will save you a lot in the long run. Just like any case you handle, you want the best expert available within your means on your side. You would not take on an airplane crash case without consulting with a pilot, mechanic, engineer, and accident reconstructionist. You would not take on a medical device case without retaining a physician or medical device expert. In the same manner, you should not venture into electronic discovery without a knowledgeable expert.

The new rule changes and the complexity of electronic discovery and the various methods of storage and extraction will require retaining an expert at the early stages of litigation. To make the investment in retaining a computer expert affordable, consider different payment structures with the expert. You may negotiate a flat rate fee per case or have the expert on a retainer if you have a sufficient caseload. If forensic research is needed (for example, the mirroring of a hard drive by your expert to find electronically

stored information), your expert's rates may vary. Often, experts employ assistants or junior associates that are just as knowledgeable as the expert, but are compensated at a lower rate. Ask your expert to have the assistant work with you on the project in order to reduce costs.

Fifth Cost-Cutting Tip: Plan Your Discovery Early in the Case by Keeping Your Eyes on the Prize Before the Scheduling Conference

One of the keys to a successful discovery plan is to know what you need to win the case and not chase unneeded data, wasting your time and resources. To accomplish this, you must narrow down what you need to win your case. With the new rule changes, you must decide what your prize is early in the case. Then keep your eye on it so that you can get it. In other words, figure out what you need to win and ask for it and avoid asking for things that you do not need that will unnecessarily bog down your case by forcing you into an expensive discovery expedition that will not get you closer to your goal.

The amendments require you to discuss an electronic discovery plan with the defendant during the initial scheduling conference pursuant to Rule 26(f)(3) as to "any issues relating to disclosure of discovery of electronically stored information, including the form or forms in which it should be produced." You will be forced early on to make well-informed decisions on what information to pursue if designated not reasonably accessible in light of the importance and usefulness of the information and the issues at stake. Once again, consultation with your computer forensics and IT expert will be valuable at that stage.

Sixth Cost-Cutting Tip: Use the Scheduling Conference to Narrow Issues and Learn Your Opponent's Position on Discovery of Electronically Stored Information

The amendments to Rule 26(f)(3) require all counsel to "discuss any issues relating to preserving discoverable information and to develop a proposed discovery plan that indicates the parties' views and proposals concerning: . . . any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced . . ." at the outset of the case. Use your IT expert to evaluate your opponent's information systems prior to the scheduling conference. The IT expert will also be helpful in crafting your discovery requests with the requisite specificity to avoid problems. Finally, your IT expert will be very helpful in determining the costs associated with the requested production.

During the initial Rule 26 conference, make sure you discuss your opponent's preservation of evidence; types, numbers, and locations of backup systems; and the name or types of electronically stored information systems used by them. Also be sure to discuss production formats. As the Committee Notes to Rule 26 suggest, it is important for counsel to become familiar with the electronic storage systems before the conference so that a discovery plan may be discussed. In particular, conferencing with individuals with special knowledge of a party's computer system may be helpful. To promote this idea, take your IT expert with you to the conference and request that your opponent do the same.

Seventh Cost-Cutting Tip: Specify the Format of Production That Will Yield the Best Results for Your Case

Rule 34(b) permits you to designate the format for production. After the scheduling conference you will have a better idea of what format to use when requesting your discovery. If the production format is not specified in your discovery request, then your opponent can state the format in which it will provide the information and produce it as ordinarily maintained or in a reasonably usable format. You need to learn from your own research and your expert what the benefits and detriments are of the various formats.

Four formats exist for review and production of electronically stored information and paper documents. They are the following: 1) online repository tools containing responsive documents; 2) native files; 3) litigation support load files, TIFF images, metadata and extracted text; and 4) printed paper. Know which format will be best for your case and keep costs down by educating yourself and consulting with your expert

Recent cases suggest that native file production may become required if there is no reasonable basis to object to it. Native files are the original computer files, in their original application or software forms. Accordingly, you will need to fully understand what the native format is for the particular discovery you seek in your case. For example, how the documents were kept, what software programs were used, how files were named, and whether there was any electronic back up or overwriting of the documents.

If you are going to request documents in a format other than the native file format, consider the following factors when formulating discovery requests:

- **Alterability and Spoliation.** Once files are converted to TIFF images, they cannot be altered. Native files, however, can be changed very easily—either intentionally or unintentionally. For example, simply opening a document can change the metadata of a native file.
- **Bates Numbering.** Tracking documents in a native production can be costly, inefficient and unmanageable. Native file productions make it impossible to Bates number documents, precluding parties from having an effective audit trail of the documents produced. Some parties add Bates numbers to the header or footer of a native document; however, in addition to being time-consuming, this modifies the document from its original form. In contrast, a TIFF production allows for Bates numbering and accurate tracking of produced documents.
- **Creating Redactions.** A TIFF review and production allows parties to redact confidential or privileged information. When documents are produced natively, however, there is no effective way to place a redaction on the native file. Thus, a native file production can undermine a defendant's efforts to protect proprietary or privileged information.
- **Searching Text.** Documents that have been converted to TIFF images can be easily searched and reviewed in one comprehensive search query. In a native file document set, this task is very difficult because few applications exist for searching across thousands or millions of native files in different formats from multiple computer

users. Be aware that courts across the country have found producing TIFF images with corresponding, searchable text and metadata acceptable.

- **Metadata.** If a defendant produces native files, all associated metadata, embedded data, and hidden information will be handed over to you. Production of TIFF images, text, and selected relevant metadata fields allows a defendant greater control over what it is giving you.

Eighth Cost-Cutting Tip: Winning the Battle of "Reasonably Accessible" Versus "Not Reasonably Accessible"

The amendments to Rule 26(b)(2)(B) authorize a defendant to self-designate sources of electronically stored information as "not reasonably accessible" because of undue burden or cost. Rather than produce the information, the defendant must only "identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing." The defendant has the burden to show that the sources are not reasonably accessible. The court may order the discovery produced even though not reasonably accessible if the plaintiff shows "good cause" for it. Nonetheless, even if the plaintiff shows "good cause," it may be required to pay a portion of, or all the costs of the production.

There is a large potential for abuse of this rule because the defendant does not have to review or produce the electronically stored information it designates as not reasonably accessible, even if it is discoverable. The potential for abuse and the adverse results of cost-shifting have been explored by courts:

Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the "strong public policy favor[ing] resolving disputes on their merits," and may ultimately deter the filing of potentially meritorious claims.

Thus, cost-shifting should be considered *only* when electronic discovery imposes an "undue burden or expense" on the responding party. The burden or expense of discovery is, in turn, "undue" when it "outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

With the potential for abuse by defendants in mind, the most significant protective cost-cutting measure for a small plaintiff's firm is to win the battle of what is "reasonably accessible." This will keep ediscovery costs manageable. Your research, your understanding of your opponent's computer information systems and your computer forensics and IT expert will be invaluable if you are forced to contest your opponent's designations of not reasonably accessible.

Ninth Cost-Cutting Tip: Use the New Rules to Your Advantage by Sampling and Taking Depositions of Computer Information Personnel

A defendant's designation of what is not reasonably accessible may actually help you keep costs down in electronic discovery by allowing you to sample a narrow range of information. When a defendant designates information as not reasonably accessible, it must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing to you. Your opponent also must provide you with enough detail to allow you to evaluate the burdens and costs of the requested production. This is akin to a privilege log. Utilize the rule to force your opponent to provide you with a sufficiently detailed listing of the responsive information, as you would with a privilege log. This will allow you to decide whether to pursue it or let it go. If you believe that the information is valuable, then you may be allowed to take limited discovery on whether the information and documents sought are truly not reasonably accessible.

The Committee Notes to Rule 26(b)(2) state that limited discovery may be needed to test the defendant's designations that electronically stored information is not reasonably accessible. That limited discovery may consist of: a) sampling information contained on the sources identified as not reasonably accessible; b) some form of inspection of the sources; and c) taking depositions of witnesses knowledgeable about the defendant's information systems.

Sampling may result in acquiring valuable information to help you decide if you need the information, and to assist you in obtaining the necessary discovery without incurring unnecessary expense. Consider taking a Rule 30(b)(6) deposition to find out about the defendant's information systems, formats, hardware, software, operating systems, file-naming and location-saving conventions, backup policies and schedules, document retention procedures, and other associated technical information. Use your computer forensics expert to assist you in developing a meaningful and productive limited discovery plan to test your opponent's designations.

Tenth Cost-Cutting Tip: Win the Cost-Shifting Battle

Up to this point in the article, we have assumed that your opponent has not prevailed in its designation of electronically stored information as "not reasonably accessible" due to being unduly burdensome and costly. Nonetheless, pursuant to Rule 26(b)(2)(B) if the source of electronically stored information is found "not reasonably accessible," then you may still obtain the information on a showing of good cause. The burden to show that the discovery is unduly burdensome and costly is on the defendant. The court will take under consideration the limitations of Rule 26(b)(2)(C) in determining if electronically stored information is unduly burdensome or costly. Courts must also decide if the burdens and costs can be justified in the circumstances of the particular case.

Even if the court finds in your favor that good cause exists for the discovery of "nor reasonably accessible" information, you may still be required to pay for the cost of production upon the court's discretion. When arguing to avoid cost shifting and

establishing good cause for the discovery of "not reasonably accessible" information, consider including the following factors in your motion:

A. your need for the discovery;
B. your client's inability to pay for the costs related to the discovery in comparison to the defendant's ability to pay;
C. the likelihood that the information requested will lead to the discovery of admissible evidence;
D. the difficulty you will encounter in finding the information from any other source
E. the ease with which the defendant can find and produce the information and documents requested;
F. the specificity of the discovery request;
G. the quantity of information available from other and more easily accessed sources;
H. the failure of the defendant to produce relevant information that seems likely to have existed, but is no longer available on more easily accessed sources;
I. the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
J. predictions as to the importance and usefulness of the further information;
K. the importance of the issues at stake in the litigation; and
L. the parties' respective resources.

Conclusion

The new rules on electronically stored information present challenges to a small plaintiff law firm's budget and resources. With careful preparation, the use of an affordable IT expert, and common sense, a small plaintiff firm can use the new rules on electronic discovery to greatly enhance the quality of discovery obtained from defendants. The key to success is to not be afraid of the new rule, or of modern technology. Instead, embrace it, learn it, and win with it.

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