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The Courts Speak

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Agenda

- The Latest State Rules and Regulations
- Applying the Federal Rules of Civil Procedure to E-Discovery
- The Latest Federal and State Case Law

New Mexico State Rules

- The New Mexico state rules of civil procedure primarily dealing with electronic discovery are:
 - 1-016 NMRA Pretrial conferences; scheduling; management
 - 1-026 NMRA General provisions governing discovery.
 - 1-034 NMRA Production of documents and things and entry upon land
 - 1-037 NMRA Failure to make discovery; sanctions.
- The rules were amended based on the recommendations of the New Mexico Rules of Civil Procedure for the District Courts Committee in May of 2009, and subsequently were adopted by the Supreme Court of New Mexico.

Scheduling Orders

■ NMRA 1-016(B)

- B. Scheduling and planning. Except in categories of actions exempted by local district court rule as inappropriate, the judge may, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time:
 - (1) to join other parties and to amend the pleadings;
 - (2) to file and hear motions; and
 - (3) to **complete discovery**.

The scheduling order shall also include:

- (4) provisions for **disclosure or discovery of electronically stored information**;
- (5) any agreements the parties reach for asserting **claims of privilege or of protection** as trial preparation material after production;
- (6) the **date or dates for conferences** before trial and a final pretrial conference;
- (7) a trial date not later than eighteen (18) months after the date the scheduling order is filed; and
- (8) **any other matters** appropriate in the circumstances of the case.

The pretrial **scheduling order shall be filed as soon as practicable but in no event more than one hundred twenty days after filing the complaint**. A **scheduling order shall not be modified except by order of the court** upon a showing of good cause.

Scope of Discovery & Limitations

- NMRA 1-026(B)

- (1) Parties may obtain discovery of **any information, not privileged**, which is **relevant to the subject matter** involved in the pending action. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence...
- (2) Limitations
 - (a) the discovery sought is **unreasonably cumulative or duplicative**, or is **obtainable from some other source that is more convenient, less burdensome, or less expensive**.
 - (b) the party seeking discovery has **had ample opportunity by discovery to obtain the information** sought; or
 - (c) the **burden or expense of the proposed discovery outweighs its likely benefit**, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Parties May Obtain Discovery of...

- NMRA 1-026(B)

- (3) Witnesses and exhibits. Parties may obtain discovery of the identity of each person expected to be called as a witness at trial, the subject matter of the witness's expected testimony and the substance of the witness's testimony. Parties may also discover the name, address and telephone number of each individual likely to have discoverable information that another party may use to support its claims or defenses as well as the subjects of such information. Parties may obtain a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that a party may use to support its claims or defenses.
- (5) Trial preparation materials. Subject to the provisions of Subparagraph (6) of this paragraph, a party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable under Subparagraph (1) of this paragraph and prepared in anticipation of litigation or for trial by or for another party or that party's representative... only by a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that they party is unable without undue hardship to obtain the substantial equivalent of the information by other means.

Claims of Privilege, “Claw Back”

- NMRA 1-026(7)
 - (a) When a party **withholds information...by claiming that it is privileged...the party shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.**
 - (b) If **information is produced in discovery that is subject to a claim of privilege...the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved...**

Discovery Conference

- NMRA 1-026(F)
 - At any time the court may direct the attorneys for the parties to appear for a discovery conference. The court shall also conduct a discovery conference upon motion by any party, unless the court determines that good cause exists not to conduct such a conference. Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action...

Production

- NMRA 1-034

- (A) Scope. Any party may serve on any other party a request:
 - (1) **to produce** and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test or sample any designated documents, **electronically stored information** any tangible things which constitute or contain matters within the scope of Rule 1-026 NMRA and **which are in the possession, custody or control of the party upon whom the request is served**;
- (B) Procedure....**The request may specify the form or forms in which electronically stored information is to be produced....**

Unless the parties otherwise agree, or the court otherwise orders,

- (1) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;
- (2) **if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained** or in a form or forms that are reasonably usable; and
- (3) **a party need not produce the same electronically stored information in more than one form.**

Failure to Make Discovery; Sanctions

- NMRA 1-037
 - (A)(2) ...if a party, in response to a request for inspection submitted under Rule 1-034 NMRA, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request...
 - (3) For purposes of this paragraph an evasive or incomplete answer is to be treated as a failure to answer
 - NMRA 1-037 Committee Commentary for 2009 amendments-
“Regardless of the form of information sought within the context of discovery, a bad faith approach to discovery warrants the imposition of sanctions. See *United Nuclear Corp v. General Atomic Co.*, 96 N.M. 155, 241, 629 P.2d 231 317 (1980)”

Applying the Federal Rules of Civil Procedure to E-Discovery

- The Federal Rules of Civil Procedure primarily dealing with electronic discovery are:
 - 16 Pretrial Conferences; Scheduling; Management
 - 26 Duty to Disclose; General Provisions Governing Discovery
 - 34 Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
 - 37 Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
- The rules were amended based on the recommendations of the New Mexico Rules of Civil Procedure for the District Courts Committee in May of 2009, and subsequently were adopted by the Supreme Court of New Mexico.

Initial Disclosures

- Fed. R. Civ. P. 26(a)(1)(A)(ii)
 - a copy—or a description by category and location—of **all documents, electronically stored information, and tangible things** that the disclosing party has in its **possession, custody, or control** and **may use** to support its claims or defenses, unless the use would be solely for impeachment;
 - Data Map
 - Timing: provided at the 26(f) Conference or within 14 days of the 26(f) Conference (see Fed. R. Civ. P. 26(a)(1)(C)).
- Fed. R. Civ. P. 26(a)(1)(E)
 - A party must make its initial disclosures based on the information then reasonably available to it. **A party is not excused from making its disclosures because it has not fully investigated the case** or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.
 - Early Case Assessment

Scope of Discovery

- Fed. R. Civ. P. 34(a)(1)(A)
 - **any designated documents or electronically stored information**—
including writings, drawings, graphs, charts, photographs, sound
recordings, images, and other data or data compilations—stored in
any medium from which information can be obtained either directly
or, if necessary, after translation by the responding party into a
reasonably usable form;

Limitations on ESI

- Fed. R. Civ. P. 26(b)(2)(B)
 - A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible because of undue burden or cost**. On motion to compel discovery or for a protective order, the party from whom discovery is sought must **show that the information is not reasonably accessible** because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.
 - Cost/effort metrics

Additional Limitations on ESI

- Fed. R. Civ. P. 26(b)(2)(C)
 - On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
 - (i) the discovery sought is **unreasonably cumulative or duplicative**, or **can be obtained from some other source that is more convenient, less burdensome, or less expensive**;
 - (ii) the party seeking discovery has had **ample opportunity** to obtain the information by discovery in the action; or
 - (iii) the **burden or expense of the proposed discovery outweighs its likely benefit**, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.
 - Cost-sharing arrangements

Inadvertent Disclosure of Priv. Docs

- Fed. R. Civ. P. 26(b)(5)(B)
 - If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.**
 - Claw back agreements under Fed. R. Evid. 502(d)
 - Effective document review and privilege checks

Discovery Plan

- Fed. R. Civ. P. 26(f)(3)
 - Changes to timing, form, or disclosure requirements
 - Subjects of discovery
 - E-discovery issues, form of production
 - Privilege claim issues, claw back agreements
 - Any other orders that should issue
- Come prepared to strategically tailor discovery

Form of Production

- Fed. R. Civ. P. 34(D) & (E)
 - Requesting party can request a format
 - Responding party has the opportunity to object to the requested form and inform the requester of the form it intends to use for the production as long as it is in a reasonably usable form.
 - Unless stipulated in court order, the documents must be produced in a format as they are kept in the usual course of business or in a reasonably usable form, always organized by request.
- Format for producing data should be captured in the 26(f) Discovery Plan
- Common production formats
 - native files (no bates), searchable PDF, load file & TIFF images

Safe Harbor

- Fed. R. Civ. P. 37(e)
 - Failure to Provide Electronically Stored Information. Absent exceptional circumstances, **a court may not impose sanctions** under these rules on a party for failing to provide electronically stored **information lost as a result of the routine, good-faith operation** of an electronic information system.
- Records retention schedules

Court Order

- Fed. R. Civ. P. 16(b)(3)(B)
 - The scheduling order may: (i) modify the **timing of disclosures** under Rules 26(a) and 26(e)(1); (ii) modify the **extent of discovery**; (iii) provide for disclosure or **discovery of electronically stored information**; (iv) include any agreements the parties reach for asserting **claims of privilege or of protection** as trial-preparation material after information is produced; (v) set **dates** for pretrial conferences and for trial; and (vi) include **other** appropriate matters.
- Capture all agreements in the 16(b) order

Anticipated Changes to the Federal Rules of Civil Procedure

- Goals: Improve disposition of civil actions via more cooperation, proportionality in procedure use, and hands-on judicial management. Clear up circuit split regarding sanctions. Rules that will likely change that we have discussed today: Rules 1, 16, 26, 34, 37
- Move 26(b)(2)(C)(iii) into 26(b)(1) to highlight proportionality, and cut out some current sections of 26(b)(1).
- 37(e)(1) provides that the court, “upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice.”
- Proposed Rule 37(e)(2) permits adverse inference instructions only on a finding that the party “acted with the intent to deprive another party of the information’s use in the litigation.”

Differences Between Federal & State

- **No automatic initial disclosures** in the New Mexico state rules (no equivalent to Fed. R. Civ. P. 26(a)(1)).
- **No required meet and confer** prior to the 16(B) scheduling meeting in the New Mexico state rules (no equivalent to Fed R. Civ. P. 26(f)).
- **No explicit safe harbor** for information lost as result of the routine deletion of electronically stored information (no equivalent to Fed. R. Civ. P. 37(e)). The Committee Commentary for the 2009 Amendments states “The committee is of the view that nothing in the nature of discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules.”
- The **judge may issue a scheduling order** under Rule 1-016(B) NMRA. Under the federal rules, with few exceptions, the judge or magistrate *must* issue a scheduling order under Fed. R. Civ. P. 16(b).
- **No explicit limits on the discovery of electronically stored information** in New Mexico. The New Mexico Rules of Civil Procedure do not contain the limits imposed in Fed. R. Civ. P. 26(b)(2)(B). Instead the Committee Commentary for the 2009 Amendments states that “discovery of electronically stored information should be subject to the same provisions in these rules for motions to compel discovery and motions for protective orders that currently govern the discovery of non-electronic information.” Although not explicitly addressing ESI, Rule 1-026(B)(2) addresses many of the limitations generally.

Recent Case Law

- Scope of Search
- Legal Holds
- Sanctions
- Computer Assisted Review

Recent Case Law- Scope of Search

I-Med Pharma Inc. v. Biomatrix, Inc., 2011 WL 6140658 (D.N.J. Dec. 9, 2011)

- Two sides agree to search protocol, Plaintiff performs searches and has “64,382,929 hits” representing an “estimated 95 million pages of data”. Plaintiff subsequently seek relief.
 - Court grants relief, but scolds the Plaintiff for not performing due diligence before entering into such a poor agreement.
 - Court provides 5 factors when considering a search protocol:
 - (1) the **scope of documents searched** and whether the **search is restricted to specific computers**, file systems, or document custodians;
 - (2) any **date restrictions** imposed on the search;
 - (3) whether the search terms contain proper names, uncommon abbreviations, or other **terms unlikely to occur in irrelevant documents**;
 - (4) whether **operators** such as “and”, “not”, or “near” are used to restrict the universe of possible results;
 - (5) whether the **number of results obtained could be practically reviewed** given the economics of the case and the amount of money at issue”

Legal holds, sanctions

United States of America, ex rel. Baker v. Community Health Systems, Inc., CIV 05-279 WJ/ACT (D.N.M 2012).

- Qui tam case alleging Medicaid fraud based on violations of the False Claims Act. Defendant moves for sanctions against the government due to the destruction of documents and Magistrate Judge issued findings that the government “failed to issue a timely and an adequate litigation hold, and recommended sanctions”. Government objects and Federal Judge affirms the Magistrate Judge’s findings.

Legal holds, sanctions

- Government did not issue a litigation hold internally until a couple of years after engaging in negotiations with the defendants. Key individuals from the Centers for Medicare and Medicaid services retired and key e-mail and documents were lost.
- Court reminds the government that the duty to preserve documents arises once a party “reasonably anticipates litigation” and cites *Zubulake v. UBS Warburg*. From the same case, the court also cites “Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.”
- Court ultimately approves sanctions that required the government to produce privileged documents that discussed key evidence and e-mail from or to key individuals, pay defendants attorney fees and costs associated with the sanction motion, and show why a forensic search shouldn’t be performed at their expense to try and locate lost data.

Atlas Resources v. Liberty Mutual, CIV 09-1113 WJ/KBM

- Business dispute results in three motions for discovery sanctions
 - Liberty Mutual did not respond to some requests for production, and Atlas had to get a motion to compel to gain any hope of a response. Liberty Mutual eventually responded, but produced over 14,000 documents in the TIF format “without any indication as to the claim file with which each document was associated. Moreover, without the use of a specialized software program, [the] TIF files are not searchable”
 - Judge ordered Liberty to produce the information “in hard copy, in separate folders, indexed and labeled all at Liberty’s expense”
 - Atlas received attorney’s fees of \$1,912.00 in response to their first motion for sanctions.

Sanctions

- Second and third motions for sanctions were based on additional issues resulting from incomplete, irrelevant, and tardy productions of electronically stored information.
 - LM neglected to provide responsive e-mail from one of its Vice Presidents due to an error made in their document review platform.
 - LM failed to locate relevant information within their proprietary software until the last moment before a deposition that had to be rescheduled, and then ultimately dumped 28,000 pages of information on the Plaintiff
 - LM produced legal files that were found to be relevant to the dispute a year after the Court ordered production.
- “Parties cannot be permitted to jeopardize the integrity of the discovery process by engaging in halfhearted and ineffective efforts to identify and produce relevant documents”.

Sanctions

- Court awarded the Plaintiff Atlas all of its attorney fees and costs incurred in preparing and defending their second and third sanction motions, with the payment to be split by the Defendant and Defendant's attorneys.
- The court also allowed the Plaintiff to recover costs and fees to obtain the production of information that was delinquent and to cover costs for any additional depositions needed to ensure that they received all relevant information.
- Finally, the court awarded a fine equal to 30% of the recoverable attorney fees tied to the effort spent to obtain the information from the proprietary software and legal files to Atlas.

Computer Assisted Review

Da Silva Moore, et al., v. Publicis Groupe & MSL Group, 11 Civ. 1279 (ALC)(AJP).

- Gender discrimination employment case involving approximately three million electronic documents that needed to be culled down and reviewed. The parties could not agree on a protocol for using predictive coding in the case and turned to the court for guidance
- Judge Peck states: “computer assisted-review is an acceptable way to search for relevant ESI in appropriate cases”.
- The Judge then goes on to explain that if there were challenges to the results of the computer-assisted coding, he would review the process and the results to determine if the approach was acceptable on a per case basis.

Computer Assisted Review in NM

- ***The New Mexico State Inv. Council v. Bland* 2014 WL 772860 (N.M. Dist. Feb. 12, 2014).**
 - Accusations of a pay-to-play scheme with state investment funds leads to a qui tam claim and New Mexico Attorney General investigation. Court entered findings of fact and conclusions of law regarding settlement agreements between the plaintiff and the various defendants. Predictive Coding
 - Computer assisted review technology was employed to assist the plaintiffs in their efforts to “identify and evaluate evidence that could support claims for recoveries against various individual[s] and entities” while reviewing 2.8 million pages of documents and data from file servers, e-mail servers, network share locations, etc.
- Computer assisted review “enabled the reviewers on the document analysis teams to work more efficiently with the documents and identify potentially relevant information with greater accuracy than standard linear review.”

Questions and Answers

