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Myth-Busting the New Amended Federal Rules

By Sean M. Byrne

Wherever you turn these days, there seems to be a new CLE seminar being offered or white paper being written on the "sweeping changes" to the Federal Rules of Civil Procedure ("FRCP") as they relate to the discovery of electronically stored information ("ESI").

And most of them are tied together by a common thread: an alarmist air of hype.

What Is, and What Seems to Be

The process of identifying, preserving and/or acquiring, processing, reviewing and producing ESI has always been a challenge for attorneys. In September 1999, Fourth Circuit Judge Paul V. Niemeyer, a former member of the Judicial Advisory Committee on Civil Rules, acknowledged in a letter to the Supreme Court and the Judicial Conference that advances in electronic information-storage and information-retrieval were changing the opportunities for discovery and creating a situation where excessive discovery was fast becoming a real problem. Niemeyer's letter was noted in the Oct. 14 - 15, 1999, meeting of the Advisory Committee on Civil Rules ("ACCR"). An exploratory group was then commissioned to recommend changes to the rules of discovery to deal with this new reality.

The amendments to FRCP 16, 26, 33, 34, 37 and 45 that went into effect on Dec. 1 are the result of over six years of intense collaboration and debate by the ACCR and the legal community at large, and reflect the thoughts of numerous luminaries in the legal and electronic-discovery communities.

Many e-discovery vendors would have people believe that the landscape surrounding electronic discovery has completely changed. From this author's perspective, that's a gross exaggeration of the truth designed to stir up angst (and business) in the legal marketplace. That said, the amended rules do offer important guidelines about the relevance, discoverability, production and costs associated with electronic discovery. The trick, as in much of the legal game, is to know how to separate fact from fiction.

Whenever the rules of a game change, opportunities for misinterpretation naturally follow. These misinterpretations usually have some basis in fact, and that's what helps them gain a life of their own. But the bigger problem becomes apparent when the situation is analyzed: Misconstrual becomes rumor, and a rumor can eventually take on mythical proportions.

The New Amendments: Myths

Below are two of the most common myths circulating about the new amended rules, along with myth-busting explanations that I hope will help you understand what you need to know to better handle ESI when it rears its, well, unique head.

Myth #1: Parties Must Now Engage In e-Discovery in All Cases

Myth-buster. An analysis of whether to include ESI as part of your discovery is highly advisable, but not *mandatory*.

Amended Rule 16(b) states that parties may include, as part of a scheduling order, any agreed-upon rules regarding the extent of discovery, disclosure or discovery of ESI, and how claims of privilege or protection should be handled. The word "may" makes it clear that the duty to address these issues is left to the parties' discretion. The Committee notes state that, while the purpose of the rule is to alert the court to the possible need of addressing the handling of discovery of ESI early in the litigation if such discovery is expected to occur, the rule itself does not provide the court with authority to enter such an order without party agreement.

Amended Rule 26(a)(1)(B) uses language that is a bit stronger, but still does not make discovery of ESI *mandatory*. It directs the parties to disclose copies or descriptions of all ESI in their possession, custody or control that they may use to support their claims or defenses at a "meet-and-confer conference" at the beginning of the case. Amended Rule 26(f) directs the parties to discuss discovery of ESI if such discovery is contemplated in the action, while Amended Form 35 calls for a report to the court about the results of this discussion. Again, while the parties must have a conference and disclose ESI they are aware they may use, there is no *requirement* to make electronic discovery part of the case. The Committee notes confirm this interpretation by stating that the discussion is not required in cases that do not involve electronic discovery, and the amendment imposes no additional requirements in those cases.

Rule 26, it can be argued, creates a gray area as to when parties must disclose ESI. If all parties do not initially plan to use ESI, then are they required to disclose its existence at all? The rules suggest (but do not clearly state) that the answer is "no." However, what happens if ESI becomes a factor later in the case? Is the reporting requirement triggered at that point or did you miss your opportunity to use it? And what happens if a party fails to disclose something at the initial meet-and-confer that it knew it would use? The Committee notes suggest that such meet-and-confers may avoid later disputes, or, at least, ease their resolution, but do not discuss sanctions for failure to do so.

But just because e-discovery is not *required* doesn't mean an up-front discussion about it isn't advisable. One would be hard pressed to think of a case where relevant e-discovery doesn't potentially exist. Litigators should make it a standard practice to examine their clients' "data universe" early on. A lack of proper due diligence can result in barred evidence and other discovery sanctions down the road. Also, if evidence is inadvertently destroyed, spoliation claims could very well mire the case in a bog of protracted, expensive motion practice unrelated to the merits of the case. Advance planning can save time and money by avoiding or mitigating the impact of these disputes. An outside electronic-evidence specialist can help to cost-effectively map a data universe to facilitate an understanding of where the bodies might be buried, putting the legal team in a position to be strategic and proactive, rather than defensive and reactive.

Myth #2: The "Safe Harbor" Provisions of Rule 37(f) Protect Me from Spoliation Claims if My Data Is Destroyed by Routine Automatic Overwriting

Myth-buster. We've heard many attorneys refer to Amended Rule 37(f) as a shield against spoliation claims — as long as their client was not culpable in the destruction of ESI. The problem is, the "Safe Harbor" isn't so safe at all. To say otherwise is absolutely incorrect and is likely to be the starting point for a great many future spoliation claims.

Rule 37(f) states that, "absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."

Again, one need go no further than the Committee notes to see that the rule is designed to address the fact that essential computer processes can alter or destroy information for reasons that have nothing to do with culpable conduct among the parties or with how that information might relate to litigation.

While on its face Rule 37(f) might appear to be a shield, the rule gives the court a great deal of discretionary power. The first three words of the rule — "absent exceptional circumstances" — undeniably open the door to judicial discretion. Additionally, a court is not limited to imposing sanctions under the FRCP. The Committee notes plainly state that the rule's safe-harbor protection applies only to sanctions "under these rules," and does not affect other sources of authority to impose sanctions or rules of professional responsibility.

The term *good faith* bears examination, too. While the term appears to address the computer system itself, the Committee notes make clear that it applies also to a computer's owner or operator. A party could very well be found in bad faith by failing to execute a timely litigation hold to prevent the routine overwriting of data. At that point, a court might find the "offending" party "culpable." Preservation obligations can arise from common law, statutes, regulations or a court order.

And even if a litigation hold is properly put in place, many well intentioned employees, including internal IT staff, are ill prepared to comply with Rule 37(f) in "good faith." The ePolicy Institute's *2004 Workplace E-mail and Instant Messaging Survey* revealed that nearly 55% of respondents' businesses did not have a written electronic document-retention policy. Nearly 24% of those polled said they didn't know the difference between retention-worthy electronic business records versus insignificant messages that could be safely deleted. Thirty-five percent of respondents said their companies had a retention policy, and 10 respondents weren't sure whether a policy existed

One can safely conclude that Rule 37(f) provides very little protection once a party reasonably anticipates litigation. Once that determination has been made, a party must make decisions that apply to all potential data, even data considered to be not "reasonably accessible" under Rule 26(b)(2). The amendment to this rule provides the court with wide discretion to impose sanctions for perceived misconduct.

What you end up with is another good reason to understand your client's data universe, as well as the retention policy that governs it, as early as possible. Doing so puts you in a much better position to take appropriate steps to preserve potentially relevant ESI. Retaining and putting outside consultants to use in this regard can be a benefit because they often can quickly identify and assist in properly preserving sources of potentially relevant ESI. Just the act of hiring a consultant can help to show good faith, regardless the preservation strategy ultimately chosen.

Conclusion

The issues addressed in this article are important, but are by no means the only areas in which opportunities for misinterpretation exist. Over the next few years, judges will offer their own interpretations of the amended FRCP, common law and professional responsibility as they relate to how ESI fits into the discovery process.

Attorneys must understand the rules and the impact the rules will have on their practices. A large percentage of attorneys have yet to deal with ESI in the context of a case. However, times are changing. As costs associated with electronic discovery continue to drop due to more efficient technologies, and better defined, understood and applied economies of scale, and as the courts become more familiar with the rapidly growing body of electron-

ic data-related case law, ESI is likely to become a regular part of the discovery process.

Most attorneys are not computer experts, yet modern litigators are required to have ever-increasing amounts of specialized knowledge about the digital world. Short of going back to school, the best way to ensure taking the right steps and looking in the right places is to work with an e-discovery specialist. The better you understand the rules of the game (and the myths surrounding them), the better prepared you'll be to handle the realities of today's discovery process. Don't be afraid to ask for outside assistance when necessary, because if preventable mistakes are made during the discovery process, especially mistakes dealing with ESI, you'll be the one left holding the bag.

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(**Editor's note:** A summary of the ePolicy Institute's survey mentioned in the middle of this article is available at www.epolicyinstitute.com/ survey/survey04.odf. For an examination of e-discovery and the matter being discussed, *see,* "The New Face of Electronic Discovery: Amendments to the Federal Rules of Civil Procedure May Tame Electronic Discovery's Wild West," a prize-winner in an American Bar Association contest, in the Fall 2005 edition of the University of Georgia School of Law *Advocate*, at www.law.uga.edu/news/advocate/fall 2005/walter.pdf.)

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