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# Top 10 Tips for the New Federal Rules of Civil Procedure on E-Discovery

By Bruce A. Olson

## INTRODUCTION

On December 1, 2006 the new e-discovery amendments to the Federal Rules of Civil Procedure became effective. In many ways the new rules simply codify practices that had been evolving in the federal courts to deal with the burgeoning problem of preserving and producing electronically stored information.

By themselves they don't address every issue that can arise when dealing with electronic discovery. Nevertheless, they serve as a starting point, and every practitioner needs to have a thorough understanding of the new rules to properly conduct discovery of electronically stored information and to avoid the many problems associated with the inadvertent spoliation of such evidence. The following 10 tips offer some quick insight into the new rules.

### 1. READ THE RULES THEMSELVES, AND IN PARTICULAR THE ADVISORY COMMITTEE NOTES ON THE 2006 AMENDMENTS.

While it may seem obvious that you should read the rules, a careful reading of the rules will provide a good introduction to the mechanics of dealing with electronic discovery. In addition, the Advisory Committee Notes on the 2006 Amendments provide a particularly good source of information in terms of understanding why the rules were implemented, what circumstances they were intended to address, and how the committee members at least intended they be interpreted.

It is expected that judges will treat the Advisory Committee Notes as being particularly authoritative so everyone should have a working knowledge of the Advisory Committee Notes as well as the text of the rules themselves.

### 2. BE AWARE THAT THE NEW RULES APPLY TO PARTIES AND NONPARTIES ALIKE.

You should be aware that the basic concepts incorporated in the e-discovery amendments apply to both parties and third parties alike. While the specific provisions of the rules applicable to parties varies somewhat when it comes to third-party subpoenas, a third party who receives a subpoena will in general be required to produce electronically stored information from its computer systems in electronic format. The fact that someone is not a party to a lawsuit will not enable them to avoid the need to respond to a request for electronically stored information.

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Every practitioner needs to have a thorough understanding of the new rules to properly conduct discovery of ESI.

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Rule 45 (a)(1)(C) specifically requires the recipient of a subpoena to produce and permit inspection, copying, testing, or sampling of electronically stored information. The subpoenaed party has 14 days from receipt of the subpoena to object in writing to the production of the ESI or to the form of production requested. If such an objection is made, the burden shifts to the requesting party to move to compel the production.

A third party need not produce "reasonably accessible" information, but in the event of a motion to compel the producing party must show that the information is not reasonably accessible because of undue burden or cost. The court may order it

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produced any way, but in such circumstances the requesting party will likely find itself subject to cost shifting obligations.

**3. THERE IS NO MORE AMBIGUITY ON THE DISCOVERY OF ELECTRONIC DATA. RULE 26(a)(1)(B) SUBSTITUTES “ELECTRONICALLY STORED INFORMATION” FOR “DATA COMPILATIONS” AND MAKES CLEAR IT IS DISCOVERABLE. RULE 34 REQUEST FOR PRODUCTION OF DOCUMENTS INCLUDES THE EXPLICIT CATEGORY OF “ELECTRONICALLY STORED INFORMATION”.**

There is no longer any ambiguity when it comes to the issue of producing electronic data. The concept of “electronically stored information” has been introduced into the rules and it supplants the more limited concept of “data compilations” first introduced in the 1970 amendments to the Rules. The concept is intended to include all types of electronically stored information, and to be flexible enough to permit new formats invented in the future to fall within the definition.

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...a responding party should produce ESI that is relevant, not privileged, and reasonably accessible...

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Rule 34(a) indicates that the scope of electronically stored information includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. The Advisory Committee Notes indicate that references elsewhere in the Rules to “electronically stored information” should also be understood to invoke this expansive approach.

**4. “ELECTRONICALLY STORED INFORMATION” MUST BE PRODUCED OR IDENTIFIED IN A PARTY’S INITIAL DISCLOSURES. RULE 26(a)(1)(B)**

Until the recent amendments, there was some confusion about whether the initial disclosure obligations under Rule 26(a)(1)(B) included the obligation to produce or identify electronic versions of documents, particularly if they were otherwise identified in paper form. The new rule requires production of a copy of, or a description by category and location of, all “documents, electronically stored information, and tangible things” that the disclosing party may use to support its claims or defenses.

As noted in the Advisory Committee Notes, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. Consistent with other provisions of the rules, this means that the electronically stored information should be produced in its native electronic format as part of the party’s initial disclosures or identified in such a way that a determination can be made on the best way to discover and produce the electronically stored information.

**5. THE “MEET AND CONFER” NOW INCLUDES MANDATORY PLANNING FOR PRESERVATION AND PRODUCTION OF ELECTRONICALLY STORED INFORMATION. RULE 26(f), RULE 16, FORM 35**

The requirements of the Rule 26(f) planning conference now include an explicit obligation to address any issues relating to the disclosure or discovery of electronically stored information, including the form or forms in which it should be produced. Likewise, Rule 16(b)(5) specifies that provisions for disclosure or discovery of electronically stored information should be made part of the Rule 16 scheduling conference and order.

The 2006 Advisory Committee Note to Rule 16 begins with the observation that the amendment to Rule 16(b) is designed to alert the court to the

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possible need to address the handling of discovery of electronically stored information early in the litigation. In practical terms this means that attorneys must meet with their clients and their client's IT staff very early in the litigation process. They must quickly understand the client's IT infrastructure to implement an appropriate litigation hold, and to develop a plan to preserve and produce electronically stored information.

Early consultation with an electronic discovery vendor or a computer forensic expert should be considered. It might well be appropriate to bring such consultants along with members of the IT staff to the conference to generate an appropriate plan for dealing with electronically stored information.

**6. RULE 34(a) PERMITS "SAMPLING" OF STORED INFORMATION FOR A PHASED PRODUCTION. RULE 45(a) DOES THE SAME WITH RESPECT TO THIRD-PARTY SUBPOENAS.**

Because of the nature of electronically stored information, parties often seek voluminous amounts of information from a great variety of storage devices without knowing in advance whether it will lead to relevant or admissible evidence. The costs to accomplish this discovery can be staggering. Often it is difficult to determine where relevant electronic information resides.

Consequently, Rule 34(a) as it relates to parties, and Rule 45(a) as it relates to third-party subpoenas, permits the sampling of electronically stored information. Sampling permits a phased production in which an initial determination can be made of a smaller data set to determine whether there are any relevant "hits."

In the absence of hits there is no need to go to greater depths of discovery, and in the presence of hits it may be appropriate to engage in broader discovery. Thus, the sampling provisions in these amended Rules can be utilized to avoid the expense and disruption of a full scale production of all potentially relevant electronically stored information. This specific and targeted approach benefits everyone.

**7. REQUESTING PARTY SHOULD ALWAYS SPECIFY THE DESIRED FORM OF ELECTRONIC PRODUCTION.**

There is no longer any question that a party is entitled to receive electronically stored information in electronic format. Ordinarily, you should seek discovery of the information in electronic form in native format. Failure to request information in native format may result in the loss of metadata which can at times be as important or even more important than the content of the computer files themselves.

Rule 34(b) provides that the request for production may specify the form in which the electronically stored information is to be produced. The requesting party, however, is not obligated to specify the form of production. If the requesting party does not specify the form, a responding party must produce it in a form in which it is ordinarily maintained or in a form that is reasonably usable.

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Early consultation with an electronic discovery vendor or a computer forensic expert should be considered.

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**8. NO OBLIGATION TO PRODUCE INFORMATION IDENTIFIED AS "NOT REASONABLY ACCESSIBLE," AT LEAST INITIALLY. RULE 26(b)(2)(B) AND (C)**

One of the great challenges in dealing with electronically stored information relates to the issue of whether the information is "reasonably accessible." This has been an issue particularly in the case of backup media where it is often difficult and extremely expensive to restore the backup media. Under the amended Rules active data is generally regarded as accessible, while backup media intended for disaster recovery is not. This does not mean that inaccessible data need not be produced under any circumstance.

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Rule 26 provides a mechanism by which a party can assert that information is inaccessible, and the requesting party can then seek an order from the court requiring that it nevertheless be produced. Under those circumstances you would ordinarily expect cost shifting to occur to place the burden of producing inaccessible data on the requesting party. Similarly, a third party in responding to a subpoena is ordinarily not obligated to produce data identified as not reasonably accessible because of undue burden or cost. Rule 45(d)(1)(D) provides the mechanism for resolving a dispute over subpoenaed information.

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Rule 37(f) provides a “safe harbor” provision with regard to ESI ... lost as a result of the routine operation of an electronic information system.

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**9. RULE 26(b)(5) INCLUDES A SPECIFIC RECOGNITION OF CLAWBACK AGREEMENTS AND QUICK PEEK AGREEMENTS, AND PROVIDES PROCEDURES FOR THE INADVERTENT DISCLOSURE OF PRIVILEGED INFORMATION.**

Often times the production of electronically stored information involves the production of a voluminous amount of information, far more than traditionally was the case when paper-based production was involved. Given the electronic manner in which the information is typically produced there is also an enhanced likelihood that privileged information will be inadvertently produced. Even the best of review processes can miss a privileged item when the equivalent of many thousands of pages of electronic paper are produced all at once.

Good practice in dealing with electronic discovery mandates the use of “clawback” agreements. Such agreements allow the producing party to

“clawback” any inadvertently produced privileged materials. Rule 26(b)(5) contains an explicit recognition that clawback agreements can be used. In addition, you can enter into “quick peek” agreements. A quick peek agreement allows a party to produce a voluminous amount of electronic information without an initial privilege review. It permits the producing party to assert any available privilege after the requesting party identifies those files it actually intends to utilize.

**10. RULE 37(f) SAFE HARBOR PROVISION TO AVOID CLAIMS OF SPOILIATION — HOW SAFE IS THE HARBOR?**

One of the greatest dangers to all practitioners in dealing with electronically stored information is the inadvertent spoliation of evidence. The nature of computers is such that simply turning the computer on may alter potentially relevant information.

Accessing a file to review whether it is responsive will change relevant metadata and potentially obliterate information regarding when a file was last accessed or modified. Email systems often have automatic delete features once mailboxes reach a certain size. Computers may have automatic cleanup and defragment settings that when activated eliminate potentially relevant evidence unintentionally. These types of data destruction can occur after litigation is instituted but before a party has time to address its obligation to preserve electronic information.

Consequently, Rule 37(f) provides a “safe harbor” provision with regard to electronically stored information. It provides that absent exceptional circumstances a court may not impose sanctions 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.

However, this rule does not eliminate any common law obligations with respect to preservation, and when the parties are under a duty to preserve because of pending or reasonably anticipated litigation a litigation hold will be required and the safe harbor will not apply. It is also true that the safe harbor provision cannot be used to permit the

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routine operation of a computer system to continue to operate to destroy information that the party is otherwise under a duty to preserve.

### **CONCLUSION**

The new e-discovery amendments to the Federal Rules of Civil Procedure provide a codified framework to address many of the issues that arise when dealing with the preservation and production of electronically stored information. A thorough understanding of the rules, and the 2006 Advisory Committee Notes in particular, will provide you with a starting point for addressing this new and challenging aspect of a litigation practice. There is no going backward. We must all learn to deal effectively with computers and the electronically stored information they generate.

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