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## There's So Much Talking Going On

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It has been nearly a year and a half since the enactment of the now well-known District of New Jersey Local Civil Rule 26.1(d). The rule, which was put into place in October 2003, requires litigators in federal district court in New Jersey to review their clients' computers and information management systems "to understand how information is stored and how it can be retrieved" prior to the Rule 26(f) conference. It also compels attorneys and their clients to deal with electronic information much earlier in the discovery process.

New Jersey, along with other federal and state courts, is ahead of the curve in implementing changes to its civil discovery rules to address electronic evidence issues. While the New Jersey rule was not the first of its kind, it is certainly one of the first to present such specific guidance. In fact, other groups have used the New Jersey rule as an example when drafting their own rules. Moreover, the proposed amendments to Rule 26(f) of the Federal Rules of Civil Procedure certainly mirror the New Jersey rule's intent to address digital discovery at the outset of litigation. Whether or not counsel is subject to jurisdiction in the Federal District of New Jersey, the rule offers all litigators best practice guidelines for effective electronic discovery case management.

The rule articulates three broad duties: the duty to investigate and disclose, the duty to notify and the duty to meet and confer.

The duty to investigate and disclose requires attorneys to work with the client - specifically an IT point-person in the client's organization - to review and create an inventory of the client's relevant data architecture and retention systems. This allows counsel to prepare for the electronic document disclosure and to anticipate collection, review and production issues.

The duty to notify mandates the requesting party to notify the producing party about its requests for "computer-based or other digital information" prior to the 26(f) conference. The rule also requires parties to specifically identify relevant categories of information being sought. Recognizing further discovery - like depositions or interrogatories - may yield new insights unavailable at this early stage of litigation; the rule allows the requesting parties to supplement the request if new information is later revealed.

The duty to meet and confer outlines the court's expectations for the 26(f) conference negotiations. As with the duty to notify, the touchstone is specificity. Parties should consider and discuss issues relating to preservation, inadvertent waiver of privilege, deleted data and legacy data, production format, and cost allocation.

While it is still too early to offer a complete picture of the rule's impact, comments from both the bench and the bar demonstrate the rule is promoting early discussion of digital data issues. Magistrate Judge John J. Hughes has noticed the effects in his courtroom:

> One value of the rule has been to get attorneys to address electronic discovery issues head on. I've seen counsel come before the court much better prepared to address the issues, and there can be little doubt that the parties benefit from early and informed discussions.
>
> Under the rule, attorneys need to be proactive in talking to their clients to identify what types of electronic evidence exist, and what the challenges may be with respect to preservation, collection, review and production of that evidence. They also need to communicate early and often with their opponent on these issues; in fact I would encourage parties to begin informal discussions before the Rule 16 conference.

In addition, the case law both in and outside of New Jersey has recognized the rule's value. In *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, a New Jersey Federal District Court case, the plaintiff moved for discovery sanctions in a case involving a patent infringement claim, alleging that the defendants failed to preserve and disclose discoverable e-mail evidence. The court found that the defendant did, in fact, fail to preserve relevant e-mails, noting "the fact that no technical e-mails were preserved, and that no 'off-switch' policy existed, demonstrates, at the least, extremely reckless behavior."

In affirming the magistrate judge's spoliation inference jury instruction and granting over $500,000 in monetary sanctions, the court specifically referenced New Jersey Local Rule 26.1(d).

Outside New Jersey, a New York Federal District Court referenced the rule in one of the most widely read series of electronic discovery decisions, *Zubulake v. UBS Warburg*. The court mentioned the rule in a reference list of a handful of jurisdictions with local rules pertaining to electronic discovery.

The case law clearly demonstrates that a failure to promptly and adequately address electronic discovery can lead to trouble down the road, chiefly in the form of sanctions. Judge Shira Scheindlin, who authored the *Zubulake* decisions, recently conducted a study of e-discovery sanctions cases. See Shira A. Scheindlin and Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 Mich. Telecomm. Tech. L. Rev. 71 (2004).

The study revealed that when courts imposed sanctions, they referred to the willfulness or bad faith of the violator 49 percent of the time. In other cases, courts imposed sanctions for prejudice to the party requesting production (35 percent), and/or the gross negligence or recklessness of the spoliating party (9 percent). The study also found courts imposed more than one sanction 28 percent of the time, with attorneys' fees and costs being the most frequently granted sanction (granted in 60 percent of the cases). Other sanctions included evidentiary sanctions, such as evidence preclusion (30 percent of the time), adverse inference instructions (23 percent of the time), and dismissal or default judgments (23 percent of the time). If attorneys fail to actively engage in e-discovery discussions early in the litigation, they may risk their case becoming one of these statistics.

The rule has also served as a statutory model for addressing digital data in other jurisdictions. In fact, the Advisory Committee to the Federal Rules of Civil Procedure seems to have taken a page directly from New Jersey's playbook when creating its proposed amendments to the Federal Rules of Civil Procedure, released in August 2004. The proposed amendment to FRCP Rule 26(f) prompts counsel to discuss early on how to handle e-discovery issues, including production format and handling of privileged information - salient items also specifically referenced in the New Jersey rule. If promulgated, these clearer discovery standards will make it easier for litigators in federal courts across the country to recognize potential practice hazards and for courts to rule consistently on electronic discovery issues.

Jim Martin, assistant Attorney General in Trenton, New Jersey, said the rule requires attorneys "to think about and plan issues surrounding electronic discovery at the earliest stage ... rather than waiting for problems to arise."

When it comes to electronic discovery, counsel must engage in thorough discussions with clients, opposing counsel and the court. Having an intimate and thorough knowledge of the relevant rules and case law is imperative in ensuring proper preservation and production of electronically stored information. Local rule amendments, like New Jersey's, as well as the proposed federal FRCP amendment, increasingly reflect the risk of sanctions or even

malpractice actions for neglecting to expediently form an electronic information discovery strategy. So take a deep breath, and start talking!

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