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STRATEGY

Under the new federal e-discovery regime, it is fair game for parties to expect to talk about electronic discovery issues—everything from preservation through production—early in the process. In fact, this happens before a single document is exchanged. But is it also fair game for parties to expect to submit to a 30(b)(6) deposition designed to quiz them on every step taken to collect and produce their documents either during or after the process? This is the so-called “offensive e-discovery deposition,” named for its tactical nature rather than expressing a value judgment about its worth (though depending on your perspective, you may find it odious indeed).

Offensive E-Discovery Depositions: Is There a Defense?

By FARRAH PEPPER AND MATT KAHN

The offensive e-discovery deposition is a tool used to determine all steps your opponent took to preserve, collect, review and produce documents. It is not the same as a deposition taken relating to parties’ information technology systems, which is taken to facilitate document discovery and has long been recognized as valid by the courts. See, e.g., *In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 214 (1993)

(holding that “Plaintiffs’ 30(b)(6) depositions to identify how data is maintained and to determine what hardware and software is necessary to access the information are preliminary depositions necessary to proceed with merits discovery”). To use a hard-document analogy, the offensive deposition does not concern basic facts such as where the file cabinets are located and how many there are, but rather who looked through which file cabinets when, and using what criteria.

Pros. Taking an offensive e-discovery deposition can be extremely valuable. First and foremost, you get an opportunity to ascertain whether you really have been provided with all responsive documents in your opponent’s possession, custody and control. Second, the specter of this deposition may frighten and/or distract your opponent, providing you with a strategic advan-

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tage. Third, in the event the deposition reveals that your opponent has not lived up to her discovery obligations (e- or otherwise), you will be able to move to compel further production to cure these failings and possibly obtain sanctions against your opponent.

Cons. On the flip side, obviously you would prefer to avoid being subjected to an inquisition into your own electronic discovery conduct, regardless of how compliant you may have been. Responding to an offensive e-discovery request is an unwelcome distraction from the substance of your case, even if your have executed the perfect document production and opposing counsel will learn nothing helpful from the deposition.

Clearly, the ability to depose your adversary on her discovery practices can have a major impact on a case. But when, exactly, are you permitted to pursue such a deposition? What rules, if any, give you this right? And, conversely, when can you resist your opponent's attempts to put your discovery conduct under a microscope?

Some commentators seem to take for granted that these depositions are automatically available in any litigation. One electronic discovery handbook advises lawyers to "identify the individual responsible for searching for, locating, and producing electronic evidence," and to take that person's deposition to "[d]etermine what that individual did to comply with your opponent's discovery obligations." KELLNER, 2 MASSACHUSETTS DISCOVERY PRACTICE § 20.4.3⁹(2005). Another author urges litigants to use depositions "[t]est the adequacy of your opponent's [electronic] search efforts and production." Arent, et al., 19 Santa Clara Computer & High Tech. L.J. 131, 172 (2002).

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What these authors and others do not explain, however, is how such depositions are proper under the Federal Rules of Civil Procedure. Despite their recent revision to address issues relating to electronic discovery, the Rules do not address whether and when a party may take deposition testimony regarding an opponent's collection, review and production of electronic materials.

Case Law. Nor have the courts provided much guidance on this issue. Very few reported decisions address whether and when a party may be deposed about its discovery practices. While a handful of courts have allowed these depositions to proceed, in most instances they have only done so after a predicate showing of discovery misconduct or noncompliance.

For example, in *Jacobson v. Starbucks Coffee Co.*, 2006 WL 3146349 (D. Kan. Oct. 31, 2006), the plaintiff sought a deposition into the defendant's discovery prac-

tices because of the defendant's discovery misconduct, including its insufficient document production. The court "agree[d] that defendant's efforts to search for documents responsive to plaintiff's production requests are highly suspect," and "authorize[d] plaintiff to conduct a Rule 30(b)(6) deposition of Starbucks to develop facts and information concerning defendant's efforts to locate responsive documents." *Id.* at *2. The court imposed the costs of the deposition on the defendant. *Id.*

The court came to a similar conclusion in *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 2007 WL 684001 (D. Colo. Mar. 2, 2007). There, the parties had been fighting over whether the defendants had satisfied their discovery obligations. The plaintiff contended that the defendants had not produced certain responsive documents; the defendants claimed those documents did not exist. The court concluded that it did not have a sufficient factual record to address these issues, so it "permitted Plaintiff to take a Fed.R.Civ.P. 30(b)(6) deposition to explore the procedures that Land O'Lakes employed to identify, preserve and produce responsive documents . . ." *Id.* at *4.

Discover Financial Services, Inc. v. Visa U.S.A., Inc., 2006 WL 3230157 (S.D. N.Y. Nov. 8, 2006) involved a slightly different situation, but the court there also permitted the discovery process deposition to proceed. In that case, American Express and Wells Fargo had engaged in an ongoing dispute over the sufficiency of Wells Fargo's document production. Wells Fargo's outside counsel had provided "lengthy letters" to American Express giving "comprehensive answers" to questions about Wells Fargo's document collection and production practices. *Id.* at *1. Nevertheless, the court ordered Wells Fargo to provide a 30(b)(6) witness for a limited deposition into its document collection and production conduct. *Id.* at *2. As in *Jacobson* and *Cache La Poudre*, the court permitted the deposition because discovery misconduct was at issue.

In one case, however, a court permitted a discovery process deposition in the absence of a showing of misconduct. In *Doe v. District of Columbia*, 230 F.R.D. 47 (D.D.C. 2005), the plaintiff sought a deposition on the defendant's "document retention policies and procedures, and the process used to collect the documents that have been produced or will be produced" in the litigation. *Id.* at 55. The defendant resisted on the grounds that the deposition "violates the deliberative process and attorney-client privileges." *Id.* The court allowed the deposition to proceed. The court reasoned that "Rule 26(b)(1) may be construed to allow for discovery of document production policies and procedures," and therefore held that the plaintiff could "request information as to the 'existence,' 'custody' or 'condition' of documents, thereby establishing defendant's policies and procedures of document retention and production."¹ *Id.* at 56 (quoting Fed.R.Civ.P. 26(b)(1)).

Another court in a similar scenario to *Doe* came to the opposite conclusion. A party in *In re Honeywell International, Inc. Securities Litigation*, 230 F.R.D. 293 (S.D. N.Y. 2003) requested production of document retention policies and documents relating to discovery efforts. The court denied the request for these materials,

¹ Federal Rule of Civil Procedure 26(b)(1) allows discovery of, inter alia, "the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things."

on the grounds that “Plaintiffs lack a concrete basis for this request.” Id. 302. In other words, in the absence of a showing (or at least allegations) of discovery misconduct, a party in the ordinary course of litigation is not entitled to discover another party’s discovery practices.

Perhaps the most detailed analysis of this issue to date comes from a Texas appellate court that refused to allow a discovery-process deposition to proceed. In *In re Exxon Corp.*, 208 S.W.3d 70 (Tex. Ct. App. 2006), the court below had granted a party the right to take a deposition regarding discovery practices. The appellate court framed the issue as follows: “[W]e must decide whether the trial court may compel a party to present a deponent to testify as to the efforts taken to search for documents requested in requests for production that have been previously responded to . . .” Id. at 71. The court observed that there was “no concrete evidence of discovery abuse in this case,” and that there was no showing that would “justify an investigation into the relators’ discovery compliance.” Id. The court held that the lower court had erred, and that allowing the deposition would provide “a license to engage in a fishing expedition regarding matters either privileged or not relevant to the subject matter of the pending action.” Id.

Much of the *Exxon* court’s holding was based on privilege, as opposed to relevance. “This subject necessarily and almost exclusively concerns the mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives and

consists of the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories subject to protection as work product and core work product.” Id. at 75 (quotations and citations omitted). The court noted that this is especially the case because the person most knowledgeable about these issues almost always will be the party’s attorney. Id. at 76. The court did suggest, however, that such a deposition might be proper if it had been established that the party’s discovery efforts were lacking in some respect. Id.

The Bottom Line. So when can you take this kind of deposition? And when can you resist one being taken of your client? As the discussion above makes clear, there is no set answer to this question. Nevertheless, it does appear that courts are more willing to allow discovery-process depositions where there has been some showing, or at least allegations, of discovery misconduct or non-compliance. Therefore, if you want to depose your opposition on its discovery practices, you would do well to first build a record of its discovery failings— inadequate productions, missed deadlines, spoliation, and the like.

Conversely, if you want to avoid being subjected to this type of deposition, your best defense is making sure that your own e-discovery hands are clean. As developed in *Exxon* (and, to a lesser extent, *Honeywell*), some courts are wary of opening this avenue in a run-of-the-mill case.