
A PRACTICAL ANALYSIS OF THE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE INVOLVING ELECTRONIC DISCOVERY

BY: Greg Cook

Rules 16, 26, 33, 34, 37 and 45 of the Rules of Civil Procedure were amended, effective December 1, 2006 to more specifically address electronic discovery. The Supreme Court's order adopting these rules makes clear that they apply to pending cases "insofar as just and practicable."

The rule changes are borne of the recognition that electronic data has three key distinctions from traditional paper documents: (1) it is exponentially more voluminous, (2) it is dynamic, rather than static and (3) it may be incomprehensible when separated from the system which created it (such as, metadata or deleted file fragments). Whether representing plaintiff or defendant, litigators will likely be both on the offensive and defensive for electronic discovery. Failure to clearly address electronic discovery issues early in litigation has led to some staggering plaintiff verdicts clearly urging caution to litigators. *E.g., Coleman Parent Holdings v. Morgan Stanley & Co.*, 2005 WL 674885 (Fla.Cir.Ct. Mar. 23, 2005) (default granted for failure to produce electronic discovery; jury awarded \$1.45 Billion); *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004) (sexual harassment employment case; adverse inference instruction and costs imposed based upon failure to preserve and produce relevant electronic discovery; \$29.3 Million awarded by jury).¹

In sum, these changes (1) emphasize early attention of the court and the parties to electronic discovery, (2) expressly treat electronic discovery (known as "electronically stored information"; or "ESI") differently than document discovery, (3) set forth rules on who determines the form of production, (4) establish shifting presumptions for avoiding production of information not "reasonably accessible", (5) provide for some court recognition of "clawback" agreements, (6) provide for procedures (even if there is no "clawback") for handling allegedly inadvertently produced privileged information, (7) incorporate certain balancing tests, (8) draw a distinction be-

tween a broader duty to preserve and a narrower duty to produce, (9) encourage parties to negotiate ESI issues, and (10) provide a narrow safe harbor from sanctions for good faith deletion of ESI.

I. Early Attention to Discovery Issues - Preservation; "Form" of Production; "Clawback" Agreements

Amended Rule 26(f) directs parties to discuss electronic discovery issues during their initial meeting and include them in their report to the court. Specifically, parties are required (1) to address the form and production of ESI, (2) to discuss an approach to production that protects against waiver of attorney/client privilege or work-product protection, and (3) establishing reasonable methods for preserving electronically stored information that will not disrupt day-to-day business operations. Form 35 - Report of Parties' Planning Meeting - has likewise been amended to reflect these changes by providing for descriptions of the parties' proposals on e-discovery and for non-waiver ("clawback") agreements between parties.

The "form" of production is likely to be the subject of considerable motion practice over time. The form of production can potentially cost hundreds of thousands of dollars, or even more if a court orders production a second time in a different format.² For instance, must a party produce ESI in "native" format (that is, in the format in which they are stored - such as "Excel" or "Word")? Must the "metadata" be intact (potentially including key evidence in some cases but also difficult to review before production and potentially creating authentication issues)?³ Can a party produce ESI in paper form? Must the party produce ESI in text searchable form? What if ESI is intelligible only with unique hardware or software (for example, digital recordings of energy commodities traders requiring specialized hardware and software).

"Clawback" agreements allow parties to

agree beforehand that the production of information protected by the attorney client privilege or the work product doctrine will not constitute a waiver. The amended rules do not require such an agreement. The amendments add this option because of the potentially staggering cost of a detailed privilege review for voluminous ESI; thus, a party might (balancing expense and the amount in controversy) opt for an automated search to screen for privileged information before production. An argument could be made (depending upon the circumstances) that the refusal of either side to agree to such a proposal might factor into the cost shifting discussed below. There is substantial debate over whether such a "clawback" agreement would be enforceable against third parties in future litigation (that is, the opponent in the current suit has agreed to abide by the "clawback", but an unrelated litigant in a future case (in state or federal court) might argue that disclosure of privileged information constituted a waiver of the privilege as to that document (or even the entire subject matter)). There is currently pending a proposed revision to Fed.R.Evid. 502 which would make such a "clawback" applicable to all persons, so long as the "clawback" is incorporated into a court order; however, Congress will need to expressly approve such a substantive privilege rule.

The initial meeting should also cover (if applicable) the scope and method of preserving ESI that will not disrupt day-to-day business operations. Rule 26(f) now requires the meeting to cover "any issues relating to preserving discoverable information." Note that this duty covers all information – not just ESI. Scope could include: (1) How long to preserve? (2) How far back into the past? (3) Whether to include electronic documents created in the future, (4) How many departments or employees to include? (5) What type of electronic documents to include? (6) Whether to include backup tapes? hard-drives? old computers? flash drives? (for instance, must a party preserve disk drives so that forensic experts can later restore deleted files or system information), (7) How to preserve (tape and other types of backups can be corrupted)?

Preservation is probably more critical than production issues. ESI that has been deleted or overwritten may be lost forever. Further, as an outside litigator at the beginning of a case, you

may have little concept of what ESI may be crucial two years into the litigation. While preservation is considerably better than defending a Zubulake type spoliation claim, preservation of everything in a defendant corporation's computer system and tape library may be extraordinarily expensive. It is much easier to address the scope and method of preservation at the outset of the case by agreement – or by identifying the issue for the court for early determination.

Rule 16 has been amended to parallel the changes to Rule 26(f). As amended, Rule 16(b) would permit the court to include provisions for discovery of electronic information into the scheduling order and/or incorporate any agreements between the parties for asserting claims of privilege or work-product protection after production. Note that the Advisory Committee cautions that the rule does not imply that courts should "routinely enter preservation orders" and if an order is made over objection, it should be "narrowly tailored."

II. Initial Production of ESI

Rule 26(a)(1)(B), governing mandatory initial disclosures, has been amended to include ESI as a separate category of required disclosure. By establishing a separate category of discovery for ESI, the rules provide for different limitations and reasonableness tests. Some have questioned whether limits in the court's initial Rule 16 order would apply to ESI (for instance, perhaps the parties would agree to eliminate or strictly limit initial production (or any production) of ESI); however, the better argument would appear to be that a court order can modify the standard discovery rules. Rule 16(b)(4).

III. Discovery of Electronic Information That Is Not Reasonably Accessible

Rule 26(b)(2) now authorizes a party to respond to a discovery request by refusing to produce ESI that is "not reasonably accessible because of undue burden or cost." When an objection is made, the responding party must "identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing." The requesting party can then move to compel production. In response, the objecting party has the burden to demonstrate why the information sought is not reasonably accessible. If the requesting party shows good

cause, a court may still require production, considering factors listed in Rule 26(b)(2) e.g., if the discovery is not unreasonably cumulative, if the requesting party has not had another opportunity to obtain the information sought, and if the expense of the discovery does not outweigh its potential benefit.⁴

This rule will undoubtedly generate considerable disagreement among litigants – both because of the dearth of caselaw interpreting what is “reasonably accessible”⁵ and because of the shifting presumption (which may, in some circumstances, encourage the requesting parties to seek court assistance). Both parties may be well-served by consulting with experts to provide affidavit support for their position before the court and by making a record of attempting to resolve the issue with opposing counsel. However, the resisting party should be careful to critically examine the information provided by IT personnel to avoid later embarrassments before the court and possibly the jury – something that occurred in both Morgan Stanley and Zubulake.

Clearly the Committee intended some change by adding the language “undue burden or cost” – but how is that standard different from the existing proportionality test in Rule 26 of “unduly burdensome”? Presumably the size of the amount in controversy will be part of this analysis.⁶ On a practical level, the litigator may need to explain why the costs are undue. Some pre-amendment opinions appear to believe that producing electronic data currently stored on disk should be near costless;⁷ however, even producing current data may be burdensome because of its volume (for example, the need to examine large numbers of individual computers, storage devices and directories) and the cost of locating, organizing and screening data for relevance and privilege.⁸

The Advisory Notes state that when an objection is made, the court might want to collect additional information by “requir[ing] the responding party to conduct a sampling” or “allow[ing] some form of inspection” of the computer system or allowing the requesting party to “tak[e] a deposition.” There is also considerable authority endorsing the use of lists of search terms (rather than manually reviewing all email of a particular witness).⁹

The amended rule further provides that

“[t]he court may specify conditions of [such] discovery.” Thus, the determination of whether ESI is truly not “reasonably accessible” and whether it might be produced nonetheless, might be determined based upon the willingness of parties to agree to cost shifting.¹⁰ For instance, some courts have employed a cost-shifting analysis to allocate the expenses of production between the parties based on factors such as: (1) the cost of production compared to the amount in controversy or the parties’ resources, (2) the relative abilities and incentives of the parties, and (3) the importance of the issues at stake. See Zubulake, 217 F.R.D. at 322.

IV. Mandatory Procedure for Responding to Claims of Privilege and Work Product Protection After Production

When a party produces electronic information, it may be so voluminous and/or complex that a full privilege review is not feasible before production is due (for instance, a deleted document on a disk may be stored in fragments). Regardless of whether a party has agreed to a “clawback” agreement, Rule 26(b)(5) is amended to set up procedures to assert a claim of privilege or work product protection after production. After notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties pending resolution of the claim. The receiving party may also submit the information directly to the court under seal for a resolution. If the receiving party has disclosed information to a non-party prior to receiving notice, reasonable steps must be taken to obtain the return. This amendment is not a substantive amendment. It does not address whether privilege or work product protection has been waived or forfeited. Importantly this procedure is not limited to ESI. Further, there is no express time limit and might be misused by a party at a point late in litigation.

V. Interrogatories and Requests for Production Relating to Electronically Stored Information: ESI Separately Defined; Form of Production

Amended Rule 34(a) adds ESI as a separate and distinct category subject to production. The Advisory Committee Notes also make it clear that the term “electronically stored information” is to have identical, broad application for purposes of both Rule 33 and 34. The new language in Rule

34 could be read to broaden slightly the right to “test” or “sample” ESI; however, courts have been hesitant to grant the right to inspect computer systems or databases absent special circumstances (indications of misconduct or demonstrated need for forensic analysis) and presumably will continue such attitudes.¹¹ Civil litigation should not create the aura of a crime scene with forensic investigations employed at every opportunity.

Amended Rule 33(d) provides that the option to produce business records and explicitly includes ESI (provided that the burden of deriving the answer will be substantially the same for either party). If a party elects to respond by providing access to electronically stored information, it must ensure that the interrogating party can locate and identify it as readily as the party served.

Amended Rule 34(b) allows, but does not require, a requesting party to specify a form or forms for producing electronically stored information. If a party does not specify a requested form of production, it requires that production be in a form in which it is “ordinarily maintained” (presumably meaning native format) or that is reasonably useable (presumably meaning a format that doesn’t degrade searchability). Where a form of production is specified, however, the responding party would be permitted to object to the requested form. Additionally, a responding party would be required to state the form it intends to use for production. The changes provide some latitude for the producing party by inserting the “reasonably usable” language. Again, this is an area that considerable motion practice is likely and which early agreement among the parties can assist. The new rule only requires production in “a form or forms in which it is ordinarily maintained” rather than “the form”, once again providing the producing party with some leeway in deciding how to produce the information.

VI. Sanctions for Loss of Electronically Stored Information

Under amended Rule 37(f), limited protection would be provided against sanctions when information has been lost as a result of the routine operation of an electronic information system, provided that operation is in good faith. Limited sanctions may be appropriate, however, despite a responding party’s demonstration of good faith, when the court is satisfied that “exceptional cir-

cumstances” exist. The Advisory Committee’s Notes state that if “the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct, may be appropriate.” Severe sanctions are only appropriate where the party has acted intentionally or recklessly in destroying evidence. Because a litigant should normally attempt to halt routine electronic destruction for at least the ESI of the “key players,” the scope of what would be “good faith” is likely narrow; however, perfection is not required to be “good faith” and this Rule would protect negligence, as well as the deletion of emails for non “key players.”¹² Note that Rule 37(f) does not specifically address the court’s inherent power to sanction.

VII. Subpoenas Cover ESI

Changes to Rule 45 reflect an attempt to conform the provisions for subpoenas to the changes in the other discovery rules. The amendments to Rule 45(a)(1)(C) establish that ESI can be sought by subpoenas, which can designate a particular form for production. Although amended Rule 45(a)(1)(C) now permits testing and sampling of electronic data – in addition to inspection and copying – it should not be construed as granting unfettered access to a person’s electronic data. Moreover, Rule 45 refers to protection of the responding party from “significant expense” which is likely more narrow than “undue burden of cost.”

End Notes

¹ The Zubulake litigation ultimately produced five reported opinions from the trial court. Beyond the sanctions involved, the opinions are instructive for their discussion of a multifactor test for cost shifting, for their discussion of what the court considers accessible and for sampling methods for electronic discovery. E.g. Zubulake (I), 217 F.R.D. 309 (S.D.N.Y. 2003); Zubulake (II), 230 F.R.D. 290 (2003); Zubulake (III), 216 F.R.D. 280; Zubulake (IV), 220 F.R.D. 212 (2003).

² Compare In re Bristol-Myers Squibb, 205 F.R.D. 437 (D.N.Y. 2002).

³ Williams v. Sprint/United Management Co., 230 F.R.D. 640 (D.Kan. 2005).

⁴ The Advisory Committee Notes list seven factors for the court to consider in determining whether “good cause” exists to order discovery that is not reasonably accessible.

⁵ The Advisory Committee Notes provide examples of data that might not be reasonably accessible (backup tapes for disaster recovery that are not indexed or organized; legacy data from obsolete systems, data that is deleted but still in fragments, certain databases). Presumably this list is not exhaustive and may change based upon the amount in controversy and the type of computer architecture. The Zubulake court appears to believe that any current data meets this test, opining that data is “accessible” if in a “readily useable” format (that is, “active, online data,” “near-line” data and indexed “archives” and

does not "need to be restored"). 217 F.R.D. at 320.

⁶ J.C. Assocs. V. Fidelity & Guaranty, Ins. Co., 2006 WL 1445173 (D.D.C. May 25, 2006) (sampling ordered rather than full production because of the modest amount in controversy).

⁷ Zubulake, 217 F.R.D. at 318 ("Electronic evidence is frequently cheaper and easier to produce than paper evidence").

⁸ Manual on Complex Litigation (4th) § 11.446.

⁸⁹ Treppel v. Biovail Corp., 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (citing The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Principle 11 (2003); defined search strategy with terms is appropriate in electronic discovery).

¹⁰ The Advisory Committee Notes state that "a requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause."

¹¹ In re Ford Motor Co., 345 F.3d 1315 (11th Cir. 2003) (rule 34 "does not grant unrestricted, direct access to a respondents' database compilations"; does not give the requesting party the right to conduct the actual search); Advante Int'l Corp. v. Intel Learning Tech., 2006

WL 1806151 (N.D.Cal. June 29, 2006).

¹² The best source on the production and preservation of electronic documents appears to be: The Sedona Principles: Best Practices, Recommendations, and Principles for Addressing Electronic Document Production (available at www.sedonaconference.org), which states (emphasis added):

The obligation to preserve electric data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However **it is unreasonable to expect parties should take every conceivable step to preserve all potentially relevant data.** . . . Absent a showing of special need and relevance, **a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented, or residual data or documents.** . . . Unless it is material to resolving the dispute, there is **no obligation to preserve and produce metadata absent agreement of the parties or order of the court.**

ATTORNEYS IN THE NEWS

JAMES (JIM) ESDALE, an attorney with Waldrep Stewart & Kendrick, LLC, was recently appointed Deputy County Conservator-Guardian of the Bessemer area cut off by presiding probate judge, Alan King.

Attorneys with Haskell Slaughter Young & Rediker, LLC: **WILLIAM W. HORTON**, will serve as the senior Co-Chair for the American Bar Association Health Law Section's Eighth Annual Conference on Emerging Issues in Healthcare Law, **WYATT R. HASKELL** has been named as the recipient of the 2007 "Outstanding Alumnus" award presented by the Alumni Council of Indian Springs School, and **KHRISTI DOSS DRIVER** has been appointed to the Board of Directors of the ONB Magic City Art Connection.

TIMOTHY M. LUPINACCI, shareholder with the law firm Baker, Donelson, Bearman, Caldwell & Berkowitz, PC has been appointed to a four-year term on the American Bar Association (ABA) Section of Business Law Council

DANIEL H. MARKSTEIN, III, a shareholder in the law firm of Maynard, Cooper & Gale, P.C., became President of the American College of Trust and Estate Counsel

Attorneys with Sirote & Permutt: **J. MASON DAVIS** has been selected by the A. G. Gaston Conference to receive the OSCAR ADAMS AWARD; **KATHERINE N. BARR** was recently invited to become a Fellow of the American College of Trust and Estate Counsel (ACTEC); **ALLISON REID LUMBATIS** and **CHERYL HOWELL OSWALT** have been selected for membership in Curia Honoris, Cumberland School of Law's academic honor society; **MAURICE L. SHEVIN** was recently elected as a Fellow of the American College of Consumer Financial Services Lawyers (ACCFSL)

JAMES S. WITCHER III, a partner in Hand Arendall, has been selected to the Multiple Sclerosis Society's Leadership Class of 2007.