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The New E-Discovery Rules

Take the Lead in Ensuring Compliance

New rules for electronic discovery adopted as part of the Federal Rules of Civil Procedure (FRCP) went into effect December 1, 2006. The purpose of these rules is to streamline e-discovery requests. In an attempt to minimize the number of motions to compel discovery, the federal courts have mandated discussions of how document production will proceed and what form the responses will take prior to issuance of its scheduling order. As a result, parties to a case now have an obligation to find out where data resides on their own systems in anticipation of any discovery requests.

As part of the information technology team, you can look forward to fielding questions and requests from your litigation practice group as to electronically stored information (ESI) formats that exist within your firm and within your clients' systems.

The new e-discovery rules will be subject to interpretation by the federal courts. However, it is no longer an option to avoid discussing ESI with opposing parties. The new rules mandate that attorneys know their clients' document management systems and storage practices. If the attorney does not identify specific ESI to be expensive to produce and identify them at the beginning of the case, the court may order these inaccessible documents to be produced at the expense of the producing party. This may lead to an expensive judgment against the client and potentially a malpractice lawsuit filed by the client against the attorney.

Impetus of the New E-Discovery Rules

The new rules stem from recent opinions, starting with the Laura Zubulake's gender discrimination and retaliation case (*Zubulake v. UBS Warburg, LLC*) against her former bank employer. In one of five decisions, the court shifted the cost of discovery to Zubulake for retrieval of the data from backup tapes (*ZUBULAKE I*). However, when the judge later opined that the bank had failed to preserve electronic evidence and instructed the jury to assume the lost e-mail messages would be unfavorable to the bank, the cost for this production was charged back to the bank (*ZUBULAKE V*). In April 2005, the jury found for Zubulake, and she was awarded $29.3 million in damages primarily because the bank had failed to adequately preserve evidence.

The case of *Coleman v. Morgan Stanley* (2005 WL 679071), however, caught the attention of law firms. In this case, the jury awarded in excess of $1 billion to the plaintiff based on the mishandling of backup tapes by Morgan Stanley and their counsel. The court held that Morgan Stanley had been stonewalling and attempting to hide their e-mail, thereby violating numerous discovery orders (March 1, 2005 Order).

In the court's order, Morgan Stanley's attorneys were blamed for not having adequate knowledge about the ESI of their client. Thus, the new e-discovery rules provide motivation for communicating with clients' IT personnel at the early stages of the case to discuss data (evidence) preservation, the types of ESI under the client's control, whether the data is accessible and inaccessible, and the costs associated with producing inaccessible ESI.

What Are the New Rules?

The new e-discovery rule changes are included in FRCP 16, 26, 33, 34, 37, and 45. The Amendments to FRCP 33, 34, and 45, provision the addition of ESI to the rule. The following are the more extensive Civil Rule changes:

Rule 16 Pretrial Conferences; Scheduling; Management (b) Scheduling and Planning

Rule 16 (b)(5): "The scheduling order may also include provisions for disclosure or discovery of electronically stored information;"

Rule 16(b)(6): "The scheduling order may also include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;"

Due to the pervasiveness of computing and the current trend to produce documents in native electronic format, the amendments attempt to encompass all ESI and delete the previously used term "data compilations" in order to more accurately state the proliferation of electronic documents in various formats.

In the past, paper productions during the discovery phase included a privilege review of the documents prior to production. With the abundance of metadata and other versions of the data included in native file formats, data will be produced that is not visible and may include privileged information.

The attorneys may stipulate to a non-waiver of privilege agreement with regard to this type of inadvertent disclosure of privileged information. Obviously, it would be more beneficial to know upfront what types of data could possibly contain metadata and how to remove it prior to production in a good faith effort to perform a pre-production privilege review. Thus, the court acknowledges by way of Rule 16(b)(6) that there may be some inadvertent disclosure of privileged documents due to the nature of ESI.

Highlights - Rule 16(b) Amendments: The scheduling order may include an agreement crafted by the attorneys of record covering how inadvertent disclosure of privileged information will be handled when discovered after production.

Rule 26 General Provisions Governing Discovery: Duty of Disclosure

Rule 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."

Rule 26(b)(5)(B): "Information Produced. If information is produced in discovery that 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 and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved."

Rule 26(f): ". . . the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses. . . "

Rule 26(f)(3): "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;"

Rule 26(f)(4): "any issues relating to claims of privilege or protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order."

With the propagation of inexpensive storage devices, your client could feasibly have terabytes of data to be considered in an e-discovery response. Aside from the typical locations for storing data such as network servers, hard drives, shared drives, laptops, and backup tapes, there are many others to consider as well. These include mirroring of data on redundant systems, instant messaging, file transfers using instant messaging, CDs/DVDs, smart phones, cell phones, BlackBerry devices, Palm Pilots, other personal digital assistants, MP3s, and thumb drives.

The attorney may come to you for assistance in figuring out what sources will be most difficult to produce in collaboration with the client's IT person. From this information, the parties will develop a list of ESI that may be difficult and cost prohibitive to retrieve. This resultant document may also clarify to your client the costs associated with requesting unduly burdensome data and assist with the decision as to whether or not they want to pay for the production of these documents.

During the early 1990's, it was no picnic to review millions of responsive documents for attorney-client and/or work-product doctrine privilege one page at a time. As a result of the explosion of ESI, more reviews began to include the use of software capable of assisting in searching for such documents during the privilege review. More document production requests now ask for documents in their native file formats, especially e-mail messages. The privilege review has once again become more onerous since there is metadata contained under the surface of what can be seen on the computer screen. Due to the presence of underlying information embedded in the ESI, there is a high likelihood that privileged information will be produced to opposing counsel unknowingly.

Highlights - Rule 26(b) Amendments: The attorneys need to know the location(s) of their clients' responsive ESI as well as what the economic impact of paying for the production of inaccessible documents will be for their client. The court is forcing a proactive review by determining upfront whether the case merits the expense of retrieving inaccessible ESI. The anticipated result will be a more narrowly defined set of document production requests. Clients will have to decide at the start of a case whether they are willing to pay for the restoration of inaccessible ESI.

Pursuant to the amendments to Rule 26(f), the parties are required to meet and confer at least 21 days before a scheduling conference to iron out any issues relating to the discovery of ESI. This is the rule that requires the form(s) in which the ESI will be produced to be included in the meet and confer report to the court. Parties to a federal court case

can no longer avoid considering ESI document requests. They have an obligation to find out where the data resides. In order to know what information would be overly burdensome and costly to produce, the client has to be aware of the various forms of responsive data to the document request. The attorney will serve as the advisor on what types of documents are responsive. You will have to inform the attorney as to the possible file formats and locations of such data. Your expertise will verify that the client's IT staff performs their due diligence.

Highlights - Rule 26(f) Amendments: The opposing parties must now meet and confer at least 21 days prior to the Rule 16(b) scheduling hearing to outline the ESI production form(s). During this meet and confer conference, the parties must also resolve how inadvertent disclosure of privileged information will be handled. This is a much earlier deadline for identifying responsive documents than how discovery was handled in the past and must be approached as soon as the dispute arises.

Rule 37 Failure to Make Disclosures or Cooperate in Discovery; Sanctions

> **Rule 37(f):** "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."

While there is still a statutory duty to preserve evidence, Rule 37(f) provides a "safe harbor" against spoliation in the event that data is deleted or written over in accordance with a routine business practice such as archiving/deleting e-mail messages after a set amount of days or the overwriting of previously deleted files. The Advisory Committee on Civil Rules acknowledges that ESI is dynamic and if separated from its system may be incomprehensible (Rosenthal, 2005). However, if there is a reasonable expectation that a lawsuit may one day be filed against the company, preservation of evidence practices should immediately go into effect. The attorney will handle instructing the client to put a litigation hold on potential evidence related to a case. It would be extremely helpful for the attorney to have an internal law firm IT person assist in educating the client. An independent audit of the system can also assist with the due diligence requirement of locating and identifying data file formats susceptible to modification and deletion.

Highlights - Rule 37(f) Amendments: The Advisory Committee recognizes that computing is dynamic and there may be inadvertent rather than intentional modification or deletion of responsive files. However, the ESI lost must be based on good-faith routine practices and not due to lack of placing a litigation hold on the responsive ESI collection.

How Can I Prepare to Help?

Microsoft prepared comments on the e-discovery rule changes during the public comment proceedings. In its request to appear, Microsoft filed a very extensive informative document which can be found at http://www.uscourts.gov/rules/e-discovery/04-CV-001.pdf detailing the history of computers and how they work. This document may serve as an educational resource for attorneys grappling with understanding how data is stored (Southerland, 2006). It delineates some of the concerns of identifying and preparing a discovery plan early in the proceedings.

The task at hand is for you to assist the attorney in preparing for the "meet and confer" conference. Some considerations and investigation are merited when assisting in this regard:

Inform/Educate Attorneys and Clients: Prepare to be inundated with requests to attend meetings with the client's IT staff to figure out what ESI would be responsive to a document production for the meet and confer with opposing counsel. The critical agenda is to identify the ESI formats that would be extremely burdensome and costly to produce, such as backup tapes.

Therefore, prepare to discuss the retrieval mechanisms with the client's IT staff and be knowledgeable about what vendors may be of assistance in this type of production. There must be convincing evidence that the production of these types of ESI would be overly burdensome. If the magnitude of procedures needed to extract the ESI is not compelling, the federal judge may order the information be produced with the burden of the cost to be absorbed by the producing party.

Visio Network Diagram: "A picture paints a thousand words." Become familiar with a program that will produce a network diagram showing where the data resides. This document will be extremely beneficial as an exhibit to the meet and confer report filed for the scheduling conference. Perform a network assessment to produce a network architecture diagram illustrating where data resides.

Technological Attributes to Discuss: The following table represents a small number of possible file formats your clients may utilize on their systems that can be included in the meet and confer report:

SOFTWARE	FILE FORMATS
MS Outlook and Outlook Express	.pst, .dbx, .mbx, .idx, .nch
MS Word	.doc
MS Access	.mdb
MS Excel	.xls
MS FrontPage	.html, .htm
MS PowerPoint	.ppt
MS Visio	.vsd
Novell GroupWise	.mlm
Netscape Mail	.na2, .smn
Photoshop	.jpg, .tif, .bmp, .psd
Audio software	.mpeg, .wav, .asf, .wma, .avi, .midi, .aiff, .au, .aac

Discover the Client's Policies & Procedures: As previously stated, the proliferation of inexpensive storage devices has spurred the belief that everything and anything should be saved forever "just in case I need it." The consequence is an unmanageable system and more data than you could ever get your hands around.

When a lawsuit is filed against your client, or for that matter, your law firm, how do you respond accurately? Without a records retention policy outlining the routine day-to-day operations in the normal course of business, deletions of data may be seen as destruction of evidence, and you can rest assured that opposing counsel will be quick to suggest a

sinister motive. A stop on all backups overwriting other files relevant to the case must be quickly implemented upon receiving a complaint in order to avoid destruction of evidence claims. As exhibited in the Enron case, destroying evidence may lead to jail time. By having a records retention policy wherein the purging and deletion of data is routinely implemented, sanctions and penalties can be avoided.

Get Your Own House in Order: By working through the details of a document retention policy for your own law firm, you will be better equipped to discuss file formats and data locations in response to a lawsuit against the firm. Additionally, when a lawsuit is filed, there is an obligation to preserve the evidence. Hence, it is crucial to have an e-discovery policy in place that identifies what steps need to be taken in order to assure this preservation of evidence.

Education and Preparation Will Help Ensure Compliance

It's very important to distribute the Amendments to the FRCP Rules for e-discovery to the entire law firm IT staff and educate them on the importance and benefits to the firm. These amendments should be read in concert with the Advisory Committee on Civil Rules Notes, which will provide a more in-depth understanding of the spirit of these new rules.

In order to accurately describe and develop an e-discovery plan, it is crucial for attorneys to learn as much as they can from their own IT staff in order to effectively question their clients' IT personnel. As the federal courts interpret these new e-discovery rules, attorneys will have a clearer picture of what the court expects during the meet and confer conferences and the scheduling order hearing.

In the meantime, develop e-discovery policies and procedures that revolve around records management for both the clients and the law firm. Additionally, procure and implement the appropriate e-discovery technologies and training. Then, take action. Assess your e-discovery readiness by finding the responsive document locations and determining the costs associated with the recovery of inaccessible documents and performing a document location assessment. Finally, repeat the process by performing regular reviews of the e-discovery policies and procedures to ensure compliance and continuous improvements. If you take the lead in preparation, you can feel confident your firm and its clients will be ready to handle discovery requests appropriately.

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