

## Hot Issues Alerts – Law Firms

# Electronic Discovery Costs And Burdens Require New Rules

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As discovery of information in litigation continues to drive costs ever upward, more claimants are driven out of the judicial system and the system serves far fewer of the purposes for which it was designed. The technological revolution has had a substantial impact upon discovery in civil litigation as the scope of what is included in the phrase “electronically stored information” (“ESI”) can be enormous and the protection of privileged and work product information made more difficult.

### The Electronic Discovery Landscape

More than just gross volume and multiple, disparate locations, electronic information is infamous for its complexity. Finding it, moving it, and understanding it may require a number of different disciplines and a variety of components.

Court rules now frequently involve an extensive search through many separate computer systems. Electronic media has become the nearly exclusive manner of producing and storing information in the corporate world.

For many litigants, the electronic data that accumulates on a daily basis is vast and difficult to manage. Much of this data is stored in reasonably accessible sources, which people use in the ordinary course of business, but vast quantities of this data are also preserved in sources that are not reasonably accessible, such as back-up storage media used for disaster recovery. Furthermore, substantial amounts of information consist of files that have been purportedly “deleted,” yet may still be recovered (albeit at significant burden and expense). Requiring a litigant to restore and retrieve data at its own expense from back-up tapes, “deleted” files, and other sources that are not readily accessible is having significant negative financial impact and resulting in substantial interference to the day-to-day business activities of many litigants.

When discovery processes were put in place, data of such magnitude and complexity were unfathomable.

### The Complexity, Cost And Burden Of E-Discovery

Examples are legion of the enormous direct costs of production of electronically stored information in today’s litigation, often running into the millions of dollars in just one case.

Computer systems are not only complicated but are designed and operated for business needs that have nothing to do with litigation. The features that make systems efficient for business may make them inefficient for retrieving information for pre-trial discovery. Clearly, something must be

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done to alleviate the burden, expense and uncertainty of complying with electronic discovery requests. Unfortunately, courts have been slow to acknowledge that litigants should not be penalized for the use of computer technology, as the use of such technology is no longer simply a choice, but a necessity.

Discovery of electronically stored information is unique and raises markedly different issues from conventional discovery of paper records. ESI is characterized by exponentially greater volume than hard-copy documents. Unlike paper, computer information is also dynamic; merely turning a computer on or off can change the information it stores. The routine operation of computer systems may systematically delete or overwrite information. And ESI, unlike words on paper, may be incomprehensible when separated from the system that created it.

Moreover, technology issues are not so apparent that they lend themselves to intuitive thinking by even the best-intentioned representatives of bench or bar. They are not inherently present awaiting counsel or judges to ferret them out. As a result, litigants have been contending with undue costs, loss of data, the belated finding of data, and impossible volumes containing largely irrelevant, redundant or unimportant information. These are some of the problems that model rules must address.

The electronic information explosion exceeds the efficient processing capabilities of lawyers, litigants, and judges, and requires narrowly focused, “smart” discovery targeted to information that is relevant and material to the claims and defenses and necessary to the disposition of the action. Clear, bright line rules would help discourage unnecessary and costly e-discovery by clearly delineating production responsibilities and properly allocating the costs and burdens of production. Without such guidance, e-discovery threatens the ability of litigants and courts to resolve cases on the merits.

### The Federal E-Discovery And Privilege Waiver Rules

The lengthy, in depth study by the federal rule makers leading to adoption of extensive amendments to the Federal Rules of Civil Procedure that became effective on December 1, 2006, established that the discovery of ESI is vastly more time-consuming, burdensome, and costly than “paper discovery.” The rule makers also recognized the inconsistencies in developing case law on e-discovery, the emergence of disparate local federal court rules, and a growing trend toward the balkanization of rules and practice that created a patchwork of rules and requirements throughout the country. While such inconsistencies are particularly confusing and debilitating to large public and private organizations, the uncertainty, expense, delays, and burdens of such discovery also affect the ability of small organizations and individual litigants to obtain justice.

The federal amendments were the result of many compromises necessitated by their application to all federal cases in courts throughout the country. Therefore, they did not attempt to solve all e-discovery problems, and early experience with them shows the need to deal directly with the remaining problems, particularly as they impact the several states.

A new Rule of Evidence, FRE 502, was also developed by the federal rule makers and enacted into law by Congress in 2008. This rule establishes predictable, consistent standards for protection against waiver of the attorney-client privilege and work product immunity in document production and complements the procedural protections of the 2006 e-discovery amendments. It is incorporated into the model rules discussed below.

### Model E-Discovery & Privilege Waiver Rules

The five rules suggested here attempt to establish concise, clear, and unambiguous standards that will supply needed guidance to bench and bar in dealing with electronic information and privilege waiver issues arising in discovery. They attempt to deal directly with the core problems in modern discovery and should reduce the ability of some litigants to leverage the cost and volume of that discovery to force settlements. They should also reduce unexpected and unnecessary discovery costs and burdens due to lack of planning, information, and management. Overall, the proposed rules should lead to faster, less expensive and better collection of data and should help to avoid expensive problems, prevent loss of data and ensure an efficient and sensible preservation, collection, review, and production process.

#### Rule 1 – Definitions

Definitions need to be updated in order to recognize the need for language specifically applicable to electronically stored information. The definition of “electronically stored information” should be sufficiently broad to cover all types of computer-based information, and sufficiently flexible to encompass future technological changes and development. The definitions of “attorney-client privilege” and “work product protection” should be drawn from the new Federal Rule of Evidence 502 (g).

#### Rule 2 – Discovery

The unique issues raised by the difficulties in locating, retrieving, and producing electronically stored information need to be addressed. Under this rule, a responding party should permit discovery of electronically stored information that is relevant, not privileged, and reasonably accessible. Information that is from sources that are reasonably accessible is subject to discovery without intervention of the court, subject to the limitations generally applicable to discovery under the state’s existing discovery rules and to the limitations imposed by another subsection of the rule that require the court to ensure that the discovery sought be relevant and necessary and that its benefit to the case outweighs the cost and burden of production.

Discovery of electronically stored information from sources that are **not** reasonably accessible should be required, over objection, only if a court orders the discovery based upon a showing of good cause. The decision whether to require the responding party to search for and produce information that is from sources that are not reasonably accessible should depend on whether the burden and expense of producing the information can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3)

the failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessed sources; (4) the likelihood of finding relevant responsive information that cannot be obtained from other, more easily accessed sources; and (5) the importance and usefulness of the further information in resolving the issues in the case. If the court orders discovery, the court should allocate to the requesting party the expense required to retrieve and produce the information.

#### Rule 3 – Sanctions

A court should be allowed to impose sanctions for failure to provide electronically stored information lost as a result of the routine operation of an electronic information system only if the producing party intentionally or recklessly violated an agreement or order issued in the action requiring the preservation of specified information. This rule responds to a distinctive feature of electronic information systems — the routine modification, overwriting, and deletion of information that attends normal use. This Rule would prohibit a party from exploiting the routine operation of an information system to destroy specific stored information that a party knows it is required to preserve or to act intentionally or recklessly to cause the loss of such electronic information.

#### Rule 4 – Form of Production

Flexibility is necessary in the production of electronically stored information. Electronically stored information may exist in multiple forms; different forms of production may be appropriate for different types of electronically stored information. The requesting party should be allowed to specify the form or forms of production, and the responding party should be allowed to object. If no form is specified, a default rule for production in a reasonably usable form should apply.

#### Rule 5 – Attorney-Client Privilege and Work Product Protection

Predictable, consistent standards for protection against waiver of the attorney-client privilege and work product immunity in connection with the inadvertent production of privileged or work product information in discovery need to be established. If information is inadvertently produced that should be protected, a procedure need be established for asserting privilege after production that is parallel to similar processes for producing and receiving parties under procedural rules in federal and many state courts. The rule should also clarify when waiver occurs.

### Conclusion

The proposed five simple and straightforward rules would make a well integrated and balanced piece of legislation or rules package that will be a major step towards a more realistic approach to electronic discovery and should significantly reduce the costs and burdens of such discovery and improve its effectiveness. Rules based on the concepts summarized above would contribute to the conduct of fair and reasonable discovery without impinging upon the truth-seeking function of the discovery process. And, they will provide clear and concise guidance to practitioners and litigants in dealing with the many complex and difficult issues involved in discovery of electronically stored information.

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