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LEADING THE NEWS

Maryland District Court Establishes Suggested Protocol for E-Discovery

By Cecil A. Lynn III

A joint bar/court committee of the U.S. District Court for the District of Maryland led by Magistrate Judge Paul Grimm has developed a "Suggested Protocol for Discovery of Electronically Stored Information." The Protocol offers a wide-ranging framework of issues that counsel and their clients should address as far in advance of litigation as practicable. "It's really what you need to make sure you haven't missed anything," said Judge Grimm.

Thus far the circulation of the Protocol has been limited to judges and lawyers familiar with the many challenges of electronic discovery. Judge Grimm noted, "The lawyers who have looked at it have told us that [the Protocol] is a really comprehensive list of things that lawyers must be thinking about when they talk to their clients and opposing counsel about electronic discovery."

According to Judge Grimm, the Protocol was intended to serve as a working model to assist counsel and litigants as they navigate the recently amended Federal Rules of Civil Procedure. While the Protocol is not binding on the parties and has not been adopted by the court, compliance—or the lack thereof—may be considered by the court in determining whether sanctions are appropriate under Rule 37.

Prior Planning and Exchange of Information

Emphasis is placed on cooperation from the outset of litigation as the Protocol underscores the need for parties to plan and prepare for the Rule 26(f) conference. Under Rule 26(f), parties must discuss the basis for their claims and defenses as well as issues relating to the disclosure and discovery of electronic data, including preservation of electronic evidence, form of production, and inadvertent production. The Protocol gives a comprehensive list of 16 topics and issues that when applicable should be brought up at the Rule 26(f) conference.

Preservation of Evidence

The Protocol advises that in preparing for the Rule 26(f) conference, counsel should ensure their clients are familiar with both the facts of the underlying litigation and their responsibilities with respect to preserving relevant and discoverable electronic information. The Protocol provides a comprehensive list of considerations regarding the implementation, notification, and monitoring of legal holds.

For example, the Protocol provides a detailed checklist of what types of data might need to be preserved and advises counsel to decide what must be retained and how to do so. In particular, counsel should consider the way to handle paper documents that are exact duplicates of electronic data.

Form of Production

Attorneys are advised to communicate with their clients and others likely to participate in the conference, and determine whether one or more information technology or other staff member should serve as an electronic discovery coordinator. The Protocol also indicates that in some circumstances, even before the Rule 26(f) conference, it might be necessary for parties to exchange information about their electronic storage systems, document retention policies, and organizational charts for information systems personnel.

The Protocol encourages parties to discuss the anticipated scope of requests for (and objections to) electronic document production, including the form of production. In the absence of an agreement by the parties or a court order, documents should be produced in either Tagged Image File Format (TIFF) or Portable Document Format (PDF).

The Protocol also encourages parties to produce the load files that may have been created when converting native files to static images unless doing so would be unduly burdensome or costly. If load files were created in the conversion process or may be created without undue burden or cost, the Protocol suggests they be produced together with the static image.

In addition, the producing party is encouraged to maintain a separate file as a native file with its metadata intact. However, the requesting party must show a particularized need for the production of metadata to gain access to this file.

If electronic documents are produced in their native format, either by agreement of the parties or court order, parties are encouraged to do so in a manner that does not alter

the integrity of the files or degrade the metadata. Thus, parties seeking to redact native files should also keep the original, unmodified file.

Inadvertent Production of Electronic Information

Attorneys are also encouraged to establish procedures for the assertion of privilege and return of inadvertently produced protected and confidential material. Accordingly, the Protocol encourages parties to ensure that "clawback" and "quick peek" agreements specify the proposed treatment of privileged information and work product, and to be cognizant of the standard set forth in *Hopson v. Mayor of Baltimore*, 232 FRD 228 (D Md 2005) (See *DDEE*, Dec. 2005, p. 1). If the parties contemplate the production of metadata, counsel should discuss whether limitations should be placed on its viewing.

Accessibility/Cost Shifting

A party objecting to the production of electronically stored information that is not reasonably accessible due to undue burden or cost should state facts to support its contention "with particularity, and not in conclusory or boilerplate language." The Protocol reinforces the notion that cost sharing for the preservation, retrieval, and production of electronic data is the exception rather than the rule. Absent a showing of good cause, even data not reasonably accessible due to undue cost or burden must be produced, with the producing party bearing the cost.

Anticipated Actions

The District of Maryland's Protocol follows in the footsteps of the U.S. District Courts for the Districts of Kansas and Delaware, which respectively disseminated "Guidelines for Discovery of Electronically Stored Information" and "Default Standard for Discovery of Electronic Documents." While the District of Maryland has yet to adopt the Protocol, the court plans to study and continue updating the procedures over the next 12 to 18 months. After that period, Judge Grimm expects the court will determine whether the Protocol should become a mandatory set of guidelines, local default rules, or remain a voluntary protocol.

A copy of the Suggested Protocol for Discovery of Electronically Stored Information can be found at: <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>.

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