Litigation

Thoughts on the E-Discovery Amendments to Federal Rules of Procedure

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On December 1, 2006, amendments to the Federal Rules of Civil Procedure, addressing the discovery of electronically stored information ("ESI"), took effect. The amendments followed six years of work by the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference to minimize the difficulties of applying to ESI—the most common form of data storage today—rules that were originally designed for information stored on paper.

The amendments address five related areas: the discussion of "e-discovery" issues early in a lawsuit (Rules 16(b) and 26(f) and Form 35); the form of production, including the definition of what constitutes a "document" (Rules 26(a), 33, 34(a) & (b), and 45); who bears the burden of retrieving, reviewing and producing ESI that is rarely or never used and difficult to access (Rule 26(b)(2)); how to deal with the inadvertent disclosure of privileged ESI (Rule 26(b)(5)); and the creation of a "safe harbor" from sanctions when discoverable ESI is destroyed (Rule 37(f)).

There exists, besides the various committee notes and comments to the new rules, an abundance of articles discussing these matters already. Thus, with the land well-plowed, this article tries to offer some fresh observations, having written and spoken about the new rules since they were initially contemplated several years ago.[1]

Although the rules of civil procedure, and especially those relating to discovery, are usually arcana left for outside litigators, in-house attorneys are a primary audience for the amendments. Often, well before outside counsel is aware of a dispute, a company should reasonably anticipate a lawsuit, thereby triggering its duty to preserve potentially discoverable information. Thus, in-house counsel will be the first line of defense against the spoliation of ESI. Similarly, the Rule 37 safe harbor anticipates that a party will have effective document retention and management policies and programs in place, and a company cannot access the safe harbor if it first implements and follows such policies after the prospect of litigation arises. Thus, in-house counsel cannot wait until a lawsuit appears on the horizon, but must proactively take steps to make sure that ESI considerations are incorporated into a company's policies and program.

In fact, an effective document retention and management program depends on actions taken before there is the possibility of a lawsuit. For example, litigation response teams with responsibility for ESI preservation efforts must be identified, and besides in-house counsel, may include representatives from human resources and information technology departments, as well as from the business units involved in a specific lawsuit. Similarly, employees must be trained on the company's data retention policies, and regular internal audits should be conducted to ensure that the employees are complying with those policies. Without these, placing a litigation hold on routine document destruction when there is notice of a lawsuit will be less effective and, perhaps as importantly, less likely to persuade a court that the company acted in good faith to avoid spoliation.

Before the amendments, most sanctions for spoliation of ESI were limited to cases of obstructive behavior or intentional destruction of evidence.[2] In her fifth decision in *Zubulake v. UBS Warburg LLC*, Judge Schira Scheindlin wrote: "The subject of the discovery of electronically stored information is rapidly evolving…. Now that the key issues have been addressed and national standards are developing, *parties and their counsel are fully on notice*…."[3] In light of this statement and the widespread publicity the *Zubulake* cases received in legal circles, attorneys generally, and certainly those appearing before Judge Scheindlein, were charged with knowledge of their ESI duties at least two years ago. Now that the new rules have taken effect, attorneys appearing in all federal courts (and many state courts, as well) will be expected, for example, to have discussed ESI discovery with their adversaries early in the case as required by Rule 26(f) and advised the court whether its Rule 16 order should include specific direction on ESI-related issues, such as providing for the "clawback" under Rule 26(b)(5) of privileged information that is produced inadvertently. Courts will have little tolerance for litigants who do not have adequate document retention and management policies that address ESI issues and provide for the placement of effective litigation holds.

The use of an adversary's spoliation of ESI as a tactic for gaining advantage in a lawsuit has mostly occurred in cases of "asymmetrical warfare." That is, in litigation against a larger business organization possessing many terabytes of ESI, an individual can demand that his or her adversary strictly comply with their discovery responsibilities, knowing that it will be relatively easy to comply with his or her own responsibilities because the amount of ESI generated by one person is much more manageable. Cases like *Zubulake* seem to reflect this.[4] By contrast, in litigation between business organizations, an element of "mutually assured destruction" has existed; if one party made unreasonably burdensome ESI request on the other, it would be certain to be asked to do likewise.

However, even before the amendments took effect, many organizations with recurring types of litigation (e.g., product liability) already had implemented meaningful ESI retention and management programs.[5] Now, with the amendments spurring them on, many, if not most, larger businesses will likely appreciate the importance of such programs. A business that lacks effective ESI programs and that becomes a party to a lawsuit will not be able to count on its adversary giving it leeway in complying with its ESI discovery duties.

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Some important terms used in the amendments will need to be further fleshed out by the courts. For example, apart from backup tapes, when is ESI "not reasonably accessible" under Rule 26(b)(2)(B), and what constitutes "good cause" for requiring that inaccessible data be produced? What conditions will a court put on a party when it grants a request "to inspect, copy, test or sample" ESI in an adversary's possession under Rule 34(a)? What are the "exceptional circumstances" under Rule 37 that will close the safe harbor even when ESI is lost due to "the routine, good-faith operation" of a company's information system?

Pre-amendment case law will provide some guidance in interpreting the amendments; in fact, the committee notes to the amendment to Rule 26(b)(2) explicitly cite the seven factors listed by Judge Scheindlin in *Zubulake* for deciding when production expenses should be shifted.[6] However, the holdings of the pre-amendment cases are not uniform and courts will need to consider the different approaches in light of the amendments and choose among them, or clarify the amendments with new case law. [7]

Endnotes

1 *See, e.g.,* Donald A. Daugherty, "Guidance On E-Discovery In The Federal Courts Percolating Out Of The Civil Rules Advisory Committee," 5 Engage 1, 86 (April 2004).

2 *See, e.g.,* PML N. Am., LLL v Hartford Underwriters Ins. Co., No. 05-CV-70404–DT, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006); Coleman Parent Holdings, Inc. v. Morgan Stanley & Co., No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. March 23, 2005); United States v. Philip Morris USA, Inc., 327 F. Supp.2d 21 (D.D.C. 2004); Mosaid Techs. Inc. v. Samsung, 348 F. Supp.2d 332 (D.N.J. 2004).

3 Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 440 (S.D.N.Y. 2004) (emphasis added).

4 *See also* Wachtel v. Health Net, Inc., No. CIV.01 4183, 2006 WL 3538935 (D.N.J. Dec. 6, 2006); Byers v. Illinois State Police, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002); *but see* Minnesota Mining & Mfg. v. Pribyl, 259 F.3d 587 (7th Cir. 2001) (former employee in trade secrets case sanctioned after responsive information on his laptop was destroyed when he downloaded six gigabytes of music onto it).

5 *See, e.g.,* Sue Reisinger, "Bringing It All Back Home,"Corporate Counsel (Dec. 5, 2006), *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1165244462425.

6 *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

7 *See, e.g.,* Hagemeyer N. Am., Inc. v.Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004) (discussing different approaches for determining when costs of burdensome e-discovery production should be shifted to requesting party).