CONSUMER & PERSONAL RIGHTS
Litigation
VOL. 12 NO. 2 • Spring 2007

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Getting Ahead of the E-Discovery Curve: The Junior Attorney's Guide

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It is probably safe to assume that lawyers across the land are at least casually aware by now that the amendments to the Federal Rules of Civil Procedure ("FRCP") related to electronic discovery (or e-discovery) went into effect on December 1, 2006. The amended rules impact every attorney at every level, so junior attorneys should not make the mistake of thinking that they are exempt from familiarizing themselves with the recent changes until some later stage in their careers. To that end, this article provides an overview of the FRCP amendments and identifies some practice pointers for junior attorneys to consider.

I. Introduction to ESI (Electronically Stored Information)

The December 2006 amendments mark the first time that the FRCP directly address electronic discovery. The FRCP coin a new phrase to refer to the subject of electronic discovery - "electronically stored information" or ESI.

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It is estimated that more than 90% of all corporate information is in electronic form. Given the increased volume and complexity of this electronic information, the basic techniques that used to work for managing discovery of hard copy documents are no longer sufficient. The recent amendments impacting six FRCP – Rules 16, 26, 33, 34, 37 and 45 – are a direct response to the ever-increasing number of electronic documents in the corporate world. *See* Text of FRCP Amendments and Advisory Committee Notes, located on the U.S. Courts web site at http://www.uscourts.gov/rules/Ediscovery_w_notes.pdf. The FRCP amendments formalize the expectations with regard to ESI, so that there is no longer any doubt that it is an unavoidable component of discovery.

II. Early Attention Must Be Paid to E-Discovery

Certain rules require that early attention be paid to ESI. Gone are the days when each side independently prepared and produced its documents and then just sat back and hoped for the best. Now, given the timetable for discussion of ESI with opposing counsel and the court, attorneys have a duty to their clients to fully understand the ESI issues well before any outside meetings take place.

The FRCP contemplate that parties will think about issues related to preservation and production early in the litigation life cycle and address them thoroughly before any documents are exchanged. Under Rule 26(f), the parties are required to meet and confer to discuss issues related to ESI preservation and inadvertent disclosure of privileged information before the scheduling conference with the court. This meet and confer must take place at least 21 days before a scheduling conference or a scheduling order is due. Any agreements related to ESI and inadvertent disclosure of privileged information are to be memorialized in amended Form 35. Under Rule 16(b), the court is authorized to include in its scheduling order any provisions related to the preservation or production of ESI as well as agreements related to the inadvertent disclosure of privileged information. Rule 26(a) includes ESI in the list of items that must be provided in initial disclosures.

As referenced above, an issue related to production of ESI that is being forced to the forefront is how parties will deal with inadvertent disclosure of privileged material. Rule 26(b)(5) sets forth procedures for how to retrieve privileged information after documents are inadvertently produced, which is colloquially referred to as a "claw back" agreement. The Advisory Committee Report makes clear that even though the text of the Rule does not mention ESI, the amendment was inspired by the volume and nature of ESI, which increase the risk of inadvertent production of privileged material.

Notably, Rule 26(b)(5) is entirely procedural in nature. It does not speak to whether there is a waiver of privilege or not when the documents are initially produced; that issue will be addressed by the proposed 2008 amendment to Federal Rule of Evidence 502. Therefore, it is important to remember that while Rule 26(b)(5) may provide a mechanism to retrieve materials that were inadvertently produced, it provides no guidance on whether the underlying privilege has been waived. Moreover, even if the parties reach an agreement on waiver, there is the risk that this agreement will not apply to other cases or to third parties who are not subject to the agreement.

Taken together, these amendments require attorneys to understand the IT structure and policies of their client at the outset and well before any conferences. Attorneys also must be prepared to ask opposing counsel about their client's systems. Furthermore, the inadvertent disclosure of privileged information should be contemplated and addressed in an agreement that will be memorialized in Form 35 and/or the scheduling order.

III. Form of Production and "Two-Tier" Discovery

The form of production is addressed by the amended Rule 34(b). The requesting party has the right to specify the form in which ESI will be provided by the responding party. If the responding party objects or if the requesting party fails to specify a form, then the responding party has the ability to provide ESI either in the form in which it is "ordinarily maintained" (i.e., native format) or else in a form that is "reasonably usable." Needless to say, no requesting party should neglect to specify the form of production at the outset, because failure to do so hands a strategic advantage over to their adversary.

Another important new development is the "two-tier" discovery process set up in the amendment to Rule 26(b)(2). It recognizes that there is a spectrum of accessible and inaccessible ESI, which can range from accessible active email to certain inaccessible backup tapes. Under the two-tier structure, the responding party can identify ESI as inaccessible and then withhold that ESI from production. The burden then shifts to the requesting party to either file a motion a compel discovery or to seek a protective

order. Once that happens, the responding party must demonstrate that the ESI is not "reasonably accessible" because of undue burden or cost. The court can still order the discovery even if this showing is made, assuming that the requesting party can show "good cause" for such a production.

Neither the terms "reasonably accessible" nor "good cause" are defined in the rules themselves. The Advisory Committee Notes to the FRCP do provide some commentary, but in reality, only time and motion practice will determine the contours of these requirements.

Interrogatories and subpoenas are also impacted by the amendments. Rule 33(d) gives the responding party to an interrogatory the option of providing ESI instead of a written response. Rule 45 clarifies that ESI is discoverable by subpoenas and makes the production subject to all the other amendments regarding form and accessibility.

IV. Imposing Sanctions: Rule 37(f)

Sanctions are a hot topic in the realm of e-discovery. Some cases with particularly dramatic sanctions imposed for ESI mismanagement – such as *Zubulake* and *Coleman (Morgan Stanley)* - have become cautionary tales and shorthand terms for how not to proceed with e-discovery.

The FRCP amendments respond to the increased concern about sanctions with Rule 37(f). Rule 37(f) disallows the imposition of sanctions on those who fail to produce ESI if the basis for the failure is that ESI was lost due to a "routine, good-faith operation of an electronic information system." This provision is also referred to as the "safe harbor" provision but, as many have observed, this harbor may not be all that safe. First, this Rule does not do away with the obligation to ensure that parties comply with litigation holds and their records retention programs. Second, this provision does nothing to prevent the imposition of sanctions from sources other than the FRCP. Courts can still impose sanctions using their inherent powers. Given these limitations, it remains to be seen how broadly courts will construe the protections of Rule 37(f).

V. Practice Pointers

The amended rules should subtly shape the way that you approach all of your cases from their very inception, since the decisions that you make can impact your clients in dramatic and significant ways. Here are some pointers to help you incorporate the amended FRCP into your daily practice:

- Read the rules. It may sound obvious, but you should take the time to read the FRCP amendments and the Advisory Committee Notes so that you will be on alert when some issue contemplated in the new rules starts to percolate in one of your cases. Even if you are not the person making the final decisions on your cases, you often serve as the eyes and ears for those who do. If you recognize, for example, in the course of doing an electronic document review of opposing counsel's production that parents and attachments are not grouped together, or that certain documents are produced in native format while others are not, then you may have uncovered a violation of an agreement on production format. As the amended rules specify, that is an agreement that should have been made before any documents were exchanged. If you see something that seems inconsistent or out of the ordinary, say something to the other members of your team.

- Assemble your own e-discovery response team. As e-discovery has proliferated, the research questions that develop have increasingly become a hybrid of legal and technical issues. While you may not reasonably be expected to know the answer to every technical question that arises, you certainly are responsible for figuring out who can help you answer them. Reach out to people who can be available to help you sort through the potentially thorny issues that are likely to emerge, such as form of production, metadata and accessibility. These people can be senior associates or partners at your organization who have been through the process before, your litigation support team or contacts at electronic discovery vendors with whom you or your organization has a relationship. Find out who you can talk to so you don't have to scramble to find these resources once a time-sensitive question arises.

- Keep careful records of your decisions. If you are the one responsible for coordinating any aspect of a document review or production project (including tasks such as overseeing the collection of hardware or ESI from the client, overseeing the processing of ESI for review, formulating a privilege review or log, or reviewing the other side's production), make sure that you keep careful records of the daily decisions that you make. Questions about document collection and document processing are proving to be fertile grounds for discovery disputes and therefore, you need to memorialize everything you did (or intentionally did not) do. Some of the more famous cases that culminated in sanctions

involved failure of companies and their counsel to locate responsive documents and erroneous certification that certain steps were completed when, in fact, they were not.

Recognize that e-discovery can mean serious costs for your clients. If you are tasked with communicating with opposing counsel about discovery or representing your client in court, don't lock your client into an expensive e-discovery agreement without thinking through the ramifications, lest you find yourself in the unfortunate predicament of a junior attorney in the recent case of *In re NTL, Inc. Securities Litigation*, Nos. 02-Civ.-3013, -7377, 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007). In this case, defendant NTL Europe Inc. was brought before the court on a motion for sanctions for failure to produce relevant documents. The junior associate who was sent to argue against the motion on the defendant's behalf consented to the court's *sua sponte* ruling that the defendant would have to foot the bill for a review all the documents located with a non-party and complete production within a week.

The firm later tried to back-pedal and claimed that the attorney was "too junior to knowingly consent" to the judge's order. Though this argument was soundly rejected, one can only imagine the psychic damage inflicted on the junior associate whose firm tried to distance itself from her professional judgment. To avoid a similar result, make sure that you understand just how expensive and disruptive e-discovery can be and that agreeing to a discovery plan for your client is a significant step that should never be undertaken lightly.

In sum, the FRCP amendments have created an exciting time to be a junior lawyer. Gaining an early understanding of these amendments presents the intellectual challenge of staying abreast of developing law on a cutting-edge topic, as well as the practical benefit of enhancing your arsenal of legal tools to best represent your clients. Don't pass up the opportunity to get – and stay - ahead of the e-discovery curve.

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