e-DISCOVERY and the NEW FEDERAL RULES of Civil Procedure

They Apply to You

FAST FACTS:

The e-discovery amendments of the Federal Rules of Civil Procedure have made electronically stored information (ESI) discoverable, if relevant.

Whether the e-discovery amendments will make e-discovery easier and less expensive or lead to increased motion practice remains to be seen.

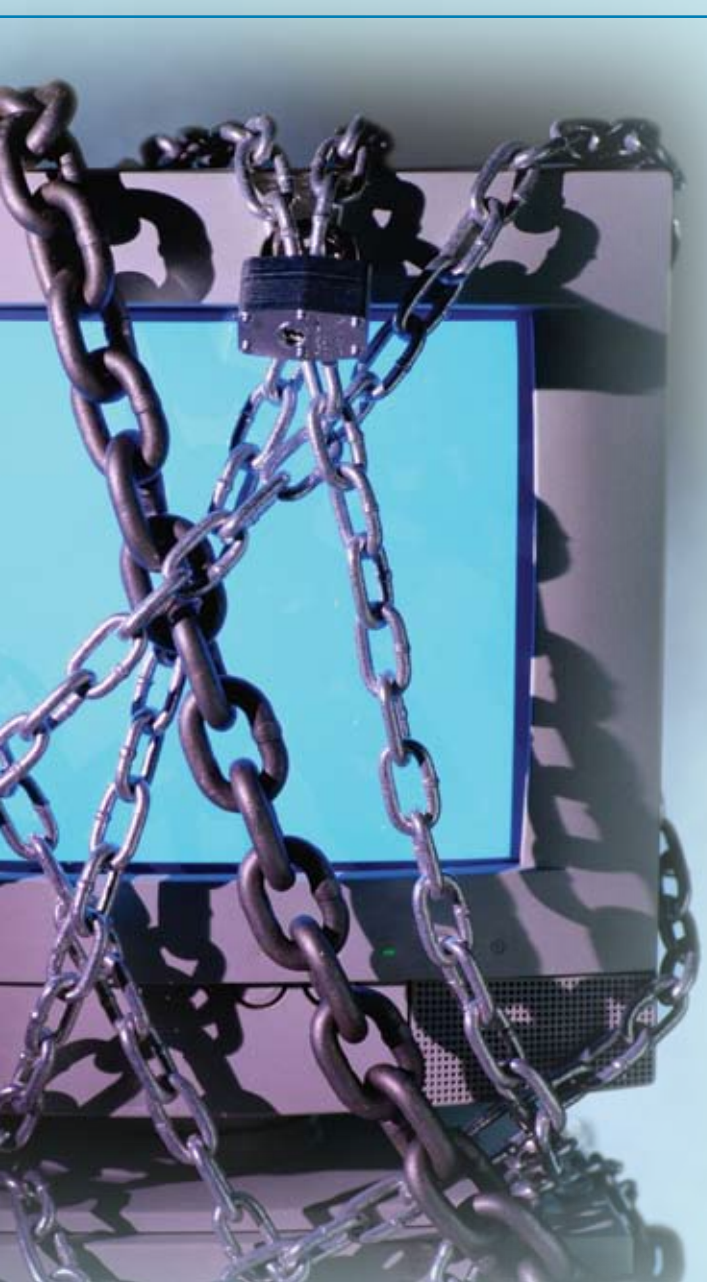
No attorney or party to a lawsuit can ignore these amended rules or their effect on how ESI is handled and exchanged during a lawsuit.

By Derek S. Witte and D. Andrew Portinga

The United States Supreme Court recently approved amendments of the Federal Rules of Civil Procedure to govern the discovery of electronically stored information (ESI).[1] These amendments took effect on December 1, 2006.

The new e-discovery rules amended current Rules 16, 26, 33, 34, 37, and 45. Currently, no changes to the Michigan Court Rules have been proposed to address discovery of ESI. Eventually, however, the Michigan Supreme Court will likely adopt rules that address the specific procedural issues raised by ESI.

Before taking a close look at the amendments, it is important to understand why they are necessary and why every attorney should care about them.



Why We Need the New E-Discovery Rules

For more than a decade, most people and corporations have been communicating by e-mail, saving documents in electronic format, and generally operating in an electronic work environment. The rise of ESI has created several challenges for attorneys and clients involved in litigation. The first challenge is that there is now much more information to review and potentially produce as part of discovery. The ease of e-mail has markedly increased the volume of written communication. In 2003, for example, the U.S. Postal Service processed 1.98 billion pieces of mail. That same year, more than 182.5 billion e-mail messages were sent.[2] Given that every e-mail is potentially within the scope of a document request, the universe of information that is potentially discoverable is much larger than it used to be.

A second challenge is that ESI may be stored in myriad places. Electronic information can be stored not only on central servers and backup tapes, but also on each individual employee's hard drive. Additionally, a client's electronic information can be stored on individual laptops, BlackBerry devices, "smart" phones, or other PDAs (personal digital assistants).[3] And with the constant proliferation of new communication devices, the number of potential repositories will surely increase.

A third challenge is that ESI contains "hidden" data, or metadata. Metadata is "data about data," and it may include, for example, information about who made what changes to a document and when the changes were made. This metadata is not seen when a document is printed, and therefore, producing an electronically stored document in paper form may omit some potentially responsive information.

Courts have recognized that it is "black letter law that computerized data is discoverable if relevant,"[4] and recent court decisions have placed heavy burdens on companies and their counsel to undertake thorough, if not exhaustive, efforts to preserve, gather, and produce ESI, at sometimes exorbitant costs. Failure to do so has resulted in harsh results. For example:

- In *Coleman (Parent) v Morgan Stanley & Co, Inc,* the court allowed an adverse-inference jury instruction for spoliation of evidence, which led to a $1.4 *billion* verdict, because Morgan Stanley and its counsel did not properly preserve and produce all e-mails from backup tapes and archives.[5]
- In *Zubulake v UBS Warburg,*[6] the court entered an adverse inference and sanctioned the nonproducing party because e-mails were not properly gathered and timely produced.[7] This led to a $29 million verdict.

Clearly, an attorney needs to become conversant with ESI and the challenges that it imposes.

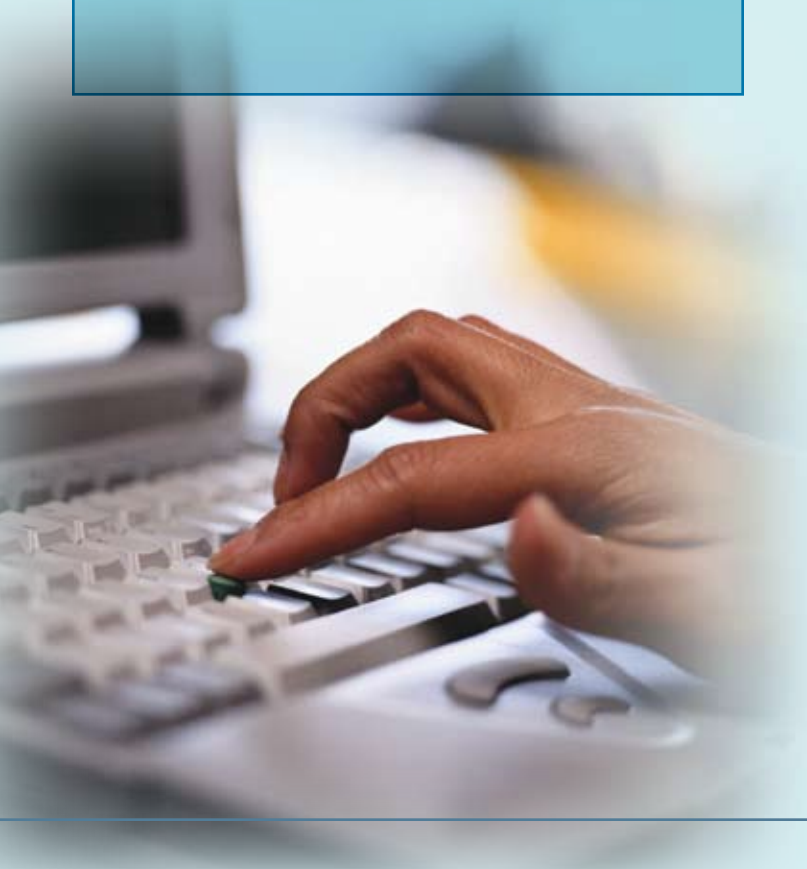
The New E-Discovery Rules

The e-discovery amendments of the Federal Rules of Civil Procedure attempt to address some of the challenges associated with electronically stored evidence. A summary of the key changes follows.

The Definition of Electronically Stored Information

Amended Rule 34(a) adds a new category of discoverable information—electronically stored information—and includes within the definition of discoverable documents and ESI "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations *stored in any medium* from which information can be obtained…." (Emphasis added.) The definition that includes ESI is broader than the prior definition of "document" in Rule 34 and should encompass all electronically stored information. The definition of ESI is intentionally broad—it encompasses data stored in any medium—to cover new technologies that may develop.

ESI creates special problems relating to the attorney-client privilege. The sheer volume of ESI makes the inadvertent production of privileged information more likely.



Accessible vs. Inaccessible Data

Although amended Rule 34(a) defines ESI very broadly, the new rules attempt to ease the burdens associated with discovery of ESI by differentiating between "accessible" and "inaccessible" data. Under amended Rule 26(b)(2)(B), a party need not provide ESI that the party identifies "as not reasonably accessible because of undue burden or cost." A key provision of the amendment is that the producing party gets to make the initial determination of whether ESI is "not reasonably accessible." Of course, this determination may be challenged through a motion to compel, and the new rule places the burden on the producing party to show that the requested ESI is not reasonably accessible because of undue burden or cost.

If the producing party successfully makes such a showing, under the amended rule, the requesting party must show "good cause" for the discovery. Issues that will surely be litigated are what is considered inaccessible data and what constitutes good cause sufficient to support an order to produce it. Before the enactment of this amended rule, the leading case on this topic was *Zubulake I,*[8] which defined inaccessible data as data on backup tapes or data that is fragmented, damaged, or "erased" and accessible data as everything else.

The committee notes on Rule 26(b)(2) suggest that a court consider the following factors in determining if inaccessible data should be produced:

> (1) the specificity of the discovery requests; (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 not longer available [in any other format]…; (4) the likelihood of finding relevant, responsive information…; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Cost Shifting

The amended rules do not explicitly address cost shifting in connection with ESI. Instead, they adhere to the general rule that the producing party must pay for discovery. Under amended Rule 26(b)(2)(B), however, when a party successfully shows that ESI is not reasonably accessible, the court may still order that the ESI be produced if there is good cause for the production, and the "court may specify conditions for the discovery." The committee note on Rule 26 suggests that such conditions could include cost shifting. Thus, the new rule implicitly endorses cost shifting for inaccessible data when there is an undue burden or cost associated with obtaining the data.

The notion that the requesting party may have to pay the cost of production of inaccessible ESI is consistent with precedent, including *Zubulake I.* According to *Zubulake I,* a party requesting data from backup tapes or "offline" inaccessible data should bear

some of the burden and cost of its discovery. The *Zubulake I* court applied a multifactored test to determine whether cost shifting should be required when a party requests discovery of inaccessible or offline data, including (1) the extent to which the *request is specifically* tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.[9] It is likely that courts will weigh these same factors under amended Rule 26(b)(2).

The *Zubulake I* factors are similar to, but slightly different from, the seven factors set forth in the committee note regarding when inaccessible data should be produced. Courts may apply the committee note factors to make the threshold determination whether a producing party must produce inaccessible data and then look to the *Zubulake I* factors to determine whether the requesting party should share costs for the discovery efforts. At this point, parties do not have any guidance on how the amended rules will be affected by the existing case law, or vice versa.

Forms of Production

Another issue associated with ESI concerns the form in which ESI should be produced. For example, when responding to a request for e-mails, many lawyers assume that it is sufficient to print out the e-mails and produce them in paper form. A paper copy of an electronic document, however, will not reveal the metadata about the document. Paper versions of ESI are also not searchable electronically. A requesting party may wish to obtain ESI in an electronic form, both to capture the metadata and to allow for computer searches of the documents.

Rule 34(b) allows the requesting party to specify the form in which the ESI should be produced. Thus, the requesting party gets to designate whether a paper printout of ESI is sufficient or whether an electronic version should be produced. The producing party may object to the form requested and show why the ESI should be produced in a different form. If no objections are made, or no specific form is requested, the ESI should be produced "as they are kept in the usual course of business," or "in a form or forms that are reasonably usable." It is unclear from the amended rule or the committee notes what "reasonably usable" ESI will be; thus, it appears that the court and the parties may be left to sort this out through litigation. Importantly, Rule 34(b) does not, absent a court order, require a party "to produce the same electronically stored information in more than one form."

Inadvertent Disclosure of Privileged ESI

ESI creates special problems relating to the attorney-client privilege. The sheer volume of ESI makes the inadvertent production of privileged information more likely. Also, metadata may contain privileged information—such as an attorney's edits to a document—that may not be revealed by a review of a paper printout of a document.

The rise of ESI has created several challenges for attorneys and clients involved in litigation. The first challenge is that there is now much more information to review and potentially produce as part of discovery.

Rule 26(b)(5) creates a mechanism for addressing the problem of inadvertent production of privileged information. Under this rule, if a party inadvertently produces information that is claimed to be privileged, the producing party may notify the receiving party of the inadvertent production and the basis for the claim of privilege. The receiving party must promptly return, sequester, or destroy the information until the claim is resolved, but the receiving party may present the information to the court under seal for a determination of the privilege claim.

Currently, courts around the country are split concerning whether the inadvertent production of information is a waiver of any privilege. Rule 26(b)(5) does not affect the law on the waiver of the privilege. Rather, it only creates a mechanism for resolving

a dispute about whether inadvertent production waives the privilege. In fact, 28 USC 2074(b) expressly states that evidentiary privileges can be altered only by an act of Congress. So, even if Rule 26(b)(5) were intended to address the issue whether inadvertent disclosure is a waiver of the privilege, the rule would be void.

Pre-Discovery Meetings

The amended rules require parties to meet early to discuss their respective electronic discovery plans. One topic that must be discussed is whether the inadvertent production of privileged information will be deemed a waiver of any privilege. If the parties are willing to enter into a "clawback" agreement, under which the parties agree to return inadvertently produced information, they may avoid the issue of inadvertent production. Rule 16(b)(6) provides for the incorporation of such an agreement into the case management order. A party should be cautious about relying on a clawback confidentiality agreement, however, because the agreement may not provide protection against claims of waiver by third parties. That is, even if a clawback agreement prevents a party to the agreement from using inadvertently produced privileged information, a nonparty may argue that the inadvertent production still constitutes a waiver of the privilege.[10]

Rule 26(f) also requires the parties to discuss the form of production of ESI as part of their initial conference. Further, Rule 26(a)(1) was amended to expressly include ESI within the scope of initial disclosures.

Preservation of Electronic Evidence

Perhaps because of several conflicting and sometimes extreme court decisions awarding sanctions and ordering adverse inferences because of the alleged spoliation of ESI, the e-discovery rules create a "safe harbor" for production of ESI. Rule 37(f) provides that "[a]bsent 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."

Although this amendment seems to protect many corporate defendants and litigators from allegations of spoliation, the committee notes on the rules indicate that to maintain "good-faith operation" of the computer system and thus avoid sanctions for spoliation, the parties and their attorneys must make reasonable attempts to institute a litigation hold and prevent the routine deletion of potentially relevant ESI. In other words, "a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."[11]

Thus, the amendment of Rule 37(f) means that there will be no sanctions unless (1) the party violates a court order or (2) the party failed to take reasonable steps to preserve ESI after it knew or should have known that the information was discoverable and the spoliation resulted from the loss of information because of routine operation of the party's electronic information systems. Therefore, to be protected by the safe harbor, parties and their attorneys must take affirmative steps to stop routine deletion of ESI once a preservation obligation arises.

Conclusion

Whether the amendments of the Federal Rules of Civil Procedure will make e-discovery easier and less expensive or lead to increased motion practice remains to be seen. One thing is clear, however: no attorney or party to a lawsuit can ignore these amended rules or their effect on how ESI is handled and exchanged during a lawsuit. ■

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Mr. Portinga is currently a member of the U.S. Courts Committee for the State Bar of Michigan. He has also served on the State Bar Board of Commissioners and as chairperson of the Young Lawyers Section.

FOOTNOTES

1. Available at <http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf> (accessed February 8, 2007).
2. *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production,* p 4 (July 2005), available at <http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf> (accessed January 26, 2007).
3. Schultz & Keena, *Navigating the perils of discovery in the electronic information age,* 81 Mich B J 54 (September 2002).
4. *Anti-Monopoly, Inc v Hasbro, Inc,* 1995 WL 649934, at *2 (SD NY, 1995).
5. See *Coleman (Parent) Holdings, Inc v Morgan Stanley & Co, Inc,* 2005 WL 679071 (Fla Cir Ct, 2005); *Coleman (Parent) Holdings, Inc v Morgan Stanley & Co, Inc,* 2005 WL 674885 (Fla Cir Ct, 2005).
6. *Zubulake v UBS Warburg LLC,* 229 FRD 422 (SD NY, 2005) *(Zubulake V).*
7. See Ramsey, *Zubulake V: Counsel's obligations to preserve and produce electronic information,* 84 Mich B J 26 (October 2005).
8. *Zubulake v UBS Warburg,* 217 FRD 309 (SD NY, 2003) *(Zubulake I);* see also Watson, *Anticipating electronic discovery in commercial cases,* 83 Mich B J 31 (May 2004).
9. See *Zubulake I, supra* at 322.
10. See, e.g., *In re Columbia/HCA Healthcare,* 293 F3d 289 (CA 6, 2002).
11. Fed R Civ P 37(f), advisory committee's note.