

THE NEW FEDERAL ELECTRONIC DISCOVERY RULES

The rules of procedure that govern the practice of law in the nation's federal courts were adopted in 1937. The rules worked easily in a business environment where correspondence and business documents were prepared on manual typewriters and copies made via carbon paper. Document storage was relegated to metal file cabinets and cardboard banker boxes.

Over the years, as technology changed; so, too, did document production, record storage and retention practices. Document discovery in litigation became more complex, time-consuming and expensive. Responding to document requests often meant endless hours spent by counsel and staff pouring through paper files and rummaging through stored boxes in off-site locations looking for documents.

American business began its move into the computer age, the federal discovery rules applicable to paper documents no longer seemed adequate to deal with real life discovery issues.

In 1970, the Supreme Court amended the Federal Rules of Civil Procedure to clarify the issue of discoverability of information stored in computers. The Supreme Court stated, "[T]he discovery principals that apply to paper-based records should apply with equal force to electronic-based records." "Digital Discovery: State of the Law," The Berkman Center for Internet and Society at Harvard Law School, <http://cyber.law.harvard.edu>. With this pronouncement, it was clear that the civil rules

would be broadly construed to cover the developing electronic record discovery.

Cases construing the 1970 modifications to the rules of procedure make clear that traditional discovery tenets set forth in Rules 26 and 34 apply with equal force to any electronic-based records. See Anti-Monopoly, Inc. v. Hasbro, 1995 WL 649934 (S.D.N.Y. Nov. 3 1995); Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7th Cir. 1993); National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257 (E.D. Pa. 1980).

No other modifications to accommodate electronic discovery were made since 1970. Some rule commentators noted that the last time the federal rules were modified, 8-track tapes were the “hot technology.” In the ensuing 36 years from the 1970 amendment, technology changed at the speed of light. Computers which were once room-size behemoths utilized by the likes of IBM, universities and government are now carried in one’s briefcase, purse or strapped to one’s belt. Craig Ball, *Hitting the High Points of New E-Discovery*, Law Practice Today, Oct. 2006, <http://www.abanet.org>.

Technological advances we take for granted today could not have been fathomed in 1970. Cell phones, Blue Tooth technology, Internet access, PDAs, home computers, wireless technology, and the ubiquitous laptop have necessarily required us to re-think issues on electronic discovery. It was clearly time for the civil rules to be modified to take into account how technology changed record keeping and

retention.

In 1996, the Civil Rules Advisory Committee began the onerous task of collecting data and soliciting recommendations for revising the rules of civil procedure to accommodate the new electronic technology of the twenty-first century, now known as “E-discovery.” In 2000, the Advisory Committee, with the assistance of think tanks such as the Sedona Conference, began research on computer-based discovery and the problems attendant to its production.¹

By August 2004, the Advisory Committee published proposed amendments and invited comments. Following consideration of extensive comments, the United States Supreme Court approved the amendments, with an effective date of December 1, 2006. Thus, the new rules on E-discovery are in effect.

The amendments specifically address discovery in federal court litigation of electronically stored information. In particular, amended Rules 16, 26, 33, 34, 37 and 45 impose new obligations on parties, counsel and courts to consider and discuss and attempt to agree on a process to discover electronically stored information.

¹The Sedona Conference is a research and educational institute dedicated to advancement of law and policy in the areas of antitrust, complex litigation and intellectual property rights. It sponsors conferences for the nation’s leading jurists, lawyers and experts that allow them to examine cutting edge issues on law and policy. In 2003, the Sedona Conference was a leading participant in the Advisory Committee’s research on E-discovery.

Fed. R. Civ. P. 16

Rule 16 was amended to specifically authorize district judges and magistrate judges to include in the Rule 16 scheduling order provisions for the disclosure of electronically stored information, as well as any agreements reached by the parties for asserting claims of privilege regarding electronically stored information. The specific modifications are modest, but clearly show that this E-discovery is firmly ensconced in the civil rules. The amendments appear in Rule 16(b)(5) and 16(b)(6).

Fed. R. Civ. P. 26

The major modifications to E-discovery are set out in Rule 26. These amendments introduce a new phrase to the American legal lexicon--“electronically stored information,” or “ESI.” That term is broad enough to cover any information stored on computers, tapes, CD disks, the Internet, office or personal electronic mail, PDAs’s and other electronic devices.

E-records now account for about a startling 95% of all information created world-wide. Thus, it is likely E-discovery will be a factor in any federal civil litigation. Craig Ball, *Hitting the High Points of the New EDD Rules*, Legal Technology, 12/27/06, <http://www.law.com>. The definition of “document,” which now includes ESI, was left intentionally broad to encompass new and developing technologies.

After all, so much of the electronic information that impacts our lives . . . data bases, web content, voice messaging, even spreadsheets--bears little resemblance to conventional documents. Instead, ESI is defined broadly to encompass the forms computer-based information takes today and adapt to whatever tomorrow brings.

Id.

By broadly defining ESI, the Advisory Rules Committee and, subsequently, the Supreme Court, imposed new obligations on parties, lawyers and courts. Amended Rule 26(f) requires parties to discuss issues relating to the discovery of ESI at the meet-and-confer session prior to the Rule 16 conference. Parties are also required to discuss the preservation of ESI and claims of privilege at the meet-and-confer. Moreover, the amended rule now includes ESI with the documents and other information parties are required to disclose initially to other parties. The initial disclosures, as before, are automatic and must occur without the opposing party making a document request.

The revisions to Rule 26 now require the parties to develop a discovery plan addressing issues relating to ESI, including the form(s) in which it will be provided. To ensure compliance with these new obligations, lawyers and their clients must now understand and discuss E-discovery issues from the very moment they initiate or learn

of the lawsuit. Counsel must have a sound understanding of the client's data system, as well as the client's record and retention system.

The new rules, for example, suggest that the party should at least discuss the format for discovery (native files, images or paper). Without some understanding of what documents and information systems the client currently maintains, plus an understanding of any legacy data, off-site storage and data in the hands of vendors, the discussion of what is reasonable and possible in the way of E-discovery will suffer, and unnecessary disagreements and misunderstandings (with the court and opposing counsel) may be created.

Steven C. Bennett, *Practical Responses to New Federal Rules on E Discovery*," Legal Technology, 1/4/07, <http://www.law.com>.

Amended Rule 26(b)(2) now contains a provision whereby a party is not required to provide discovery of ESI that is identified as "not reasonably accessible because of undue burden or cost." However, even when a party can establish that the electronic data is not reasonably accessible, the court may nonetheless order its production if the requesting party can establish good cause for disclosure after considering various factors set forth in Rule 26(b)(2)(C). Those factors include

whether:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought;

or

(iii) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Rule 26(b)(2)(C).

Rule 26 has also been amended in subsection (b)(5). This amendment sets forth detailed procedures for asserting claims that the information is privileged or subject to protection as attorney trial-preparation material.

A new subsection (B) imposes a requirement that parties notify each other when privileged information has been inadvertently disclosed, and, in some instances, that parties "return, sequester or destroy" privileged information that was

unintentionally disclosed with other E-discovery. Fed. R. Civ. P. 26(b)(5)(B).

Fed. R. Civ. P. 33

Rule 33(d) provides a responding party with the option to produce business records by way of E-discovery when the answer to an interrogatory may be derived or ascertained from the business record itself. The amendment now includes the phrase, “including electronically stored information” so as to clarify that ESI, as a business record, may be used to respond to interrogatories.

Fed. R. Civ. P. 34(a) and (b)

Two modifications in Rule 34 address the format of production of ESI, and permit the requesting party to designate the form or forms in which it wants ESI produced. The amended Rule also allows parties to “test, or sample” information to be produced.

The Rule doesn’t require the requesting party to choose a form of production since, at this stage of the proceedings, the requesting party may not have a preference or even any information about what form the producing party uses to maintain its ESI.

The amendments to this Rule now provide a method for resolving disputes over the form of production in the event the responding party objects to the requested format. Further, the Rule provides that if a request does not specify a form of production, or if the responding party objects to the requested form(s), the responding

party must notify the requesting party of the form in which it intends to produce the ESI, with the option of producing the information either (1) in a form in which the information is ordinarily maintained, or (2) in a reasonably useable form. *See, generally, E-Discovery Amendments to the Federal Rules of Civil Procedure, Electronic Discovery Law, 12/1/06, <http://www.ediscoverylaw.com>.*

Fed. R. Civ. P. 37(f)

A new subsection (f) was added to Rule 37 to provide that, absent “exceptional circumstances,” a court may not impose sanctions 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.” This amendment, often referred to as the “safe harbor provision,” insulates a party if ESI is lost during routine modification, overriding or deletion of information in the normal use of the business’s ESI. To avoid the loss of information that may be routinely deleted in the normal course of business, parties should address the preservation of ESI at their meet-and-confer.

Fed. R. Civ. P. 45

The last amendment touching on E-discovery appears in Rule 45, which includes a specific procedure for responding to requests for electronically stored information through subpoenas. There have been several modifications to this Rule. For example, Rule 45(a)(1)(C) provides:

Every subpoena shall . . . command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing or sampling of designated books, documents, electronically store information, or tangible things in the possession, custody or control of that person

So, too, 45(c)(2)(A) now provides:

A person commanded to produce and permit inspection, copying, testing or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

Similarly, subsection 45(c)(2)(B) now provides a method in which to object to producing ESI in the form or forms requested.

Recent Cases

Not many cases on E-discovery have been authored or published. However, United States District Judge Shira A. Schiendlin provides a good starting point in five opinions she authored. Her decision in Zubulake v. UBS Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004), as well as her follow-up E-discovery decision, provide an excellent

analysis of electronic discovery and have often been cited in ESI disputes.

Other recent cases of interest include Treppel v. Biovail Corp., 233 F.R.D. 363 (S.D.N.Y. 2006). In Treppel, the magistrate judge discussed the circumstances under which parties should be ordered to preserve ESI during the discovery process. Plaintiff's Rule 37 motion to order the defendants to preserve all potentially discoverable data, whether in electronic or paper form, was premature. The motion was denied under circumstances where the plaintiff could not demonstrate that evidence had been lost. In so ruling, the magistrate judge noted that if the motion were renewed, the parties should discuss the issue of who should properly bear the costs of preserving the evidence.

In Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228 (D. Md. 2005), the magistrate judge discussed in depth issues concerning how parties should conduct discovery of voluminous electronic information. The court addressed how to ensure both that the requesting party receive appropriate discovery and that the producing parties are not subject to unreasonable burden, expense or risk of waiving attorney-client or work-product privileges.

The Hopson decision is excellent in that it discusses the merits of using negotiated non-waiver, electronic records production agreements between parties as a means of avoiding the waiver of attorney-client privilege and work-product protections in the production of large volumes of ESI.

Finally, in Williams v. Sprint/United Management Co., 230 F.R.D. 640, a case arising out of this circuit (D. Kan. 2005), the magistrate judge discussed the parties' responsibilities to produce underlying metadata when producing ESI during discovery.

Metadata poses unique issues for discovery of ESI. Metadata is information “that is hidden within a digital copy of document and not rendered visible when the document is printed out into hardcopy” *Discoverability of Metadata*, 2006 A.L.R. 6th 6 (2006). Metadata is sometimes also described or understood as “data about data.” Id. § 2. It can “usually be seen when a digital document is viewed in its native format using the program that originally produced the document.” Id. For example, if a document is created in MS Word, there is hidden information (metadata) about that document that can only be viewed if the document is opened by that program. Id. Examples of metadata are the modification history or the date and time the document was first created along with dates and times when it was modified; a file's name, a file's location, file format or file type, or file size. The Sedona Conference Working Group identified the preservation and production of metadata as one of the biggest challenges to the production of electronic information.

There are few published opinions discussing the discoverability of metadata. However, the annotation at 2006 A.L.R. 6th gathers some courts' discussions of metadata and the circumstances under which it may or may not be discoverable. The

Williams case presents an extensive discussion on discoverability of metadata.

Williams involves a class action under the Fair Labor Standards Act, and the magistrate judge noted that, as a general rule, the party ordered to produce electronic documents should produce the electronic documents with their metadata intact. Unless that party timely objects to production of the metadata or the producing party requests a protective order, the parties agree that the metadata should not be produced.

In Williams, the court ordered the production of electronic spreadsheets in the manner in which they were maintained, including metadata. While concluding that the defendant should not have unilaterally “locked” data within the spreadsheets it produced, without giving the plaintiffs notice of its action, the magistrate judge declined to impose any sanctions.

Conclusion

Taken as a whole, the Rule amendments impose significant new responsibilities on counsel to become familiar with basic E-discovery issues, and, together with opposing counsel, to discuss early on the discovery needs and objections to ESI discovery. So, too, additional burdens are placed on the court to carefully balance one party’s need for information with the opposing party’s burden of production and to impose or allocate the costs of production as appropriate.

These new obligations and burdens on counsel will certainly increase the complexity of cases and costs for clients. Thus, you should take the time to review the

amended rules to ensure that you are cognizant of the new responsibilities imposed by the Rules in this developing area of electronic discovery.