



WILLIAMS MULLEN

Where Every Client is a Partnersm

Electronic Evidence and Discovery: The Changes in the Federal Rules

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Bill Belt

Key dates

- » 2000 – Judge Scheindlin coins term “ESI” in Boston College Law Review Article.
- » 2000 – Chair of the Advisory Committee lays out mission to create changes in rules for ESI.
- » October 2002 - Sedona Conference forms.
- » May 2005 – Advisory Committee submits proposed changes to Standing Committee on Rules of Practice
- » November 2005 – Standing Committee approves Advisory Committee’s proposed changes without amendment.
- » April 2006 – United States Supreme Court approves changes without amendment.
- » December 1, 2006 – Effective Date for New Rules



Why the Rules Were Changed?

- » Recognition that paper and ESI are different
- » Inconsistent court rulings
- » Anecdotal reports of massive e-Discovery costs



ESI vs. Paper: Qualitative Differences

- Metadata (information about information);
- Hidden Information (embedded data, back-ups, cookies);
- Can't read E-Docs without software.
- These are not “documents” or “data compilations”
- Trickier to manage (deleted ESI)



ESI v. Paper Quantitative

- » Kilobytes (1 thousand bytes – e-mails usually measured in kilobytes)
- » Megs – Megabytes (1 million bytes – a small novel, 100 megs is stack of books a yard high; typical for pdf's and images)
- » Gigs – Gigabyte (1 billion bytes – pick-up truck loaded with books; 100 gigs is a library floor of books. We often collect two gigs of data from a document custodian's hard drive)
- » Terabyte (not called "ter's" just yet) – (1 trillion bytes. 50,000 trees; 10 terabytes holds the 19 million books in the Library of Congress print collection. Lawyers collected 250 terabytes of data – 25 libraries of Congress – in Enron.)
- » Petabytes and Exabytes



ESI v. Paper Quantitative

Then	Now
2.6 trillion e-mails in 1997	10 trillion e-mails in 2006
207 billion pieces of paper mail in 2001	211 billion pieces of snail mail in 2005
93% of documents created electronically in 2002	97% of documents created electronically in 2006
30% of documents never printed to paper in 1997	50% of documents never printed to paper in 2005.
Hard drives held 4 gigs in 2000, 80 gigs in 2004	Typical hard drives hold 80 – 600 gigs. Terabyte External Hard Drives Widely available



ESI v. Paper Discovery: Volume for Collection from 20 “Key Witnesses”

Paper (variable per case)	ESI (wildly variable per case)
Paper from each individual: average about 2 boxes per witness (about 100,000 pages)	2 gigs from each hard drive (2 million pages)
Paper from each department: average about 10 boxes X 5 departments (about 125,000 pages)	Data from servers (databases, shared drives)(1 million pages)
Paper from “dead storage” 75 boxes (about 175,000 pages)	Data from back-up tapes, 40 gigs - if ordered (2 million pages)
Total – 400,000 pages	Total – 5 million pages



Inconsistent Decisions

- » Back-Up Tape Cases
- » Metadata Cases
- » Waiver Cases
 - › Inadvertent Waiver
 - › Selective Waiver
 - › Clawback cases



Back-Up Tape Cases

» Pre-Rule Changes:

- › *In Re: Brand Name Drug*;
- › *Linnen v. A.H. Robbins*;
- › *McPeck v. Ashcroft*

» Post-Rule Changes:

- › *In Re: Veeco Instruments (S.D.N.Y. 2007)*
- › *AAB Joint Ventures (Feb. 28, 2007)*



Metadata Cases

» Pre-Rules Cases:

- › *Williams v. Sprint/United Mgmt. Co.*
- › *Wyeth v. Impax Laboratories, Inc.*

» Post-Rules Changes

- › *Kentucky Speedway, LLC v. Nat'l Assoc. of Stock Car Auto Racing, Inc.*
- › *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*



Waiver

- » New Rules do not change substantive rule of waiver.
- » *Amerisham Bioscience Corp. v. PerkinElmer, Inc.*, 2007 WL 329290 (D.N.J. 2007)
- » *Marrero Hernandez v. Esso Standard Oil Co.*, 2006 WL 1967364 (D. Puerto Rico July 11, 2006)



Proposed FRE 502

- » Status - public comment dates:
 - › January 12 (Phoenix)
 - › January 29 (New York)
 - › April 13 (San Diego – Meeting of Evidence Rules Advisory Committee)
 - › Several web sites opine that passage is imminent

- » Highpoints
 - › Subject matter waiver – limited to purposeful waiver
 - › Inadvertent disclosure – would adopt fact specific test
 - › Selective waiver – would permit selective waiver – hot topic
 - › Court orders control – would add strength to court orders
 - › Agreement binding only on parties – reiterate need for court orders

- » Impact on *e*-Discovery



Multi-Factor Test under Proposed FRE Rule 502

- » Reasonableness of the precautions;
- » Number of inadvertent disclosures;
- » Extent of the disclosure;
- » Timeliness in notifying opposing counsel;
and
- » Overriding interests of justice.
 - › *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228
(D. Md. 2005).



e-Discovery Cases in 2006 (by the numbers)

35% Motions to Compel

32% Spoliation and Sanctions

13% Form of Production

11% Litigation Holds/Preservation

5% Privilege waiver



Anecdotal Reports

- » Massive review projects
- » Expensive ESI processing
- » Inadvertent productions of privileged documents



Changes in the Rules

A Topical/Practical Grouping of Changes in the Rules



Preservation and the First Steps

Rules 16(b), 26(a) and 26(f)

- » Rule 16(b)
“The scheduling order also may include ... provisions for disclosure or discovery of electronically stored information” FRCP 16(b)(5)
- » Rule 26(a)
“a description by category and location of, all documents, [and] electronically stored information...that the disclosing party may use to support its claims or defenses, unless solely for impeachment.” FRCP 26(a)(1)(B).
- » Rule 26(f)
“[T]he parties must... confer...to discuss any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced”



Early Attention to *e*-Discovery

Rule 26

- Learn about client: be ready to address IT topology and accessibility intelligently
- Educate client about duty to preserve
- Prepare for meet and confer
 - Prepare to discuss ESI preservation
 - Consider production formats
 - Clawback and quick peek agreements
- Rule 16 Conference: Educate the Court



Early Attention to e-Discovery

- » Team up
 - › Meet with client's in-house attorneys
 - › Meet with client's IT
- » Set Scope
 - › Preserve broadly
 - › Identify key people, dates and issues
- » Send Hold
- » Follow up
- » Start the written a Protocol



Learn the Client's IT Topology

- » Ask about e-mails
- » E-Documents
- » Databases
- » Websites
- » Voicemail
- » Legacy equipment
- » Former employees
- » PDA's
- » Disaster Recovery
- » Offsite storage

Duty to Preserve

- » Arises when litigation anticipated
- » Covers ESI
- » Preservation scope is wide
- » Production will be narrower
- » Talk tapes – (e.g. oldest complete set)
- » Talk format and forensics (mailboxes, hard drives, external media)
- » Test is “reasonableness” of preserving



Use Topology for the Meet and Confer

- » E-Mail
- » E-Documents
- » Tapes
- » Websites
- » Databases
- » Other ESI
- » Production Format
 - › Non-Native
 - › No Metadata
- » Protective Order
 - › Waiver
 - › Clawbacks
 - › QuickPeeks



Production Formats

- » Paper production;
- » PDF's/TIFF's;
- » PDF/TIFF load files;
- » Hosted Data;
- » Native Data.



Rule 16 Conference Themes

- » You and your client take the rules seriously
- » You have made concrete efforts to preserve ESI and prepare for discovery
- » The volume of ESI is voluminous 2 gigs is 100,000 pages
- » ESI discovery is not as simple as “pushing a button”



Rules 16 and 26 – Privilege

- » Rule 26(f) requires parties to discuss privilege and invites claw back agreements:

“[The parties must confer to develop a discovery plan concerning] ...any issues relating to claims of privilege.”
FRCP 26(f)(4)

- » Rule 16 scheduling orders should cover privilege:

“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.”
FRCP 16(b)(5)



Key Claw Back Provisions

- » Acknowledge risk of inadvertent production given large volume;
- » State procedure to handle privileged documents (see Rule 26);
- » Agree that inadvertent production does not waive privilege;
- » Acknowledge parties' right to challenge privilege designation



Rule 26(b)(5)(B) – Privilege Procedure

- » Notification of inadvertent production;
- » Requester returns, destroys or sequesters;
- » Use of information prohibited;
- » Requester must retrieve information;
- » Requester may submit documents to court;
- » Producing party preserves information.



Rule 26 - Limitations

- » Inaccessible information [legacy data, encrypted data, and for now, back-up tapes]:

“A party need not provide discovery of electronically stored information from sources that a party identifies as not reasonably accessible because of undue burden or cost.” FRCP 26(b)(2)(B).

- » What this means: Attorneys should object to requests to look EVERYWHERE and to save EVERYTHING.
- » If the other side demands inaccessible ESI, they may have to pay for it.

Cost Shifting 3-Step Process

1. Identify inaccessible ESI
2. Review sample
3. Apply balancing test



Cost shifting - *Zubulake*

- » Is request tailored to find relevant information;
- » Availability of information from other sources;
- » Total cost of production compared to amount in controversy;
- » Total cost of production compared to ability of each party to pay;
- » Relative ability of each party to control costs and incentive to do so;
- » Importance of issues in litigation;
- » Relative benefit to the party of obtaining information.
Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 320 (S.D.N.Y. 2003)
- » **What this means:** Whether the court will force the requesting party to pay for information it requests depends on the circumstances.



Rule 33 - Interrogatories

- » Interrogatories are the written questions lawyers exchange in discovery. The new rule states:
“Where the answer to an interrogatory may be derived or ascertained from ... electronically stored information” it is sufficient to specify the ESI. FRCP 33

What this means: Lawyers have always been allowed to point to documents to answer written questions from the other side in litigation. This rule simply allows you to point to ESI in addition to paper documents.



Rule 34 – Document Requests

- » “Any party may serve on any other party a request to produce ...translated, if necessary, into a reasonably usable form...The request may specify the form or forms in which electronically stored information is to be produced.” FRCP 34
- » What this means: Parties must produce ESI in a format that the other side can review and cannot strip searchability and metadata.



Sanctions – Preservation and “Safe Harbor” provisions

“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 routine, good-faith operation of an electronic information system.”
FRCP 37(f)

- » What this means: Clients need to have a good document retention plan in place that provides for:
 - › Routine and good faith destruction of paper and ESI;
 - › Procedures to halt the destruction and preserve potentially relevant evidence.



Document Retention Policies

- » Rule 37 Safe Harbor
- » Create Litigation Preparedness Plan
 - › IT Topology Summary
 - › Litigation Hold Policy
- » Review Document Retention Plans
 - › Routine
 - › Good faith
 - › Determine approach
 - › “Lock it down” or
 - › “free it up”
- » Use but manage technology
 - › e-mail archiving



Third Party Subpoenas

“Do we have to produce e-mails too?”

- » “A subpoena may specify the form or forms in which electronically stored information is to be produced.”

FRCPP 45(D)

- » What this means: Yes, you have to produce e-mails and electronic files. Rule 45 does include extra protections for non-parties and the courts are more willing to listen to a non-party’s objection that the request is too burdensome.



Questions

