BAR BULLETIN

KCBA KING COUNTY BAR ASSOCIATION

Justice... Professionalism... Service... Since 1886

This is a reprint from the King County Bar Association Bar Bulletin

June 2016

Your Electronic Discovery Plan: Rule 26 — Hidden Nuggets for the Savvy Litigator

By Larry G. Johnson

One of the most useful wonders of the world is the Swiss Army knife. I mean the one actually used by the Swiss Army, not the many, cute, tourist versions of same.

I got one as a present a long time ago from the family in Zurich that took me in for a year as an exchange student. But after playing with all the things tucked into the knife, I wound up using just the small blade, the corkscrew and the toothpick (I am pretty sure it was a toothpick). Unlike the ever-proficient Swiss, I chose not to take advantage of all the other tools, a number of which I could never figure out.

And so it is, I have found, with litigators who routinely ignore some really advantageous tools sitting there in Rule 26, begging to be exploited. Gold unmined!

You have a lot to gain if you take the initiative early in a case to set the agenda on discovery. That means always having in your back pocket a default discovery plan ready to send to opposing counsel that you intend to use in your first Rule 26(f) "meet-and-confer" and to present to the judge or magistrate at the first pretrial conference.

To be more precise, you should have ready for each case an electronic discovery plan as specifically referred to in FRCP 26(f)(3)[1] and as implied in Washington CR 26(f).[2] That plan could be crucial, since e-discovery is unfortunately the most expensive and potentially most contentious aspect of discovery these days and the one most frequently exploited for waste and harassment by lawyers who think litigation is a war of attrition.

A Momentary Detour for Some Background and Ammo

Below, I present you with a sample template of an electronic discovery plan with mock data for use in your practice as you see fit. But before we get there, I think you should know there are some pretty hefty policy arguments you can summon to support a discovery plan that serves the purposes of efficiency, fairness, economy and the recently renewed emphasis on the importance of proportionality in the updated FRCP 26.

And let's remember what Rule 1 says for both federal and Washington cases: All the other rules that follow Rule 1 "should be construed, administered, and employed by the court and the parties[3] to secure the just, speedy, and inexpensive determination of every action and proceeding."

It was not that long ago when I would remind lawyers attending CLEs at which I spoke about the "just, speedy, and inexpensive" language in Rule 1. Inevitably that was cause for guffaws and "Yeah, right." But no more. Most courts and consumers of legal services have had it with the waste and gamesmanship that once thrived unchecked in the heyday of "kitchen sink" e-discovery.

But the bench and bar have gone much farther than just curbing or sanctioning e-discovery abuses. Some innovative and well-supported initiatives were launched in recent years to come up with ideas and solutions to make e-discovery more affordable, efficient and reasonable. Notable among these are the 7th Circuit Pilot Project; the Standing Order in the 7th Circuit Pilot Project; the Sedona Conference Principles; and the Model E-Discovery Order for Patent Litigation created by the Eastern District of Texas.

Each of these initiatives is worthy of emulation and discussion, but to highlight their individual merits will have to be the subject for a future article. To read these source documents on your own, you can find and download them at *www.e-dataevidence.com/Links.html*.

Try Your Hand at It

Start now to create your own "model" electronic discovery plan that incorporates some or all of the good ideas welcomed by judges in the projects cited above.

Here is the text of the suggested template I promised you, which happens to comply with the federal Form 35 format, for you to use in your next case (and also downloadable at *www.e-dataevidence.com/Links.html*):

Report of Parties' Planning Meeting per CR 26(f) and Discovery Plan

1. Meet and Confer. Pursuant to Fed. R. Civ. P. 26(f) [or CR 26(f)], a meeting was held on March 12, 2016, at the Seattle law offices of Tomlin & Chase, PLLC, and was attended by:

Larry G. Johnson, Attorney for Plaintiff.

Ronald J. Tomlin, Attorney for Defendants.

2. Pre-Discovery Disclosures. The parties will exchange by June 4, 2016, the information specified in and required by Fed. R. Civ. P. 26(a) [or CR 26(a)], subject to the following agreed-upon protocol:

Responsive electronically stored information ("ESI") will be produced in native file format and, to the extent possible, produced in electronic folders and subfolders as stored on the media from which the ESI is produced, preserving the names used for those folders and subfolders. Alternatively, the producing party will provide for each produced electronic file a spreadsheet or other document with the "path" for each such file, indicating the storage device's hierarchy of folders within which the file was stored. For example, if a file named "Jones.PDF" is stored on a desktop computer in a folder named "Correspondence," and that

folder in turn is stored in a folder named "ABC Project," which in turn is stored in a folder called "Current Projects," then the production of "Jones.PDF" should be produced in that hierarchy of folder and subfolders in a separate document, such as a spreadsheet, and should show a link to "Jones.PDF" indicating its path, e.g.: "C:\Users\Jones\Desktop\Current Projects\ABC Project\Correspondence." This procedure shall be deemed to satisfy the requirement of Fed. R. Civ. P. 34(b)(2)(E)(1) [or CR 34(b)(2)(E)(1)] that ESI be produced as "kept in the usual course of business."

3. Discovery Plan. The parties jointly propose to the court the following discovery plan:

A. Electronic Discovery Plan.

1. ESI produced in this case shall be in accordance with the protocol regarding native file types and tracking of file paths as outlined in Paragraph 2 above.

2. Electronic discovery will be conducted in phases which will be repeated iteratively as necessary to enhance the precision and accuracy of search results, and so long as the effort is in accordance with the proportionality requirements of Fed. R. Civ. P. 26(b)(2)(C) [or CR 26(b)(2)(C)]. The parties will cooperate and use best efforts in their use of technology to achieve cost-effective results. To that end, the first phase of keyword searches of potentially relevant ESI shall proceed as follows:

a) Emails and their attachments. Each party shall provide to the other the names, job titles and job duties of five persons who may become witnesses for that party and most knowledgeable about facts relevant to this action, and that party shall conduct searches of all email accounts of such persons, according to search terms set out in paragraph 2(b) below, and each party shall produce to the other party all responsive ESI, i.e., both emails and their attachments, not privileged, to the opposing party, no later than July 1, 2016, subject to the other conditions set out in this paragraph 2.

b) Search terms. For the initial search, each party may submit to the other party up to 10 search terms they are to use to search their ESI. A combination of terms used together in a single search in order to provide greater precision and accuracy of results shall be deemed, for the purposes of this subsection, to be one search term. For example, a Boolean search such as "Jones AND Smith BUT NOT Appleby" is one search term, as would be a proximity search such as "Jones WITHIN 2 WORDS OF Ralph." Each party shall communicate within five business days from the date of this report the search terms it wishes the opposing party to use as to the opposing party's email sets defined in subsection 2(a) above.

c) Date range. For the purposes of this initial phase, the parties agree that the relevant date range within which potentially relevant documents may be found is September 1, 2012, through September 1, 2015, inclusive. Search term results for any ESI lying outside that date range may be ignored.

d) Certification. The parties, through their attorneys, will certify per Fed. R. Civ. P. 26(g) [or CR 26(g)] that all ESI produced as a result of the searches is complete and accurate as of the date the production is made.

e) The parties agree to meet and confer no later than August 1, 2016, to attempt agreement on whether a second phase of e-discovery is required; additional search terms to be used based on what is learned from the first-phase results; and to identify any disputes regarding e-discovery which may be submitted to an agreed-upon third party to mediate and/or resolve as Special Master per Fed. R. Civ. P. 53 [or CR 53], or in any other agreed-upon capacity.

f) The parties agree to follow and be bound by the Sedona Principles regarding electronic discovery, as currently published at www.thesedonaconference.org.

g) The parties will repeat the process as set forth above, whereby the scope of ESI may be further limited or expanded as needed by agreement between counsel or by order of this Court.

B. Discovery will be needed on the following subjects:

1. Plaintiff's proposal: Defendant's customer lists, sales data, research data and technical specifications regarding Project ELMO; Defendant's emails regarding the foregoing internally and to/from third parties; Defendant's use of such information in attracting investors to the planned incorporation of XYZ Industries; the source and amount of investments obtained for XYZ Industries, along with Defendant's business plan(s) regarding same.

2. Defendant's proposal: Plaintiff's Minutes of Board meetings regarding anything relative to Project ELMO, including plans regarding abandoning that project; emails of Executive Committee employees regarding those same subjects.

C. Discovery Cutoff. All discovery commenced in time to be completed by January 12, 2017.

D. Discovery Amount.

1. Maximum of 25 interrogatories, including subparts, by each party to the other party.

2. Maximum of 25 requests for admission, including subparts, by each party to the other party.

3. Maximum of 5 depositions by Plaintiff and 5 by Defendant. Each deposition is to be limited to a maximum of three hours unless extended by agreement of the parties.

E. Reports from retained experts under Fed. R. Civ. P. 26(a)(2) [or CR 26(a)(2)] due:

from Plaintiff by November 15, 2016.

from Defendant by November 15, 2016.

F. Other Items.

1. The parties do not request a conference with the Court before entry of the Scheduling Order.

2. The parties request a pretrial conference in December 2015.

3. Plaintiff is allowed until May 12, 2016, to join additional parties and until July 15, 2016, to amend the pleadings.

4. Defendant is allowed until May 20, 2016, to join additional parties and until July 15, 2016, to amend its pleadings.

5. All potentially dispositive motions should be filed by December 1, 2016.

6. Settlement may be enhanced by use of the following alternative dispute resolution procedure: appointment of a Special Master for any discovery disputes per Fed. R. Civ. P. 53 [or CR 53].

7. Final lists of witnesses and exhibits under Fed. R. Civ. P. 26(a)(3) [or CR 26(a)(3)] should be due:

from Plaintiff by November 15, 2016.

from Defendant by November 25, 2016.

8. The parties have 10 days after service of final lists of witnesses and exhibits to list objections under Fed. R. Civ. P. 26(a)(3) [or CR 26(a)(3)].

9. The case should be ready for trial by January 4, 2017, which at this time is expected to take approximately three days.

Dated this 14th day of March, 2016.

[signatures and contact information of counsel] ■

Larry G. Johnson is a lawyer in Newcastle, and has been a member of the Washington bar since 1974. He recently served on the E-Discovery Subcommittee of the WSBA Escalating Cost of Civil Litigation (ECCL) Task Force. Besides being a litigator, for the past 20 years, he has served as a consultant and expert witness in e-discovery matters. He does business as Electronic Data Evidence (www.e-dataevidence.com).

[1] (3) Discovery Plan. A discovery plan *must state the parties' views and proposals* on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), *including a statement of when initial disclosures were made or will be made*;

(B) the subjects on which discovery may be needed, when discovery should be completed, and *whether discovery should be conducted in phases* or be limited to or focused on particular issues;

(C) *any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced*;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). (emphasis added)

[2] CR 26(f), not as robust as Fed. R. Civ. P. 26(f), provides in part:

Discovery Conference. At any time after commencement of an action the court *may direct* the attorneys for the parties to appear before it for a conference on the subject of discovery. The court *shall do so upon motion* by the attorney for any party *if the motion includes*:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion *has made a reasonable effort to reach agreement with opposing attorneys* on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan *if a plan is proposed* by the attorney for any party. (emphasis added)

So, while the federal rule requires a "meet and confer" followed by a pretrial conference to devise a discovery plan, it appears that process is optional in our state courts. The point of this article, however, is to try and convince you to take the opportunity proactively via 26(f) anyway to put reasonable controls on discovery before it even starts. I don't think it's a coincidence that lawyers who can control the flow of a case are often the ones who win it.

[3] The phrase "and the parties" was added in recent federal rules changes to emphasize the point that litigants have responsibilities in this regard along with the courts.