

In-House Solutions to the E-Discovery Conundrum

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▶ I. OVERVIEW OF THE RULES GOVERNING ELECTRONICALLY- STORED INFORMATION



Purpose of the Amendments

- ▶ To establish uniform practices nationwide for discovery of ESI in Federal Courts.
- ▶ To provide for the “clawback” of privileged documents
- ▶ To help clarify what information is “not reasonably accessible”
- ▶ To provide a “safe harbor” in the case of accidental spoliation



Focus of the Amendments

3 P's

- ▶ Preservation
- ▶ Production
- ▶ Privilege



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Placing “ESI” Under the Microscope

- ▶ “Rule 34. Production of Documents, **Electronically Stored Information**, and Things..”

“... any designated **documents or electronically stored information** — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other **data or data compilations stored in any medium from which information can be obtained** — translated, if necessary, by the respondent into reasonably usable form.”

Bottom line: ESI is any electronically stored information.



Purpose and Effect of the Amendments

- ▶ **Procedural** mechanisms that force all parties and their lawyers to address their substantive ESI obligations **at the beginning of a case (at the latest)**
- ▶ Do not change the substantive obligations to preserve and produce ESI
- ▶ Companies: incentive to better manage ESI
- ▶ Require better communication between counsel and their clients



Brief Summary of the Amendments

26(f) Heart of Amendments

1. Meet and confer about “any issues relating to the disclosure or discovery” of ESI
2. Automatic disclosure of the location of clients’ ESI Rule 26(a)(1)]
3. Reasonably accessible ESI must be produced [Rule 34(b)]
4. ESI that is “not reasonably accessible” because of “undue burden or cost” may not have to be produced [Rule 26(b)(2)(B)]



Brief Summary of the Amendments

5. Privilege claims after production [Rule 26(b)(5)(B)]
6. Clawbacks and Quick Peek Agreements [Rule 16(b)(6)]
7. Document Requests: parties can specify the form of production [Rule 34(b)]
8. Default – ordinarily maintained; reasonably usable; does NOT include metadata, unless requested
9. Safe Harbor from sanctions for failure to produce ESI that is “lost” under certain circumstances [Rule 37]



Early Attention to ESI: Identify & Preserve

1. Understand your client's information management systems
2. Preservation: Help client define scope and means
3. Communicate with client's key IT personnel
4. Identify the client's in-house IT employee who could give 30(b)(6) testimony
5. Talk with "key" employees



Preservation or “Litigation Hold”

- ▶ “Once a party **reasonably anticipates litigation**, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“Zubulake IV”).
- ▶ No duty to “preserve every shred of paper, every e-mail or electronic document” and the like. *Zubulake*, 220 F.R.D. at 217.



Zubulake V:

What We Have Here, is a Failure to Communicate

- ▶ Counsel failed to communicate the litigation hold order to all key players.
- ▶ They also failed to ascertain each of the key players' document management habits.
- ▶ Employees ignored the litigation hold instructions.



Zubulake: Preservation Requirements

1. When the duty to preserve attaches, counsel must put in place a **litigation hold**;
2. Counsel must also **identify sources** of discoverable information;
3. Counsel should **communicate** directly with the “**key players**” (i.e. “those employees likely to have relevant information”). “This will usually entail speaking directly with the key players in the litigation, as well as the client’s information technology personnel”;



Zubulake: Preservation Requirements

4. “[L]itigation hold instructions must be reiterated regularly and compliance must be monitored”;
5. “[C]ounsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.”



Rule 26(b)(2)(B):

Two-Tiered Approach to Discovery of ESI

1. Produce reasonably accessible ESI (it can be obtained and reviewed for relevance without extraordinary cost or technical difficulty)
 2. ESI that is “not reasonably accessible”: may not have to be produced. Rule 26(b)(2)(B).
 - A. Burden: the responding party must show that ESI is not reasonably accessible because of undue burden or cost.
 - B. Court may order production even if it determines the ESI is not reasonably accessible if the requesting party shows “good cause.”
- **Practice Note: Preservation obligation broader than production obligation.**



“not reasonably accessible” - ?

“‘[L]egacy’ data that can be used only by superseded systems” (Advisory Committee Note to Amendment of FRCP 34(a))

“[I]nformation [that] may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes” (Report of the Civil Rules Advisory Committee, May 17, 2004, at p. 47).



RULE 34: Document Requests

Rule 34(b):

1. Requesting Party: May specify the form in which ESI is to be produced
 2. Responding Party: Must object to the specified form:
 - A. the reasons for the objection; and
 - B. the form or forms it intends to use
 3. If a request does not specify the form or forms for producing ESI, then the producing party must produce the information in a form or forms
 - A. in which it is ordinarily maintained or
 - B. that is reasonably usable
- **Practice Point: Attempt to agree on the form of production at or before the Rule 26(f) conference.**



Rule 26 (b)(5)(B): “Clawback” of Inadvertently Produced Information

- ▶ **Notification:** If privileged or work product information is disclosed, “the party making the claim may notify any party that received the information of the claim and the basis for it.”
- ▶ **Conditional prohibition on use:** “must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information **until the claim is resolved.**”
- ▶ The rule does not provide immunity to an inadvertent production. The receiving party retains the right to challenge the claim of privilege.
- ▶ **Practice Point:** Enter into a written agreement concerning inadvertently produced information and make the terms part of a court order.



Early Attention to ESI: Rule 26(f) Conference

1. Consider inviting a computer consultant to assist
2. Attempt to agree:
 - A. “Key employees” and “key systems”
 - B. List of document “key words”
 - C. Format in which the parties will produce documents (TIFF v. Native v. PDF)
 - D. Will metadata be produced?
 - E. ESI that is “not reasonably accessible”
 - F. Privilege waiver issues (and have the agreement incorporated into a court order)



Rule 37: “Safe Harbor” Provision

- ▶ Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

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(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules 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.**



Preservation: the “Safe Harbor” (and why it may not be “safe”)

- ▶ **Rule 37(f):** information lost due to “routine, good faith” operation of electronic information systems
- ▶ **“Routine”:** necessary to have policies and procedures for information management that are implemented in practice
- ▶ **Good Faith:** show why information is destroyed pursuant to established routine
- ▶ Show that routines resulting in destruction of information arise from “the ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs.”
- ▶ Good faith may require suspension of routine in face of preservation duty



Rule 45 Subpoenas

- ▶ New procedural rules apply to third parties
- ▶ Courts will likely be faced with numerous disputes about third-party subpoenas



▶ II. TACKLING ES: THE CORPORATION'S RESPONSE



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Preservation

Litigation Hold Process

- ▶ Automated
- ▶ Defensible
- ▶ Standardized
- ▶ Third Party Vendors



Preservation / Production

Legal / IT Communication

- ▶ Sources of ESI
- ▶ Data Maps
- ▶ 30(b)(6) Witness
- ▶ Production
- ▶ Forensics



Possible Sources of ESI include:

- ▶ PCs, laptops
- ▶ servers (e.g., email, file, print, fax and blackberry servers)
- ▶ PDAs
- ▶ voicemail database systems
- ▶ backup tapes



Production - Privilege

Discovery Response Team

- ▶ Centralized
- ▶ Consistent
- ▶ Standardized
- ▶ Defensible
- ▶ Privilege Review



Privilege Review

- ▶ In-House
- ▶ O'S Counsel
- ▶ Vendors



Mechanics of DRT

- ▶ Requests
- ▶ Review
- ▶ Form of Production
- ▶ Uniform
- ▶ Chain of Custody



In-House or Third Party Vendors

► Cost

Resources

- ▶ Corporate E-Discovery Forum
- ▶ CGOC—Summit — PSS Systems
- ▶ Sedona

