FRCP And MetaData – Avoid The Lurking E-Discovery Disaster

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Executive Summary

New e-Discovery rules are forcing organizations to develop policies and implement actions to address the new world of civil litigation in a digital era. The rules clarify that document metadata will be part of e-Discovery and must be considered in every case. Organizations who do not take steps face significant risks. Organizations that step up to the challenge by designing and implementing reasonable policies and selecting tools that help automate procedures will not only lower e-Discovery costs, but will avoid future e-Discovery disasters that can lead to sanctions and penalties and lost business, brand reputation and customers.

A treasure trove of potentially damaging information hides in plain sight beneath the surface of today's electronic documents. Although we see the occasional newspaper story announcing the embarrassing release of this hidden data, the issues raised by document "metadata" have only slowly made their way into litigation matters, court cases and law practices.

That's all now changed – and drastically – with potentially disastrous consequences for the unprepared. New amendments to the Federal Rules of Civil Procedure (FRCP) that became effective December 1, 2006 have brought organizations to a crossroads in the way they deal with the issues raised by metadata in civil litigation. These new amendments update traditional discovery rules for the modern era of electronic documents and force organizations and their legal teams to consider the impact of electronic data, including hidden data associated with documents, in every case.

In this article, you will learn practical ways to deal with the issues raised by metadata under the new FRCP amendments, to prepare your organization and your legal team to understand these issues, and to take appropriate practical steps to deal with your metadata in the new FRCP-driven legal environment. This article will cover the highlights of the new rules that affect e-Discovery and metadata, provide you with a practical overview of the issues involved, and outline the policies, procedures, tools and approaches you will need to consider for your organization to move forward confidently and successfully in this new era.

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The Impact Of Rule Changes

The new rules make metadata management a cornerstone of any effective e-Discovery strategy. Metadata management has been elevated to a level of importance traditionally occupied by often-discussed topics like email archiving, document retention, and content indexing for e-Discovery readiness. And it's more than just Rules 26(b) and 34(a) and (b) eliminating any doubt that metadata is subject to discovery. New Rule 37(f) provides a welcome safe harbor for organizations that manage metadata as part of normal business practices in accordance with automated implementation of reasonable policies.

Organizations that attempt to deal with metadata on an ad hoc basis rather than managing metadata from document creation based on well considered policies now face risks and costs that are simply unacceptable. The new rules change discovery procedures and shift the emphasis on discovery in litigation matters to reflect our increasingly digital world. They also subject organizations and their counsel to the full range of discovery sanctions for sloppy or improper handling of documents and their associated metadata.

However, there are larger issues at stake than simply sanctions and penalties. This hidden data can include records of changes, comments, dates and other information that can spell the difference between winning and losing cases at trial or being forced to settle cases where there initially appeared to be little at risk. Establishing good policies on handling electronic documents and their associated metadata cannot only avoid these business disasters but can save money in document production, streamline cases, and improve efficiencies in handling litigation matters. Because virtually every document created in today's business contains metadata, the extent, scope and implications of metadata and metadata management issues are large. Unprepared organization risk unprecedented disasters, as the $1.5 billion verdict recently handed to Morgan Stanley as a direct result of discovery violations illustrates all too well.[1]

New FRCP Amendments Bring Metadata Front And Center

After many years of discussion and drafting and with much fanfare and attention, the new amendments to the Federal Rules of Civil Procedure became effective December 1, 2006. Given all of this attention, anyone who reads the new amendments will be surprised at how little is really there, both in the number of words and how few rules are affected, and how modest the changes seem to be. The rules adopt and implement some simple rules and sketch out broad guidelines rather than give specific answers. These amendments reflect the approach of the Sedona Conference Working Group and other sources of the amendments that featured fourteen core principles of e-Discovery that focused on big picture issues rather than micromanagement of all aspects of the discovery process. The amendments also recognize and reflect that technology is likely to make specific requirements obsolete within a short time after enactment of any rules.

Sedona principles that affect metadata include an emphasis on a realistic assessment of costs and burdens of dealing with electronic data, a recognition that organizations are in the best position to evaluate the most reasonable ways to preserve and produce their own data, and a focus on active data that is meant to be used for future business purposes. The Sedona principles did not expect parties to take every possible step to preserve all potentially relevant data. The new amendments to the FRCP incorporate these Sedona principles.

The new rules are evolutionary, rather than revolutionary. In simplest terms, they are designed to clarify that e-Discovery is now a part of traditional discovery. The amendments provide for roughly equivalent treatment of electronic documents and paper documents. It is in the implications of these rules where the action is. Organizations that fail to comply with these rules face possible sanctions, including adverse instructions, default judgments and even monetary fines. Even worse, they risk losing cases that previously would have been won or favorably settled.

It is important to note that there are not substantive requirements, guidelines or directives under these new rules that you can pull out and implement. Much like the existing discovery rules, the new amendments are directed to the ways lawyers and courts handle and conduct cases in the federal court system (and in many, if not all, states). They deal with the ways electronic information will be gathered and produced in the litigation context. They do not mandate records management requirements.

As a result, organizations have not found the clarity and certainty they might have expected from the new amendments. As the extent and complexity of e-Discovery gradually become clearer, organizations have more, not fewer, questions about what they really need to do to prepare for and safeguard themselves from the lurking dangers of e-Discovery and metadata disasters. The numbers associated with e-Discovery will grab your attention. Consider (1) trillions of bytes of data to

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Prevent Risk of Damaging Metadata Through
Proactive Metadata Management!
- Eliminate eDiscovery disasters and sanctions resulting from risky metadata
- Reduce the risk of lost business and reputation
- Comply with the newly amended FRCP
- Reduce document review time by over 50%
- Improve metadata management consistency and efficiency across the entire organization
- Secure content by removing hidden metadata before distributing

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review, (2) billions of dollars in estimated e-Discovery costs, including products and services, in 2007 and already a billion dollar verdict, (3) millions of documents in complex litigation cases, and (4) potentially thousands of items of metadata in a single document with tracked changes. The number of newspaper headlines and court cases involving metadata and metadata disclosure continues to grow at a fast pace.

In the case of metadata, you will not find a specific new rule on metadata that you can turn to and learn everything that applies to metadata issues. Instead, you will see that the treatment of metadata arises from the implications of the rules and the discussion of the rules in the official comments. Simply put, the decision-makers in your organization need to know that the new rules clarify that the treatment of metadata must be a consideration in all discovery in today's litigation matters.

There are five amendments to the rules that will have an impact on the handling of metadata in litigation matters. These rules and their impact are summarized in Table 2 and detailed below.

1. Definition of Electronically Stored Information ("ESI")

No set of new legal rules would be complete if it did not introduce at least one new acronym. In the case of these amendments, that acronym is ESI, for "electronically stored information." Before the amendments, discovery consisted of two categories of discoverable items: documents and things. Although judges tended to treat electronic data as a form of "document," some courts treated electronic information differently and there were always questions whether new forms of electronic data would fit into the category of "document." Metadata is one example of whether it falls into the definition of "document."

Perhaps the most important aspect of the new amendments is that they eliminate issues about electronic data and "documents" by creating the additional category of "electronically stored information" in Rule 34(a). Electronic data, including metadata, is now clearly discoverable material, assuming relevance and other requirements are met. This result is consistent with the general approach of eliminating formal distinctions between electronic and paper documents. There should no longer be any grounds to contest whether metadata is by definition not discoverable.

2. Emphasis on Production in Native File Format

Rule 34(b), among other things, gives the requesting party the right to specify the format in which ESI is produced and places the burden on the producing party to show why another format should be used.

Today, litigants generally use one of three formats when producing documents electronically. Electronic documents might be provided in the TIFF format, or essentially as a scanned copy of the underlying printed document. They also might be provided in the PDF format, which is seen as more convenient, searchable, and usable. Finally they might be provided in what is known as the "native file format." Native file format simply means the actual format in which the document was created in the application in which it was originally created. For example, a Microsoft Word document would be produced in its original document format – the .doc format. Documents produced in native file format do not require scanning or conversion. They can also be viewed in the same manner that the creator and recipients saw the documents. In the case of spreadsheets, for example, you can see formulas used in cells and other information not available from a paper printout or TIFF or PDF versions of the same spreadsheet. Use of native file format tends to be cheaper, easier, and more convenient, and makes documents more accessible in many settings than production in the other two formats.

However, unlike TIFF and most PDF documents, electronic documents produced in native file formats will contain the hidden and embedded data often referred to as "metadata." As a result, there is a growing tendency to request electronic documents in native file format, in no small part because of the availability of the metadata associated with these documents. There is a growing consensus that judges will be sympathetic to requests for production in native file formats and that the trend will be toward native file format becoming the default form of production under the new rules. The result will be that metadata will be in play and need to be considered and dealt with in nearly every case.

3. Accessible and Inaccessible ESI

Rule 26(b)(2) introduces the notion of accessible and inaccessible information. The intent of the rule is not to require production of electronic information when it is not "reasonably accessible" as a practical matter because of undue costs or burdens of production. The concept of "inaccessible" has been defined in terms of substantial economic or of other burdens, not in terms of being "hidden" or "embedded." As a result, the rule indicates that, absent very unusual circumstances, metadata will fall into the reasonably accessible category of ESI.

4. Rule 37(f) Safe Harbor

Rule 37(f) provides a limited protection from the imposition of discovery sanctions in the event of deletion or loss of ESI in the routine, good faith operation of computer systems. While there seems to be some consensus among commentators that the safe harbor will apply only in limited situations related to backup procedures and the standard workings of operating systems, the language of the rule is broad enough to cover policy-based automatic metadata management efforts. However, the concept of "routine, good faith operation of computer systems" will find its way into other areas of interpreting these rules. The safe harbor also illustrates the way that the new amendments emphasize and have a respect for the difficulties of trying to work with the issues involved in handling electronic information in a changing technology environment. As a result, judges may respond favorably to reasonable efforts, procedures and processes adopted by organizations and their data managers when dealing with data handling and production issues, including metadata deletion and management. It is unclear how the case law will develop in that area, but organizations with reasonable, well-considered, and carefully administered metadata policies and procedures certainly have arguments that they fit into the safe harbor provisions.

5. Meet and Confer

Rules 16(b) and 26(f) require that ESI be considered as part of every case, and considered and addressed early and often. There is an obligation of parties to meet and confer about discovery within 45 days after filing the case. A discussion of the handling of ESI must be part of that conference. There is also a clear expectation in the rules that lawyers will cooperate to work out reasonable solutions to the issues raised by ESI. Lawyers and their clients must be prepared early to address, and have a plan for dealing with, ESI and electronic discovery issues, including the handling of metadata.

These five amendments will play the biggest part in the treatment of metadata. As the distinction between "paper discovery" and e-Discovery disappears, you will need to be aware that traditional rules and case law with respect to spoliation, chain of custody, presumptions of "hiding" evidence when ESI is deleted and other notions will apply and take on new meaning in an electronic age. Other aspects of discovery practice, such as Rule 82, relating to entities in non-U.S. jurisdictions and requiring consideration of ESI across an organization's global network, will apply when ESI is involved, and forms, such as Form 45, will expand to cover ESI.

The new rules do not set up requirements, regulations or specific guidelines for the handling of metadata and specific metadata issues. However, they clearly leave no place for organizations and their legal teams to hide when it comes to metadata. The rules clearly bring the consideration, discussion and handling of metadata to the surface in every case, and eliminate any argument that metadata is not a part of modern discovery practice.

For further details please visit www.workshare.com.

[1] Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc., *2005 Extra LEXIS 94 (Fla. Cir. Ct. Mar. 23, 2005).*

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