

Editorial Opinion

E-Discovery

From Avoiding Malpractice to Gaining a Litigation Edge

By **Richard L. Seabolt**



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Litigators and judges who have not yet focused on the tectonic shift caused by the digital age will soon need to grapple with the unique set of challenges associated with electronic discovery. On December 1, 2006, amended Federal Rules that address e-discovery issues will become effective. A month later, on January 1, 2007, similar procedures will become part of the California Rules of Court. The proposed new rules appear on the

respective court websites — www.uscourts.gov and www.courtinfo.ca.gov.

These changes are important, in part, because some of the most highly publicized litigation disasters arise from electronic discovery issues. They also are important because electronic discovery presents one of the best opportunities to gain a litigation edge.

Here is my quick overview of the why electronic discovery is important and different, together with a summary of the key changes in the rules.

More Important, — Harder (and Easier) — than Before

Digital information is exploding. Even seven years ago, back in 1999, more than 93% of all information was digital. *In re Bristol-Myers Squibb Securities Litigation*, (D.N.J. 2002) 205 F.R.D. 437, 440 n.2. The trend has accelerated. We now create data at a rate of approximately 5 exabytes (a billion gigabytes) per year. That translates to nearly one gigabyte per year (or the equivalent of 35 feet of books) for every man, woman and child on the earth! This trend is driven by the proliferation of emails, which can be transmitted conveniently around the

world at no cost. The new global economy is less dependent on personal meetings and more dependent on electronic communications. The average American business person now receives between 50-150 emails per day.

E-discovery is important because the best evidence of what was done, what was said and what was known is often recorded as electronically stored information (“ESI”). Most litigators have long recognized that contemporaneously prepared pre-dispute documents “don’t lie.” As computers and electronic devices have become ubiquitous, we leave electronic tracks of much of what we did, said and thought.

The review and production of ESI is much harder because of its volume. Clients and their litigation adversaries frequently have vast quantities of ESI. But ESI presents other unique challenges. While ESI is very susceptible to unintentional dele-

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Rick Seabolt is Immediate Past Chair of the Litigation Section and practices with Duane Morris LLP in San Francisco.

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tion, it frequently is difficult or impossible to permanently remove all copies of ESI so that the data cannot be recovered through special forensic techniques. Evidence of the recovery of deleted data obviously has its own litigation significance and unique problems.

The review and production of ESI is, in other ways, easier. Emails, unlike paper, can be searched and screened through the use of word searches. Key words, such as the names of the plaintiff, an involved employee, a competitor or a project, can instantaneously segregate massive amounts of data and isolate potentially relevant data.

To accommodate the unique challenges of e-discovery, the new rules address the following topics:

Early Meet and Confer Obligations

The amendments to the Federal Rules and the California Rules of Court will require the parties to meet and confer among themselves, and then address key electronic discovery issues with the court. Wisely, the drafters of the rules recognized that substantial costs and delays could be avoided with some advance planning and cooperation. The initial conference required by the new rules should cover the following topics:

The 'Litigation Hold' and Preserving E-Info

Destruction of documentary evidence in anticipation of a discovery request has long been recognized to be an abuse of the discovery process. *Cedars-Sinai Medical Center*

v. Superior Court, 18 Cal. 4th 1, 12 (1998). Because ESI is volatile and easily destroyed, counsel are now required to take affirmative steps to preserve electronic evidence. Counsel must issue a "litigation hold" that suspends routine document destruction procedures and notifies key personnel that they must preserve all ESI that bears on the threatened or pending litigation. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433 (S.D.N.Y. 2004) ("*Zubulake V*").

An early agreement with the litigation adversary or court direction about the breadth of the litigation hold can avoid later second-guessing, criticism or sanctions over the scope of the obligation. Litigators need to investigate their client's technology systems and computer backup systems, and need to understand how to corral the client's ESI, whether the data is stored on abandoned computers, backup tapes, laptops, Blackberries, Treos, other PDAs, home computers or personal email accounts that may be used for business purposes.

An early agreement or court direction can be particularly important to multinational corporations, which are constantly involved in major litigation. It is not reasonable or practical to have all ESI for such a party preserved indefinitely worldwide. But absent clear rules established by agreement or court order and implementation of those rules, there is a risk of disastrous sanctions. See, *U.S. v. Philip Morris*, 2004 WL 1627252 (D.D.C. 2004) (\$2.7 million monetary sanctions); *Coleman v. Morgan Stanley*, 2005 WL 674885 (2005) (\$1.45 billion verdict following adverse inference jury instruction after court found that a certification regarding Morgan Stanley's backup tapes was false when made).

Counsel's obligation to interview client's IT personnel and to undertake a "methodical survey" of electronically stored information sources is illustrated in a recent case in which the party and counsel were sanctioned \$10,000 for each key witness that needed to be re-deposed. In that case, counsel had asked the client to preserve and produce all electronic and hard copy documents, but the court held that counsel needed to do more. The sanctions were based on the failure to conduct an appropriate search that would have discovered data located on abandoned computers and on a partitioned section of a hard drive that was not accessible in the client's newly configured computer system. *Phoenix Four v. Strategic Resources*, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. 2006).

Counsel should also be alert to the tension between assertion of attorney work product protection and the duty to implement a litigation hold. While it may be advantageous to use an early "contemplation of litigation" date to broaden the availability of work product protection, that same date can be used by a litigation adversary to argue that the party and counsel should have preserved all ESI as of that same, early date.

Form of Production and Metadata

One of the other issues that should be discussed at the early meet and confer session that is mandated by the new Rules is the form in which ESI is to be produced — whether in electronic format or in hard copy paper. The Rules expressly provide that the requesting party

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can require production of ESI in the manner in which it is maintained in the ordinary course of business. For applications/programs other than email and word processing, such as databases and spreadsheets, it almost always is best to obtain the information electronically since the information is more easily accessible in electronic format.

Although a 2005 ABA Digital Evidence Survey found that during discovery nearly half of the corporate counsel respondents agreed to exchange ESI in paper or hard copy form, litigators should consider an inherent advantage of the electronic format — ESI is searchable. Vast amounts of emails can be “sifted and sorted” and brought down to a manageable size almost instantly if the parties can agree upfront on: (1) the identity of the key personnel who are likely to be witnesses; (2) keywords that can be used to search the email boxes and computers of the key personnel; and (3) a relevant time frame for the searches. Agreements at the early meet and confer session on the identity of the key personnel, on searchable keywords and on relevant time frame can simplify the pre-production review and minimize after-the-fact criticisms that a search was inadequate.

Similarly, privilege reviews can be simplified if the names of the lawyers likely to be involved in pre-dispute communications are the subject of searches and further review so as to screen privileged communications from the production. This proposed method warrants a note of caution. A search of the “To,” “From” and “cc” fields for lawyers’ names will not necessarily identify those emails which involve the retransmission of an attorney’s advice within and among the client’s management group. *See, e.g., INA v. Su-*

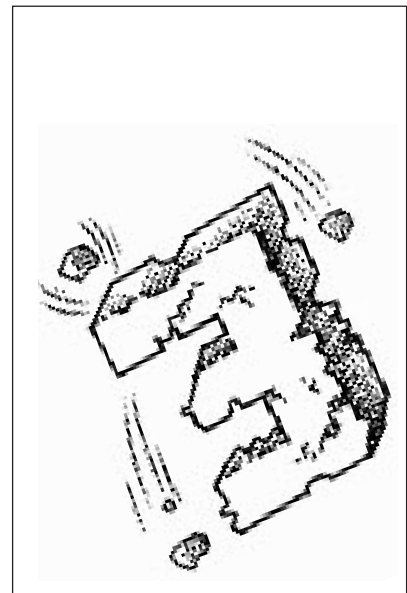
perior Court, 108 Cal. App. 3d 758, 770-771 (1980). Inadvertent production of such embedded privilege communications can be particularly devastating since an executive’s summary of legal advice can be more blunt and less cautious than the actual advice given in the lawyer’s own words.

Production of ESI in electronic or “native format” also makes available metadata — or data surrounding the document that is not visible when the document is printed. Metadata may include information such as the content of earlier drafts of the document and/or a record of “track changes,” creation and modification dates, and the authors of earlier drafts. The information can be used to authenticate a key document or to show who knew what when. Federal case law now holds that when there is a request or agreement that electronic documents be produced as they are maintained in the ordinary course of business, “the producing party should produce the electronic documents with their metadata intact. *Williams v. Sprint/United Management* (D.Kan. 2005) 230 F.R.D. 640, 652. Metadata requires special care and expertise to avoid alteration/spoliation and to avoid inadvertent production of otherwise privileged lawyer input into the preparation of electronic documents.

Claw-Back Provisions for Claims of Privilege

The Committee Notes to the new Federal Rules acknowledge that substantial costs and delays are frequently associated with privilege reviews. As a result, the new rules provide a “claw-back” procedure by which a producing party can require

a prompt return of all information claimed to be privileged, until the claim is resolved. FRCP 26(b) (5) (B). Notably the proposed rule does not require that the production be inadvertent, so the claw-back protection would appear to apply even to a production in which there was



no pre-production privilege review. Although the claw-back provision is a useful backstop, litigators should be cautious not to place too much reliance on the provision. The return of privileged information does not “unring the bell,” and adversaries may become emboldened and more creative after they have seen damaging privileged information. It is also unclear that a “claw-back provision” agreed to between two parties would have any effect on a third party who could contend that the production constituted a waiver. *See, McKesson HBOC Inc. v. Superior*

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Court, 115 Cal. App. 4th 1229 (2004) (privilege as to internal investigation was waived when report was provided to the SEC).

Cost-Shifting and Not Reasonably Accessible Data

Under the new Federal Rules, a responding party may object and not provide discovery of ESI from sources that are identified as “not reasonably accessible because of undue burden or cost.” FRCP 26(b) (2) (B). Some of those sources may be back-up tapes or discs that are maintained for disaster recovery, handheld devices, or legacy information stored on obsolete software or hardware. When the readily accessible ESI appears to have been deleted or unavailable, the court may require that the responding party produce the information even though the production may be very

expensive. The court also may condition the production by shifting some or all the costs to the party requesting production. FRCP 26(b) (2) (B). Although cost-shifting in federal court is relatively rare, the courts have developed a seven-factor test to help decide the issue. *See, Zubulake v. UBS Warburg* (S.D.N.Y. 2003) 216 F.R.D. 280, 284. In contrast, current California case law has interpreted the California discovery statutes to require that the party demanding discovery bear the costs associated with the production of backup tapes because such a production involves the translation of data into a reasonably usable form. *See, Toshiba America v. Superior Court*, 124 Cal. App. 4th 762 (2004).

Even though a responding party may be able to object to production of ESI that is not reasonably accessible, it is critically important that counsel discharge the duty to identify and preserve such information so as to avoid charges of spoliation of evidence and the risk of sanctions.

— Safe Harbor Provisions —

In an effort to accommodate concerns about the burdens and expense of electronic discovery and the resulting risk of sanctions, the new Federal Rules create a safe-harbor provision that protects a party from sanctions if the ESI is lost as the result of “the routine, good-faith operation of an electronic information system.” FRCP 37(f). But this provision likely will provide little comfort to parties who have an obligation to implement a litigation hold because they reasonably anticipate litigation.

With this column, my term and duties as Chair end. From our membership survey results, it appears that our members appreciate the publications and other educational benefits that the Litigation Section provides. From my perspective, it is comforting to hand the baton to the extraordinarily capable leadership of the new Chair, Erik Olson, and the new Executive Committee members and advisors.