

Dealing with Electronically Stored Information¹

Preservation, Production & Privilege

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I. Introduction

Electronically stored information, referred to as “ESI”, is prolific in our lives. It exists in our computers, computer peripherals (like printers and fax machines), PDA’s, as well as pagers and wireless (cell) telephones. It also resides in storage on disks, backup tapes or removable drives, CD’S and other forms of media. There is also a great deal of hidden data in areas such as “metadata”, system data, and deleted data readily overwritten.

The greatest technological challenge for lawyers and judges is dealing with ESI and “E-Discovery.” From preservation of ESI to its disclosure and discovery, more questions than answers currently face the legal community.

In August 2004, the Judicial Conference Committee on Rules of Practice and Procedure proposed amendments to Civil Rules 16, 26, 33, 34, 37 and 45 to deal with the distinctive features and issues associated with ESI. These amendments took effect on December 1, 2006. Once enacted, they superceded existing law. 28 U.S.C. §2072(b).

In general terms, as reported by the Civil Rules Advisory Committee in its May 17, 2004 Report (revised August 3, 2004), page 5, these amendments have an impact on issues involving preservation, production, and privilege issues associated with ESI. Of these issues, preservation of ESI relevant to litigation is not covered extensively by the new rules and by itself is the subject of extensive analysis and articles. As a result, this article focuses on the issues of production and privilege regarding ESI under the new federal rules.

II. Production of ESI Under the Proposed Rules

The new federal rules require early attention to ESI by the parties, define the practical universe of data within the scope of disclosure and discovery, and provide procedural guidance related to format and procedures under various devices related to ESI.

A. Early Attention to ESI

The concept of early attention to ESI is addressed in two ways in the new rules. First, Rule 16(b)(6) has been amended to reflect that the Court may include provisions for disclosure or discovery of electronically stored information, as well as the parties’ agreement, if any, for

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protection against waiver of privilege in the Rule 16(b) Scheduling Order. This ensures early attention by the Court.

Second, Rule 26(f) was amended to require parties discuss any issues relating to preserving discoverable ESI at the Rule 26(f) conference. The parties also need to develop a discovery plan that would cover any issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced and whether the parties have agreed to or require the Court to enter an order protecting their right to assert privilege after production of privileged information.

One issue that needs particular attention is the protocol for computer record searches. This is not only true in a general sense but also as it relates to any deleted information that might be occupying "unallocated space" awaiting to be overwritten. A court addressed this issue in *Antioch Co. v. Scrap-Book Borders, Inc.*, 210 F.R.D. 645 (D. Minn. 2002), which is a good reference point in this regard. In a recent case in the Southern District of California the Court took a different approach, requiring the joint experts to develop a search protocol for the "mirror image," and then proceed to jointly search and review any information recovered. The defendant's expert was allowed, to the extent possible, to identify privileged and non-relevant information within the unallocated disk space. A privilege log was created and provided to plaintiff. Only the remaining non-privileged relevant information in the unallocated disk space was made available to the plaintiff for review. The Court then dealt with issues with regard to privilege or excluded material thereafter. *See, Venture Catalyst, Inc. v. Tech Results, Inc.*, U.S. District Court for the Southern District of California, Civil No. 05cv0063 W (AJB), Docket No. 24.²

The amended rules also clearly contemplate the initial disclosure of ESI as part of the parties' obligations under Rule 26 by adding "electronically stored information" to Rule 26(a)(1)(B). Numerous courts had previously so held, even prior to these amendments. *Bills v. Kennecott Corp.*, 108 F.R.D. 459 (D. Utah 1985); *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp.2d 1050 (S.D. Cal. 1999); *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002). Fed. R. Civ. P. 26(f)(3) places ESI on the agenda for the Rule 26(f) conference by adding, "any issues relating to disclosure or discovery of electronically stored information . . .". So even if you are not seeking your opponents' ESI, you may need to discuss disclosing ESI under Fed. R. Civ. P. 26(a).

B. Defining the Universe (ESI That is Not Reasonably Accessible).

In an attempt to define the scope and the breadth of the discovery of ESI, and recognizing the difficulty in locating, retrieving and providing discovery of some electronically stored information, Rule 26(b)(2)(B) was amended to provide that "a party need not provide discovery

² This order is available on-line through the Court's PACER system at www.casd.uscourts.gov.

of electronically stored information that the party identifies as not reasonably accessible because of undue burden or cost.” This is commonly referred to as a “two tiered system.” The burden of establishing “not reasonably accessible”, and therefore being in the “second tier”, is firmly on the party from whom the discovery is sought. *Id.* On a motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the Court may order discovery of the information for good cause and may specify terms and conditions for such discovery. *Id.* These “terms and conditions” will likely involve consideration of cost shifting issues. No definition of “reasonably accessible” is set forth in the rule. This is because, as the Committee explains in the Note to subdivision (b)(2), it is simply “not . . . possible to define in a rule the different types of technical features that may effect the burdens and costs of accessing electronically stored information.”

A party’s duty to respond to this discovery is stated in the Committee Note to subdivision 26(b)(2) as “produce electronically stored information that is relevant, not privileged and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery.” The Committee goes on to state that the responding party must “identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.” *Id.*

As noted previously, the burden of establishing that the discovery is not “reasonably accessible” is on the responding party. In a discovery dispute where the appropriate showing is made, the burden shifts and the requesting party has the burden to show that it has a need for the discovery that outweighs the burdens and costs of locating, retrieving and producing the information. In trying to establish a focus on what is “reasonable,” the balancing test under new Rule 26(b)(2)(C) is the likely source.

C. Interrogatories, Document Requests and Subpoenas.

Fed. R. Civ. P., Rule 33(d) was amended to include provisions regarding ESI, which would allow “a responding party to substitute access to documents or electronically stored information for an answer only where the burden of deriving the answer will be substantially the same for either party.” *See* Committee Note to Rule 33(d). The rule already provides this option to produce business records, but now specifically addresses ESI. The rule still requires the party served with the interrogatory to “specify” the records, and the “specification shall be in sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records for which the answer may be ascertained.” Fed. R. Civ. P. 33(d). The Committee Note to proposed Rule 33 characterizes this duty as follows: the party “must ensure that the interrogating party can locate and identify it.”

Rule 33(d) contemplates affording the requesting party the opportunity to “examine, audit or inspect” as well as make compilations, abstracts or summaries of the identified data. As a result, and notably, when a party invokes Rule 33(d), they may “be required to provide direct

access to its electronic information system, but only if it is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.” *Id.* Faced with this issue of “direct access” a responding party may decide it is more prudent to provide the answer itself rather than utilize the provisions of Rule 33(d). A search of a party’s active files should certainly be discouraged in any case. The issue of changed data, or lost data, as well as questions of privacy, are extreme. Utilizing a forensic copy of the enumerated files may be a good alternative to allow the “sampling” without the attendant risks.

Concerning requests for production of documents, Rule 34(a) also includes electronically stored information relative to a party’s request to “inspect, copy, attest or sample . . . documents or electronically stored information.”³ The Committee Note to Rule 34 states a change in the treatment of the discovery of ESI, putting it on an “equal footing” with discovery of “paper documents.” The same Committee Note states that “the change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined.” The Committee Note also provides some practical information for addressing Rule 34 discovery:

- (1) The term “documents” should be understood to encompass, and the response should include, ESI information unless a clear distinction is drawn between ESI and other type of documents;
- (2) Rule 34 is intended to be broad enough to cover all current types of computer based information, and flexible enough to encompass future changes and developments; and
- (3) The Rule’s requirement that the producing party “translate” stored information into usable form does not contemplate translating from one human language to another.

Rule 34(a)(1), like Rule 33(d), also provides that a party may request an opportunity to test or sample material sought under the rule in addition to inspecting and copying it. This may be of particular value with ESI considering its nature and volume. The standard notions of burden and intrusiveness may be raised pursuant to Rules 26(b)(2) and 26(c) and in opposition to such a request. See, Committee Note to proposed Rule 34(a).

Rule 34(b) now provides that the request may specify the form or forms in which ESI is to be produced. The responding party is entitled to object to the requested form in the response to the request. If no form is specified in the request, then the responding party must state the form or forms it intends to use when responding. Unless requested or ordered to agree, a responding party must produce any requested ESI in the form or forms in which it is ordinarily

³ Changes to Rule 34(a) in 1970 made it clear that “records” included electronically prepared and stored information.

maintained, or in a form or forms that are reasonably usable. Finally, a party need only produce ESI in one form per Rule 34(b)(iii).

Rule 45 was also amended in conformity with changes to Rules 26 and 34, and reference to ESI is now specifically included throughout new Rule 45. For example, (1) the testing or sampling language from Rule 34(a) have been inserted into proposed Rule 45(a)(1)(c); (2) the subpoena will be allowed to specify the form of production, similar to proposed Rule 34(b), and where a subpoena does not specify the format, the responding party will be required to produce the information in the form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable consistent with proposed Rule 34(b)(ii); (3) the "reasonably accessible" limits as to scope and breadth incorporated into Rule 26 (b)(2)(B) are repeated in Rule 45(d)(1)(D); and, (4) privilege will be dealt with under the same "status quo" concept (discussed below) set forth in Rule 26(b)(5). The same Rule 26(b)(5) provision will be inserted into Rule 45(d)(2)(B).

III. Handling Privilege Under the Proposed Rules.

With close to a million bytes of information in a computer storage system (including data, metadata, unallocated space awaiting to be overwritten), it is not always, if ever, feasible to fully search ESI for privilege. The Committee Note to Rule 26(b)(5) states that "the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed."

Simply stated, the Rule as amended provides that if more information is produced that is subject to a claim of privilege or a protection as trial preparation material: (1) the party making the claim may notify any party that received the information of the claim and its basis; (2) the party notified must promptly return, sequester, or destroy the specified information and any copies it has; (3) the receiving party is otherwise restricted from use or disclosure of the information until the claim of protection is resolved; and (4) the "receiving party" must take reasonable steps to retrieve any information that was disclosed prior to notification. Finally, the receiving party may promptly present the information to the Court under seal for a determination of the claim. The goal is to preserve the status quo until the Court can consider the questions of privilege and protection of work product.⁴

Notably, Rule 25(b)(5)(B) does not address whether the privilege or protection it has asserted after production was waived by the production. The issue of waiver is left to the Courts under the principles developed through case law. The impact of Rule 25(b)(5)(B) is to provide a procedure for presenting and addressing these issues, nothing more.

⁴ Withers, Ken, "We Have Moved The Two Tiers and Filled in The Safe Harbor," *The Federal Lawyer*, P. 50, Nov./Dec. 2005.

The Committee Note to Rule 26(b)(5) describes that the notice and claim for the basis of privilege must be as "specific" as possible. This is to allow the receiving party to decide whether to challenge the claim, and determine whether the claimed privilege or protection applies in the first place or is otherwise waived. Unless the notice is sufficiently detailed, the receiving party will be hampered in its attempt to decide its course of action.

There are a wide range of approaches employed by courts regarding waiver by inadvertent disclosure. "There is no consensus . . . as to the effect of inadvertent disclosure of confidential communications." *Allread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993). Courts deal with the issue in a variety of ways. These range from a strict liability approach such that any disclosure forfeits the privilege; a subjective intent approach, so that only a deliberate disclosure forfeits the privilege; and, a balancing test in which the Court considers all relevant circumstances. *United States ex rel. Bagley v. TRW, Inc.*, 204 F.R.D. 170 (C.D. CA. 2001).

Where courts use the "balancing" approach, a number of factors are considered in determining whether to excuse a waiver as "inadvertent." These include: (1) reasonableness of the precautions taken to prevent the disclosure in the first place; (2) the time that has passed since the disclosure; (3) the volume of discovery involved (which can be particularly extensive with ESI); (4) the amount of information disclosed; and, (5) and whether justice would be better served by relieving the party of its mistake. *Id. at 177*.

However, the time involved and the extent to which a party has relied upon the documents is extremely critical. Where a party in reliance on receipt of a document, and after a period of time, has relied upon the information in formulating or refining claims or defenses, or has used the information against the producing party, the privilege may indeed be lost. *See Bowles v. National Ass'n of Home Builders*, 2004 WL 2203831 (D.C. Cir 2004).

The intention of the Rules Committee was to create rules that will be flexible enough to embrace ever-changing technology. This wisdom should make these proposed rules stable for many years to come.

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