Digital Matters

The Newsletter of the Technology for the Litigator Committee
Section on Litigation, American Bar Association

Vol. 2, Issue 1 Spring 2008

This Issue's Theme:
"The Continued Evolution of eDiscovery and the eDiscovery Rules"

What's Inside:

eDiscovery in State Courts

By Gregory D. Shelton

The Federal Rules of Civil Procedure were amended on December 1, 2006 to address discovery of electronically stored information (ESI). Several states have recently followed suit and adopted new rules, some of which are modeled after the Federal Rules. Other states are currently con-

(Continued on page 5)

eDiscovery 101: What is Metadata and How Do you Produce ESI Containing Metadata?

By H. Hunter Twiford, III and John T. Rouse

The year 2006 saw unprecedented changes in electronic discovery in civil litigation, in part in order to keep pace with the significant changes in the business world.

According to some sources, over 93% of all commercial documents are produced and stored on computers, and of those, only 0.003% are ever printed on paper. Add to that an estimated 3.25 trillion e-mails generated by U. S. businesses in 2002.

Despite this widespread use of electronically generated and stored information, most businesses did not however, adequately take into account the effect of this massive amount of information in litigation decisions.

For example, in a 2003 survey conducted by the American Bar Association, the corporate attorneys surveyed acknowledged that over 83% of their business clients had no formal documentation retention/ destruction policies in place.

Federal courts, perhaps in recognition of the almost universal use of electronically stored information in business (and perhaps as a result of failure of business to proactively manage retention and production of electronic data in litigation), responded with the 2006 amendments to the Federal Rules of Civil Procedure.

The adoption of the amendments to the Federal Rules and the increasing number of judicial opinions require that attorneys, and particularly, litigators, pay close attention to Electronically Stored Information (ESI) in their cases.

In this article, we take a broad-brush look at the Federal eDiscovery amendments, and take a more in-depth look at "metadata," including why both attorneys and their clients should be concerned about metadata; how to find it; whether it is ethical to "peek" at metadata in documents transmitted or produced to the attorney; whether to scrub metadata prior to transmission or

(Continued on page 6)

Let the Lawyer Beware:

Qualcomm v. Broadcom Judge Holds Lawyers Responsible for Improper eDiscovery Conduct

By Melissa Klipp and Kate Seib

In the most recent decision in Qualcomm v. Broadcom, a contentious patent lawsuit, the United States District Court for the Southern District of California sent a powerful message to attorneys everywhere regarding their obligation to understand and conduct electronic discovery.

Magistrate Judge Barbara L. Major ordered Qualcomm to pay Broadcom over $ 8.5 million in attorneys' fees and costs, and referred six of Qualcomm's attorneys to the State Bar of California for possible ethics violations regarding electronic discovery. Although there has been a growing understanding of attorney obligations regarding electronic discovery, it is now very clear that the consequences for failing to meet these obligations are enor-

(Continued on page 7)

(Continued from page 4)

6. Know Your Case

The best eDiscovery practices are going to vary with the facts and legal issues at the core of your case. No one can give a laundry list of what to do and what not to do. The real answer is almost always "it depends".

Don't lose the forest for the trees. As you re-evaluate your case remember to have the procedure follow the substance. If you have reviewed 15,000 out of 30,000 emails for a custodian who has become moot, don't review the remaining 15,000 emails just because you already started looking at these documents. As the case issues change so must your process.

7. Know Your Custodians

End-user computer usage varies greatly. Some people delete emails as soon as they cross an issue off their list, others keep every email and every draft on the same machine for years. Some custodians put notes in hidden text, use embedded documents, create multiple drafts or hold data in very large spreadsheets. Any of these uses can have a big effect on your review and production.

8. Know What Your Client Knows About eDiscovery

In-house counsel may not know much about eDiscovery or they may know it much better then you. EDiscovery is an important litigation matter. Make sure that you and your client are on the same page.

You do not want your client to feel lost in the eDiscovery. More importantly, you do not want to appear as if you are lost in the eDiscovery.

9. Know That eDiscovery is an Emerging Practice Area

The practice of eDiscovery is yet to be really developed (or even understood) by many litigators. There is a high level practice of eDiscovery. Understand that your eDiscovery is your case, your evidence and the essence of your investigation. It directly effects the legal analysis that you are able to provide for your clients.

10. Know What You Don't Know

You don't need to know how to perform all of the day-to-day technical aspects involved, but you do need to know how that effects the day-to-day management of your case and the advice that you ultimately provide.

It is unfortunate, but true: a very small eDiscovery mistake can have very big consequences. Make sure that you understand what has been accomplished and what has not. Know that eDiscovery is frustrating practice development with which most of us struggle.

I will leave with one final need-to-know piece of information: I can think of no time where an eDiscovery issue can be prepared so that someone, somewhere can "Just push a button"; there is no easy button in eDiscovery.

eDiscovery in State Courts (Continued)

(Continued from page 1)

templating changes, have decided not to implement specific eDiscovery rules, or have adopted a "wait and see" approach to see how the Federal Rules work before adopting state rules. Following is a short overview of the Federal Rule amendments and a survey of the eDiscovery rulemaking that has taken place in various states.

Overview of eDiscovery Amendments to Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 26 now requires parties to address early in the litigation electronic discovery issues including scope of discovery, preservation of evidence, privilege issues, and the format of ESI for production. Parties now must provide "a copy of, or a description by category and location of . . . electronically stored information" as part of their initial disclosures. Fed. R. Civ. P. 26 (a). The Rules explicitly empower courts to enter the parties' agreements into case management orders. FED. R. CIV. P. 16(b)(5). They also provide for a bifurcation of discovery; permitting a party to produce reasonably accessible data, and hold back less accessible data until the cost of production and need for the data can be assessed. FED. R. CIV. P. 26(b)(2)(B). The Rules now contain provisions regarding the procedure for addressing inadvertent production of privileged information. FED. R. CIV. P. 26(b)(5)(B). Finally, the new Rules provide a safe harbor from sanctions for spoliation if electronic infor-

(Continued on page 24)

ESI and the Discovery Rules (Continued)

(Continued from page 19)

esty, fraud, deceit or misrepresentation" or that is "prejudicial to the administration of justice." *Id.* New York State Bar Opinion 782 specifically addresses metadata, and concludes that "lawyer-recipients also have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets . . . [and] use of computer technology to access client confidences and secrets revealed in metadata constitutes 'an impermissible intrusion of the attorney-client relationship.'" New York State Bar Ass'n Formal Op. 782. This opinion seems to be premised on the attorney's affirmative use of software to recover metadata in order to rise to an ethical violation, and may now be somewhat dated.

The Florida Bar prohibits a lawyer from looking for metadata in a document sent inadvertently. Florida Bar Op. 06-2. The Alabama State Bar's ethics panel advised in a recent opinion that the unauthorized mining of metadata to uncover confidential information in electronic documents constitutes professional misconduct. Alabama State Bar Office of Gen. Counsel, Op. RO-2007-02.

A recent opinion was handed down in September 2007 by the Legal Ethics Committee of the District of Columbia Bar. Ethics Opinion 341 addresses the review and use of metadata in electronic documents. D. C. Bar Opinion 341. The D. C. Bar examined other states' ethics opinions, and reached the compromise position that a receiving lawyer is prohibited from reviewing metadata sent by an adversary only where the receiving lawyer has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer, or confidences or secrets of the sending lawyer's client.

Scrubbing Metadata

There is an important distinction to be drawn between the day-to-day transmission of electronic documents, both between attorneys, and with their clients, and the production of ESI pursuant to discovery requests. As to the former, the lawyer must always consider attorney-client privilege in communications, and when appropriate, "scrub" metadata

(Continued on page 25)

eDiscovery in State Courts (Continued)

(Continued from page 5)

mation is lost in the regular course of business. FED. R. CIV. P. 37(f).

eDiscovery Guidance Documents for States

Uniform Rules Relating to the Discovery of ESI

On August 2, 2007, the National Conference of Commissioners on Uniform State Laws adopted the *Uniform Rules Related to the Discovery of Electronically Stored Information*. These model rules are based on the Federal Rules of Civil Procedure. They do not, however, contemplate a mandatory conference amongst the parties early in the litigation as called for in Federal Rule of Civil Procedure 26. Rather, the *Uniform Rules* suggest that a conference occur, but allow parties to opt out.

Guidelines for State Trial Courts on Discovery of ESI

The Conference of Chief Justices recently published *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* (see Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* (Aug. 2006) (available at http://www.ncsconline.org). The *Guidelines* are not binding, nor are they model rules, but are simply an additional tool to assist state court judges "in identifying the issues and determining the decision-making factors to be applied" in electronic discovery disputes. The *Guidelines* make several recommendations to judges that are substantially similar to the Federal Rules, but differ in some respects. For instance, they recognize that not all states have adopted civil rules that require counsel to confer early in a litigation. Thus, courts in those states are advised to "encourage" counsel to meet and confer if electronic discovery is likely to be an issue in a case. The *Guidelines* also provide a list of factors to be considered when deciding a motion to protect or compel discovery of electronically stored information.

State Court Rulemaking

At least 14 states have adopted electronic discovery rules in all or part of their judicial systems. Many more are contemplating rules or watching to see how the Federal Rules and other

(Continued on page 26)

eDiscovery in State Courts (Continued)

(Continued from page 24)

states' rules are implemented and received. A list of online resources relating to these state rules is included on page 29.

Early Rulemaking Efforts

Texas, the first state to adopt eDiscovery rules, enacted Texas Rule of Civil Procedure 196.4 in 1999. The rule requires the requesting party to specifically request production of "electronic or magnetic data" and to specify the format of production. The producing party must produce "reasonably available" information, but may object to producing information that it cannot retrieve through "reasonable efforts." If the court still orders production, the cost of any extraordinary methods needed to retrieve and produce the information *must* be borne by the requesting party. Cost-shifting in this instance is mandatory.

In 2003, Mississippi enacted a rule that is virtually identical to the Texas rule, but does not require mandatory cost shifting. *See* MISS. R. CIV. P. 26(b)(5).

Adoption of the Federal Rules of Civil Procedure

Arizona, Idaho, Indiana, Minnesota, Montana, New Jersey and Utah have all recently enacted sweeping changes that are modeled on the new Federal Rules, although only Utah has adopted an early "meet and confer" requirement. Arizona does not require an early conference amongst the parties, but does require disclosure of a list relevant ESI 40 days after a responsive pleading is filed. As part of its new rules, Idaho has adopted the approach taken by Texas and Mississippi, although mandatory cost shifting is not required.

Limited eDiscovery Rules Enacted

On January 10, 2008, the Supreme Court of Arkansas approved a new civil rule and a new evidence rule that provide limited protection against inadvertent disclosure of privileged information. *See* Ark. R. Evid. 502; Ark. R. Civ. P. 26(b)(5). The civil rule amendment is similar to Federal Rule of Civil Procedure 26(b)(5) and allows a producing party to "take back" inadvertently produced privileged information. The new rule of evidence is modeled on Proposed Federal Rule of Evidence 502, and protects from waiver attorney-client communications and attorney work product that has been inadvertently disclosed. The amendments are effective immediately.

In June 2007, Louisiana adopted limited new rules that are modeled on the Federal Rules. The Louisiana Code now sets forth protections against the waiver of inadvertently disclosed information, allows for the withholding from production ESI that is not reasonably accessible, and requires parties of specify the form of production. *See* LA Code of Civ. P. Art. 1424, 1425, 1460, 1461, 1462.

In March 2007, New Hampshire enacted a statewide civil rule mandating that the parties meet and confer shortly after the lawsuit is filed to discuss, among other things, the scope of electronic discovery, the extent to which ESI is reasonably accessible, the likely costs of obtaining access to such information and who shall bear said costs, format of production, preservation of ESI, and protections against the waiver of attorney-client privilege contained in ESI. *See* N.H. Superior Ct. R. 62.

In 2006, New York adopted a new rule for the Commercial Division of the trial courts. The new requires counsel in commercial disputes to consult about ESI prior to a mandatory preliminary conference, including but not limited to: (i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts. *See* 22 N.Y.C.R.R. 202.70(g), Rule 8.

North Carolina has also adopted electronic discovery rules in its specialty business courts. *See* General Rules of Practice and Procedure for the N.C. Business Court 17.1(i); 17.1(r); 17.1(s); 17.1(t); 17.1(u); 18.6(b); Form 2. The Business Court Rules require that counsel meet and confer very early in the litigation to discuss the scope of ESI that may be involved in the case, preservation of information, potential cost-shifting for discovery of ESI that is not reasonably accessible, format of production, discovery of metadata, and security measures required to protect ESI that is produced in the discovery process.

Rule Changes Contemplated

As noted above, other states around the country have either proposed amendments, or are contemplating changes. For instance, on January 14, 2008, Alaska released proposed changes to its Civil Rules

(Continued on page 28)

eDiscovery in State Courts (Continued)

(Continued from page 26)

that would bring the state rules in line with the Federal Rules. Public comments are due by February 29, 2008.

After rejecting changes in 2006, California recently released proposed amendments to its Civil Discovery Act and Court Rules. The proposed rules are modeled on the *Uniform Rules Related to the Discovery of Electronically Stored Information*. They also seek to incorporate two case management rules that would encourage parties to identify and discuss electronic discovery issues early in the litigation and to encourage courts to address the issues in case management orders.

Ohio released proposed amendments and accepted public comment up to November 14, 2007. The proposed changes are mostly based on the Federal Rules amendments, but provide a list of factors courts should consider in determining sanctions when a party has destroyed potentially relevant electronically stored information, including:

(1) Whether and when any obligation to preserve the information was triggered;

(2) Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;

(3) Whether the party intervened in a timely fashion to prevent the loss of information;

(4) Any steps taken to comply with any court order or party agreement requiring preservation of specific information;

(5) Any other facts relevant to its determination under this division.

Ohio R. Civ. P. 37(f) (Proposed). If approved, the changes will become effective on June 1, 2008.

Maryland's Standing Committee on Rules of Practice and Procedure submitted proposed amendments to the Maryland Court of Appeals on September 26, 2007. The proposed amendments are modeled on the Federal Rules and also draw from the

Sedona Conference, *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production*, the Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information, and the Maryland Business and Technology Case Management Program, Electronic Data Discovery Guidelines.

In March 2007, Iowa released for public comment a series of potential amendments that are based on the new Federal Rules. The deadline for comment was May 1, 2007.

The public comment period for Nebraska's proposed limited changes closed on August 31, 2007. Nebraska has proposed adopting the phrase "electronically stored information" and some other terminology revisions to its rules related to interrogatories, requests for production, and subpoenas. Also included in the proposed amendments are provisions dealing with format of production of ESI that mirror the Federal Rules.

The District of Columbia is reportedly in the process of revising its local rules to adopt the amendments to the Federal Rules of Civil Procedure. A subcommittee of the Washington State Bar Association is currently circulating to stakeholders proposed amendments to that state's civil rules. Florida, Kansas, New Mexico, South Carolina, and Virginia are all currently contemplating the adoption of rules relating specifically to electronic discovery. Several other states, such as Missouri, Oregon, and Vermont, are in the very early stages of exploring whether they need or want to amend their civil rules.

No Changes Contemplated, or Changes Rejected

Several states, like Delaware and Nevada, are taking no action at all to adopt eDiscovery rules, preferring to "wait and see" how the Federal Rules

(Continued on page 29)

Digital Matters

eDiscovery in State Courts (Continued)

(Continued from page 28)

amendments and other states' rules are received.

Rationale for Adoption of State Rules

Electronic discovery is now a fact of life for litigators and courts. The proliferation of computer usage, inexpensive data storage, and developments in communication technology have changed modern discovery practice tremendously over the past several years. Courts around the country have been promulgating *ad hoc* case law, rules, and procedures to deal with electronic discovery which provide little guidance or assistance to litigants. The Federal Rules amendments, along with the *Uniform Rules Related to the Discovery of Electronically Stored Information* and the *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* provide a strong backbone upon which states can build a comprehensive, uniform set of rules to address electronic discovery in their courts.

Gregory D. Shelton is Of Counsel in the Seattle office of Williams Kastner. He is a frequent author and speaker on eDiscovery and products liability issues.

On the Internet...

Enacted/Proposed State eDiscovery Rules

Arizona Enacted Rules:

159.87.239.100/rules/ramd_pdf/r-06-0034.pdf

Arkansas Proposed Rules:

www.lexisnexis.com/applieddiscovery/lawLibrary/ArkansasPrivilege.pdf

Indiana Enacted Rules:

www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf

Iowa Proposed Rules:

www.judicial.state.ia.us/wfdata/frame5416-1022/File11.pdf

Ohio Proposed Rules:
www.sconet.state.oh.us/Rules/amendments/practiceProcedureOct07.pdf

Maryland Proposed Rules:

www.courts.state.md.us/rules/reports/158thReport.pdf

Nebraska Proposed Rules:

www.supremecourt.ne.gov/rules/proposedarchive/DiscoveryRulesCivilCases.pdf

Wading Deep (Continued)

(Continued from page 23)

hold" – at what point does a party have the obligation to preserve electronic records above and beyond their normal retention policy (if any)? *In re Napster, Inc. Copyright Litigation*, 462 F.Supp.2d 1060 (N.D. Cal. 2006), provides a detailed autopsy of the timeline of when a party would be obligated to preserve, and a dire warning: an individual or corporation may be obligated to preserve documents not only when litigation is pending, or when it is imminent, but even when there are indirect threats that do not materialize for years.

Napster, as all may well be aware, was an incredibly popular and controversial file sharing web site, known mostly for the sharing of music files. It was the subject of several ultimately effective lawsuits for copyright infringement. *Napster* concerns a lawsuit by a record company, UMG Recordings, against Hummer Winblad Venture Partners (Hummer), a venture capital investor in Napster.

Hummer made an investment in Napster after it was already in litigation, in May 2000, and signed a "Common Interest and Defense Agreement" at that time. Two days later, a Hummer employee sent what later became the "smoking gun" e-mail, instructing Hummer employees to, among other things, continue the company policy of deleting e-mails.

Soon thereafter, in a scene that might be straight from a movie, Universal Music Corp. CEO Edgar Bronfman told John Hummer of Hummer Winblad in a meeting that he would sue investors in Napster if the copyright infringement continued. Hummer was sued by different parties the next month, and that case was eventually dismissed. The instant suit was filed three years later.

The key question considered by the court in *Napster* was at what point

(Continued on page 31)