Protocol for Discovery of Electronically Stored Information

By Michael D. Berman and The Honorable Paul W. Grimm[1]

Shortly after the Federal Rules of Civil Procedure were amended on December 1, 2006, the United States District Court for the District of Maryland posted a "Suggested Protocol for Discovery of Electronically Stored Information" (the "Protocol") on the Court's web site.[2] The Protocol was the product of many months of work by a joint committee of the Bar and the Court. As noted on the web site, the drafting Committee also received input from technical consultants. The Court's web site notes that the Protocol is a working model that has *not* been adopted by the Court. Instead, the Protocol is intended to serve as a tool to assist counsel in resolving disputes in a new, rapidly-unfolding field. The Protocol may serve as the framework for developing Local Rules in the future. To this end, the Court has invited comments and suggestions from the Bar.[3]

The Protocol opens with a prefatory section noting that its purpose is to assist counsel in resolving disputes over Electronically Stored Information ("ESI"). It clearly states that the Protocol provides a framework, but not an inflexible checklist, and that the Protocol may be inapplicable, in whole or in part, to a specific case. The goal of the Protocol is to assist counsel in resolving disputes over ESI early and informally, without Court involvement.

The Scope section of the Protocol states that the Protocol applies to all ESI issues, including those presented by subpoenas, and it defines terms such as "Meta-Data," "Native Files," and "Static Images," all of which are pertinent to the duties to preserve and produce ESI. It provides that, absent agreement, ESI should be produced as a Static Image. It also provides that, if "load files," such as those used by common litigation support programs, were created by the producing party, the load files should also be produced to the requesting party.

Fed. R.Civ.P. 26(f) provides for a Conference of Parties to discuss ESI issues early in the case. While a Rule 26(f) Conference of Parties is not mandatory, the Protocol encourages litigants to conduct such a conference, even if not ordered by the Court. It recommends, if practicable, an in person conference, and details the form of the report that should be made to the Court. It provides that, after the Conference, the parties should identify areas of agreement, disagreement, and any need for Court intervention. It also provides detailed guidance on "clawback," and other, agreements that may be reached in such a Conference. Specifically, it alerts counsel to the privilege waiver problems and solutions discussed in *Hopson v. Mayor and City Council of Baltimore,* 232 F.R.D. 228 (D.Md. 2005).

Recognizing that a Conference of the Parties may be of reduced or no value absent prior preparation and planning, the Protocol not only suggests such planning, but also sets out a framework for a pre-Conference exchange of information. For example, the Protocol suggests a pre-Conference discussion of who will participate in the Conference and sets out a framework to resolve disputes over whether a party should have an information technology specialist participate in the Conference.

The Protocol provides detailed information regarding how counsel should prepare for a Conference of Parties. For example, it outlines how counsel may communicate to clients, and discuss with each other, the scope of a "litigation hold." It provides a detailed framework for avoiding errors that may lead to spoliation issues. To give only one example, the Protocol notes that counsel should consider whether the operation of File and System Maintenance Procedures, such as "janitor" programs that compress, defragment, or maintain computers, need to be suspended. The Protocol also recommends that a technical representative be designated as the ESI Coordinator. The Protocol provides a comprehensive list of the places that ESI may be stored, so that, in preparing for the Conference of Parties and complying with the common law duty to preserve ESI, counsel do not overlook, for example, obsolete or "legacy" systems, event data recorders, historical website information, third-party vendors, and other sources of ESI.

The Protocol provides a framework of topics to discuss at a Conference of Parties. Counsel are directed to topics such as the anticipated scope of requests for, and objections to, production of ESI. The Protocol suggests that counsel discuss the form of production, *e.g.,* Native File, Static Image, or hard copy. It provides that, if the parties are unable to agree on the format of production, ESI should be produced as Static Images. It also provides the producing party with guidance for complying with each type of production, suggesting that the Native Files be maintained in their original form. The Protocol gives detailed guidance regarding the production of Meta-Data, when that data is produced (see below). It suggests discussion of preservation agreements and "clawback" agreements, as well as designation of some ESI as not reasonably accessible without undue burden or cost. It provides guidance regarding who should bear the cost of producing different types of ESI. Counsel are also encouraged to discuss methods of "bates numbering" ESI, and provided suggested sample identification formats.

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In addition to those ground-breaking suggestions, the Protocol recommends methods for early depositions of information systems personnel that will permit the producing party to enforce limitations on the scope of such depositions and suggests discussion of two-tier discovery. It also provides that use of an expert at a Conference of Parties does not, in and of itself, identify that person as a "testifying" expert under Fed.R.Civ.P. 26(b)(4)(A, B).

Finally, the Protocol addresses two other important issues. First, the Protocol provides a framework for asserting, under Fed.R.Civ.P. 26(b)(2)(B), that some ESI is not reasonably accessible because of undue burden or cost. It expressly suggests that boilerplate or conclusory objections are unsatisfactory. It recommends that the party raising this issue "should be prepared to specify facts that support its contention." Second, the Protocol addresses the costly and sensitive issue of the production of Meta-Data. It notes that production of Meta-Data "may impose substantial costs" on litigants. Noting that Meta-Data is part of ESI, but - - in certain circumstances - - may not be reasonably subject to discovery, the Protocol states that Meta-Data may be subject to cost shifting under Fed.R.Civ.P. 26(b)(2)(C).

The Protocol notes that Meta-Data may be System Meta-Data, Substantive Meta-Data, or Embedded Meta-Data. System Meta-Data is automatically generated by a computer, such as the date a document was created. Substantive Meta-Data is data that reflects edits that a user made in a document. Because it is less costly, at least from an attorney review perspective, to produce System Meta-Data, production of the former is encouraged, subject to some limitations, while production of the latter is not routinely encouraged. The Protocol recognizes a subset of Meta-Data called Embedded Meta-Data. This data consists of items such as formulae in spreadsheets or hyperlinks that refer to external files. Under the Protocol, Embedded Meta-Data should be produced as a matter of course.

The Protocol represents a comprehensive effort to provide a framework for handling ESI in litigation. It recognizes that there is no "one size fits all" approach to ESI. It, therefore, suggests many approaches to litigation-related issues. Aspects of the Protocol may be criticized and it was created only after substantial debate and consideration. Events may prove that there is a need to revisit portions of it, and comments are invited by the Court. Nevertheless, the Protocol provides guidance to counsel in handling this new aspect of litigation and it provides a framework for resolving disputes in a speedy and inexpensive manner.

Footnotes

[1]Judge Grimm is the Chief United States Magistrate Judge. Mr. Berman is the Deputy Chief of Civil Litigation in the Office of the Maryland Attorney General. The views expressed in this article are those of the authors, and not the Court or the Office of the Attorney General.

[2] http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf.

[3]Comments should be sent to mdd_voyager@mdd.uscourts.gov.

Litigation Section Council Meetings and Regional Programs 2007-2008

September 20, 2007	Regular Meeting – Baltimore
October 18, 2007	Meeting/Joint Regional Program with Tax Law Section – Howard County
November 15, 2007	Regular Meeting – Anne Arundel County
January 17, 2008	Regular Meeting – Baltimore
February 21, 2008	Meeting/Joint Regional Program with Appellate Practices Committee – – Frederick County
March 20, 2008	Meeting/Joint Regional Program with Young Lawyers Section – TBD
April 17, 2008	Meeting/Joint Regional Program with Criminal Law and Practice Section – Baltimore
May 22, 2008	End of Year Dinner — TBD
June 2008	Annual Meeting