

TOP TEN THINGS TO KNOW ABOUT THE FEDERAL RULES OF CIVIL PROCEDURE ADDRESSING ELECTRONICALLY STORED INFORMATION

by Gary Beaver

1. The 12/1/06 rule changes make explicit the duties that already existed. Electronically stored information (ESI) has been discoverable for a long time. The courts have applied the prior rules of civil procedure and developed several duties concerning e-discovery:
 - a. duty to understand your client's ESI system
 - b. duty to preserve ESI
 - c. duty to locate, disclose, and produce ESI

2. Duty to preserve ESI:

- When does it arise? Usually before the client even consults an attorney. In a non-ESI context, Fourth Circuit has ruled that the duty to preserve evidence arises **when a party reasonably should know that the evidence may be relevant to anticipated litigation.**

Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir.2001).

- First tasks:
 - a. inform your client of duty to preserve;
 - b. send an evidence preservation letter to the other side. This is especially important if you think that there will be disputes over the scope of the case and scope of discovery. Do not want the other side to say it did not know that the sought evidence was within the dispute.
- Informing client:
litigation hold notice to at least key players;
 - review/ suspend / modify document retention/ destruction policy as needed;
 - create proper document retention/ destruction policy where none exists – cannot use the policy to destroy discoverable evidence;
 - must be specific about what to preserve;
 - must monitor compliance by periodically reminding client and checking to ensure litigation hold is being followed

3. Understand your client's ESI system:

- Fed.R.Civ.P. 26(a)(1)(A)(ii) initial disclosures:
 - (b) a copy – or a description by category and location – of all documents, **electronically stored information**, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- Cannot simply rely upon client's statements about what ESI it has. Must inquire deeply; involve client's IT personnel. Very important to talk to client's IT personnel who may be only ones with knowledge of all ESI storage devices. Must ask probing questions about ESI

systems, ESI devices used by personnel, storage of archival data and backup tapes, retention/destruction of data, disposition of old ESI storage hardware

- See the Phoenix Four case from SDNY (you can be personally sanctioned for failing to ask the right technical questions).
- Inventory your client's ESI and create an ESI schematic showing sources of ESI storage, such as servers, desktops, laptops, magnetic disks (e.g. computer hard drives or floppy disks), backup and archival magnetic tapes, USB Drives, ZIP Drives, optical disks (e.g., CDs or DVDs), PDAs (e.g. Blackberries, Treos, iPads, smart phones), pagers, cell phones, and home computers. Determine what ESI is inaccessible due to undue burden or cost (e.g., back-up tapes, archives). Find out what backup tapes/ archival materials exist and have them inventoried; consider need to have computer geek take a snapshot of all possibly relevant ESI. If you have right to access ESI held by others, include them in your ESI schematic.

You cannot properly do other duties: meet and confer, scheduling, or even know how best to ensure client preserves discoverable ESI without first doing the tasks listed above.

4. Meet and confer requirement:

- Fed.R.Civ.P. 26(f)(3) requires parties to meet and confer about ESI discovery and include it in proposed discovery plan. Must discuss ESI issues, including "the form or forms in which it should be produced."
- Consider using e-discovery protocols/ directives to have hired experts examine/ download the ESI and examine the hardware and software

5. Scheduling requirement

- Fed.R.Civ.P. 16(b)(5) requires court to address ESI discovery in the scheduling order.

6. Limits on ESI discovery. Rule 26(b)(2)(B) allows parties to withhold inaccessible ESI due to "undue burden or cost." Must still disclose/ identify the ESI so that other party can challenge if they choose and must preserve such ESI.

7. Rule 33 provision allowing production by pointing the opponent to the documents now specifically allows the same with respect to ESI.

8. Rules 34(a) and 45 specifically include ESI. Rule 34(b) allows the requesting party to designate the form in which the ESI is to be produced. If not designated, then producing party "must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable." Must decide: hard copies, PDF, TIFF, HTML, native files? Must metadata be produced? Do parties need to create search protocols?

9. Inadvertent Production of Privileged Information – Fed.R.Civ.P.26(b)(5)(B) -- requires receiving party to return, sequester, or destroy the information upon being notified of its inadvertent production. Disputes to be decided by submitting to court under seal. Codified the "clawback" agreements we had to do in the past. Not limited to ESI. Note that under Rule 16(b)(3)(B)(vi), the court can address in the scheduling order any agreements between the parties such as "clawback" and "quick peek" agreements that may help with ESI discovery.

10. Limited safe harbor for routine destruction of ESI – Fed. R. Civ. P. 37(e):

Failure to Provide Electronically Stored Information. 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 the routine, good-faith operation of an electronic information system.

This rule reflects common law on spoliation which generally requires a “culpable state of mind” in destroying relevant evidence before sanctions will be imposed.

Other issues:

- Be aware of local rules of court
- Many gray areas remain:
 - when is preservation duty triggered in particular scenario;
 - how far does the attorney have to go to learn about his clients’ ESI system;
 - handling and producing metadata.

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