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FEDERAL RULES

Understanding the E-discovery Obligations Before Making a Certification

By DANIEL K. GELB

Litigators are placing greater focus on electronic discovery (e-discovery) of electronically stored information (ESI), as a result of the amendments to the Federal Rules of Civil Procedure (Fed.R.Civ.P) which are now guiding the courts and litigants.¹ Ac-

ording to the United States Supreme Court, the recent amendments which took effect on December 1, 2006 “. . . govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.”²

Case Law. During the last several years, lawyers were guided principally by case law, most notably the *Zubulake* line of cases.³ The *Zubulake* cases are extremely

¹ Rule 16 (Pre-Trial Conferences; Scheduling; Management); Rule 26 (General Provisions Governing Discovery; Duty

of Disclosure); Rule 33 (Interrogatories to Parties); Rule 34 (Production of Documents, ESI, and Things and Entry Upon Land for Inspection and Other Purposes); Rule 37 (Failure to Make Disclosures or Cooperate in Discovery; Sanctions); and Rule 45 (Subpoenas). Form 35 (Report of Parties’ Planning Meeting) amends the discovery plan to include the handling of the disclosure or discovery of ESI and claims of assertion of privilege or protection as trial preparation material after production.

² “Amendments to the Federal Rules of Civil Procedure” found at <http://www.supremecourtus.gov/orders/courtorders/frcv06p.pdf> and at <http://ddee.bna.com> under “Proposed & Enacted Rules.”

³ *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y., May 13, 2003) (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); *Zubulake v. UBS Warburg LLC (“Zubulake II”)*, 2003 WL 21087136 (S.D.N.Y., May 13, 2003) (concerning issue not involving e-discovery); *Zubulake v. UBS Warburg LLC (“Zubulake III”)*, 216 F.R.D. 280 (S.D.N.Y., July

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informative, and make unequivocally clear that a major area of discovery peril is the spoliation of electronic evidence, which can be fatal to a litigant's case.⁴ The United States Supreme Court has held that courts possess the inherent power to sanction litigants where appropriate, and are not confined to the rules of procedure.⁵

Sanctions may be imposed where a party allows evidence to be destroyed in contravention of the good faith provision incorporated into recently amended Fed. R. Civ. P. 37. However, Fed.R.Civ.P. 37 is not the only mechanism for sanctions within the civil rules of procedure. Pursuant to Fed.R.Civ.P. 26(g)(3), a Court may sanction a party where the offending counsel is leveraging the complexity of the e-discovery process by responding to discovery obligations in an effort to impede opposing counsel.

Additional Authority. The recently amended rules address the importance of handling e-discovery with diligence at the Federal level, and resources such as *The Sedona Principles* provide practical guidance on how to handle ESI.⁶

In addition, at the state level, state court trial judges are guided (but not bound) by The National Center for State Courts' *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* ("Guidelines") approved by the Conference of Chief Justices ("CCJ") in August 2006.⁷ The CCJ's approval of the *Guidelines* is the product of the deliberation of issues relating to e-discovery at the state court level nationwide.⁸ Notably, like the *Zubulake* cases, the *Guidelines* also reference *The Sedona Principles*.⁹

24, 2003) (allocating backup tape restoration costs between plaintiff and defendant); *Zubulake v. UBS Warburg LLC* ("Zubulake IV"), 220 F.R.D. 212 (S.D.N.Y., October 22, 2003) (ordering sanctions against defendant for violating its duty to preserve evidence); and *Zubulake v. UBS Warburg LLC* ("Zubulake V"), 2004 WL 1620866 (S.D.N.Y., July 20, 2004) (explaining, among other issues, counsel's duty to effectively communicate to her client its discovery obligations to ensure information is discovered, retained, and produced).

⁴ See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. 502003CA005045XXOCAI, 2005 WL 679071, at*7 (Fla. Cir. Ct. Mar. 1, 2005) *rev'd on other grounds sub nom. Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings, Inc.*, — So.2d —, 2007 WL 837221 (Fla. App. 4 Dist. March 21, 2007).

⁵ See *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1997) (holding that sanctions available under the Federal Rules of Civil Procedure do not displace or supersede the inherent power of a court to sanction bad faith conduct).

⁶ *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (The Sedona Conference® Working Group Series, 2007)*.

⁷ The Conference of Chief Justices, *Guidelines for State Courts Regarding Discovery of Electronically Stored Information* (Aug. 2006), available at http://www.ncsconline.org/WC/Publications/CS_ElDiscCCJGuidelines.pdf.

⁸ Note that The National Conference of Commissioners on Uniform State Laws (authors of several uniform laws such as the Uniform Commercial Code) has also established a Drafting Committee On Uniform Rules Relating to the Discovery of Electronically Stored Information.

⁹ See generally The Conference of Chief Justices, *Guidelines for State Courts Regarding Discovery of Electronically Stored Information* (Aug. 2006).

With the advent of *Zubulake* and *Morgan Stanley*, Fed.R.Civ.P. 37 received significant attention when the issue of "bad faith" in discovery practices was considered. With ESI language being added to Fed.R.Civ.P. 33 and 34, Fed.R.Civ.P. 26(f) and 16 have also attracted the attention of practitioners, as these particular amendments impact how pre-trial conferences and the exchange of ESI is handled between litigants during initial disclosures pursuant to Fed.R.Civ.P. 26(a)(1). It is imprudent for attorneys to approach ESI as just another form of documents. Failure to recognize the obligations attendant to e-discovery could result in a bad faith certification of a discovery response or objection which might be sanctionable pursuant to Fed.R.Civ.P. 26(g)(3).¹⁰

New Obligations. E-discovery is a growing and dynamic part of the process of pre-trial exchange of information. Because the discovery of electronic evidence has become central to litigators as businesses and individuals routinely communicate by e-mail, voicemail, electronic facsimiles, cell phones, PDAs, and many other media that retain ESI, counsel's obligations to certify accurately the identification, preservation, and production of ESI has been heightened. With the emergence of automated litigation support resources, algorithmic document review, and digital forensics, e-discovery has become a multifaceted endeavor. Counsel must be familiar not only with the federal rules governing e-discovery, but with the proper procedures for handling the ESI itself.

Therefore, particularly in disputes involving large corporations and/or multiple parties, it is unreasonable for counsel to engage in willfully blind discovery certification. It is perilous for counsel to represent to an opposing party by way of a discovery response or objection that discovery of *all* ESI is complete without fully exploring every location where potentially relevant ESI might reside.

One of the annotations to Fed.R.Civ.P. 26(g) states that "[counsel's] duty to make a 'reasonable inquiry' is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11."

Bad Faith. If counsel has knowledge that not all discovery avenues have been exhausted, or even worse, that opposing counsel could discover the ESI by other means, a concern arises that counsel may be engaging in bad faith discovery practices in order to interpose delay.¹¹ Recently in an opinion addressing, among other

¹⁰ Fed.R.Civ.P. 26(g)(3) states that "[i]f without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, **shall** impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee" (emphasis added).

¹¹ See Fed.R.Civ.P. 26, Advisory Committee Notes on Subdivision (g): "If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discov-

issues, sanctions pursuant to Fed.R.Civ.P. 26(g), the United States District Court for the District of Colorado stated that “[b]ad faith” is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. It is also defined as that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.” This can include counsel’s failure to properly oversee the discovery process where such behavior rises to the level of interfering with the integrity of the judicial process.¹²

Applicability at Summary Judgment. A context in which a Fed.R.Civ.P. 26(g) violation could surface is in the summary judgment phase. For example, in *Scott v. Metropolitan Health Corp.*, the Sixth Circuit Court of Appeals held that the District Court properly imposed sanctions against the plaintiff pursuant to Fed.R.Civ.P. 26(g), 56(g) and the Court’s inherent powers.¹³ In *Scott*, the Court stated the following when justifying the District Court’s imposition of sanctions due to Scott’s conduct during summary judgment pursuant to Fed.R.Civ.P. 56(g) for filing a misleading affidavit and 26(g) for inaccurately certifying the production of meeting minute tapes where the discovery Scott turned over was in fact incomplete:

The district court did not clearly err in finding that Scott submitted discovery filings that falsely certified that they were believed to be complete and accurate, in violation of Rule 26(g)(1) and (2). Nobody could know better than Scott whether she had all three tapes of the meeting. That was flatly within her knowledge, and it was not clear error to find that Scott knew she was lying when her initial disclosures and later responses certified that she had not “found” all of them. Once the court found that Scott violated Rule 26, it was *obligated* to impose sanctions under Rule 26(g)(3) (emphasis in original).

Crucial Decisions. The management of e-discovery preservation and production can be an extremely challenging task since the scope of the project may expand rapidly. Therefore, it is crucial for counsel to recognize the importance of accurately certifying discovery responses. Litigants are mandated by the rules not to sign a discovery response in bad faith. In fact, Fed.R.Civ.P. 26(g)(1) states that “[e]very disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney’s individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party’s address. *The signature of the attorney or party constitutes a certification that to the best of the*

ery are governed by Rule 11. However, since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).”

¹² *Cache La Poudre Feeds, LLC v. Land O Lakes, Inc.*, slip copy, 2007 WL 6840001, *24 (D. Colo., March 2, 2007) citing *Danis v. USN Communications, Inc.*, 200 WL 1694325 (N.D. Ill. 2000) (imposing monetary sanctions where defendant’s failure to implement adequate steps to discharge all discovery duties properly resulting in purging of emails to ensure that potentially discoverable documents were preserved).

¹³ *Scott v. Metropolitan Health Corp.*, 2007 WL 1028853 (6th Cir. 2007) (unpublished slip copy but properly cited pursuant to F.R.A.P. 32.1(a)).

signer’s knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.” (emphasis added).

Counsel should not use the complexity of e-discovery as a means of engaging in conduct which is directed to creating obstacles to delay the proceedings.¹⁴ After opinions such as *Zubulake* and *Morgan Stanley*, litigators became increasingly aware of the courts’ ability to impose dispositive sanctions such as a default judgment, adverse inference, or a summary judgment ruling as well as monetary sanctions under Fed.R.Civ.P. 26(g).¹⁵

Counsel should be cognizant of the fact that a court is not required to find “bad faith” in order to impose sanctions pursuant to Fed.R.Civ.P. 26(g)(3) if, without *substantial justification*, a discovery certification is made in violation of Fed.R.Civ.P. 26(g).¹⁶ If it has a reasonable basis to believe that a party has engaged in improper discovery tactics, a court has the authority to impose sanctions pursuant to Fed.R.Civ.P. 26(g) *sua sponte*.¹⁷

Whether the context is pre-trial discovery, summary judgment or trial, it is the Court’s role to determine ultimately what information is relevant and reasonably calculated to lead to the discovery of admissible evidence. As a predicate to the Court’s decision, counsel, as an officer of the Court, is obligated to accurately certify a discovery response or objection in good faith. Counsel’s e-discovery due diligence extends to the production of ESI and not merely the preservation of it.

Continuing Challenges. As technology advances, fulfilling counsel’s obligations to preserve and produce ESI will become even more challenging. Counsel must be vigilant so that E-discovery does not result in a trap for the unwary. When following the amended rules of civil procedure counsel should bear in mind that it is well-settled law that if a violation of Rule 26(g) occurs without substantial justification, the imposition of sanctions is mandatory upon the Court to correct such disobedience.¹⁸

¹⁴ See *Starlight International Inc. v. Herlihy*, 186 F.R.D. 626 (D. Kan. 1999) (interposing delay in judicial proceeding to amount attorney’s fees is tantamount to prejudicing an opposing party’s case).

¹⁵ See *National Association of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D. Cal. 1987)

¹⁶ See *St. Paul Reinsurance Co., Ltd. V. Commerical Financial Corp.*, 198 F.R.D. 508 (N. D. Iowa 2000) (“The Advisory Committee Notes explain that “Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26-37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to . . . evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. . .”).

¹⁷ *Id.*

¹⁸ *Cache La Poudre Feeds, LLC v. Land O Lakes, Inc.*, (slip copy) 2007 WL 6840001, *24 (D. Colo., March 2, 2007) citing *Danis v. USN Communications, Inc.*, 200 WL 1694325 (N.D. Ill. 2000) citing *Gucci America, Inc. v. Costco Wholesale Corp.*, 2003 WL 21018832 (S.D.N.Y. 2003); *Washington v. City of Detroit*, slip copy, 2007 WL 603379 (E.D.Mich., February 22, 2007) (Court upheld Magistrate Judge’s order for sanctions pursuant to Fed.R.Civ.P. 26(g) where offending counsel violated discovery order without “substantial justification.”).