

# MCLE ON THE WEB

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TEST # 68

1 HOUR CREDIT

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## **E-Discovery: What You Need To Know Now** *Electronic data has taken over the world and the court wants to know what you know about it*

**By NANCY L. STAGG and  
HA TRAN LAPPLE**

Back in the days when typists tapped out letters with the help of carbon paper and efficient clerks tucked files away in clearly labeled drawers, laying your hands on information that may be relevant to your client's lawsuit might have been as straightforward as tracking down the right file room and pulling open those shiny filing cabinets.

But with the proliferation of computers, personal digital assistants, external drives, Web pages, digital cameras, voice-mail, and — especially — e-mail by corporate and individual clients, you just can't depend on paper files to get you everything (or anything) you need to litigate your case effectively anymore.

Welcome your client's information technology specialist. She — who is hopefully well-versed in the client's computer network architecture, e-data retention policy and protocol for system backups — can either smooth out the bumps in the discovery road or throw you under the sanctions bus.

You'll need to get to know her. And you'll need to get to know the rules governing the discovery of electronic data for use as evidence in a civil or criminal case.

Maybe you don't think this will affect you because you specialize in California state court practice. Or your client has informed you, helpfully, that he doesn't have any electronic data to produce. You can sit back and cruise along while those poor souls in federal court talk terabytes and sampling and brainstorm inclusionary keywords. Sedona's just another place to play golf in Arizona, right? (See <http://www.thesedonaconference.org>.)

Just so — unless California enacts proposed amendments to the Rules of Court to adopt e-discovery rules for state practice or until a state or federal court judge sanctions you or your client for hiding electronic evidence.

Courts don't expect you to become a technological whiz. But they now expect you to learn enough about your client's computer systems to answer questions about potentially discoverable electronically stored information ("ESI").

### **New federal rules of the road and why they aren't so new anymore**

The amendments to the Federal Rules of Civil Procedure (which took effect Dec. 1, 2006) are not as groundbreaking as you might think. Rather, they codify principles that federal (and some state) courts have worked out over the years in grappling with information increasingly born, stored and destroyed in electronic format.

In a nutshell, the new federal rules expressly call for the investigation, discussion, handling and production of e-data in the ordinary course of discovery. As amended, Rule 16 provides that the scheduling order may include "provisions for the disclosure or discovery of ESI," as well as "agreements the parties reach for asserting claims of privilege or of protection [of] trial-preparation material after production."

The real change — and it's a big one — is in the new level of cooperation and transparency that courts will demand from parties about their systems and technology. As amended, Rule 26(a)(1)(B) requires parties to disclose any ESI they may use to support their claims or defenses. Rule 26(b)(2)(B) divides ESI into two categories: If you claim that data is "inaccessible," you must identify and describe the data and show why it would be unduly burdensome or costly to retrieve. The burden then shifts to the requesting party to establish good cause for going after that data. However, you may still need to preserve this information subject to a court order that allows your client to purge it in the ordinary course of the client's retention or recycling policy.

Rule 26(b)(5)'s amendments deal with inadvertently disclosed privileged or protected information. The producing party must notify the receiving party of the inadvertent disclosure. The receiving party must then return, sequester or destroy that information. Such information may not be used or disclosed to third parties until the privilege claim has been resolved. (If the information has already been disseminated, the receiving party must take reasonable steps to retrieve it). A belated notice of inadvertent disclosure may constitute a waiver of the privilege.

Amendments to Rule 26(f) require parties to "meet and confer" about the preservation of discoverable information, the form in which ESI will be produced (e.g., paper, .PDF, .TIFF, or as kept on the producing party's system — a.k.a. "native" format). The parties should also discuss any agreements for "snapping" or "clawing" back privileged information disclosed during "quick peeks" of voluminous data.

Rule 34, as amended, explicitly recognizes ESI as a category subject to discovery, as distinct from "documents" and "things." Rule 34 now also authorizes the requesting party

to specify the desired form of production (e.g., paper or electronic). The producing party may object. Absent a court order, a stipulation, or a request for a specific production form, a party may produce ESI in the form in which it is ordinarily maintained or in reasonably usable form. Unless the court says otherwise, a party need only produce ESI in one form.

Rule 37 now provides limited guidance to keep you and your client from being sanctioned over failure to produce ESI. The rule provides that, absent exceptional circumstances, sanctions may not be imposed under the civil rules if ESI sought in discovery has been lost as a result of the routine operation of an electronic information system, so long as that operation is in good faith.

But, depending on the circumstances, good faith may require a party to modify or suspend certain features of a computer system's routine operation to prevent the loss of information that is subject to an existing preservation obligation. "Exceptional circumstances" are not defined, and Rule 37 allows for sanctions for the destruction of evidence with or without a preservation order. (In addition, Rules 33 and 45 have also been amended to conform their provisions to ESI changes in the other discovery rules.)

### **The litigation hold letter**

As the new rules and their wellspring case law illustrate, attorneys and clients who breach their preservation duty do so at their peril. In a series of orders flowing from Magistrate Judge Shira Scheindlin in *Zubulake v. U.S.B. Warburg* (S.D.N.Y. 2003–2005), attorneys learned that they have a duty to go beyond a client's initial representations, if necessary, to monitor the client's compliance with a litigation hold (particularly as it relates to ESI). *Zubulake* centered around employment discrimination and retaliation claims. The plaintiff showed that the defendant's network backup tapes were likely sources of relevant evidence and should be restored for use in the case. But upon examination, the court found that several backup tapes were missing and relevant e-mails deleted.

The court noted that the defendant was obligated to preserve what it knew (or reasonably should have known) would be relevant in the action. Once a party reasonably anticipates litigation, it should suspend its routine document destruction policy and implement a "litigation hold" to ensure preservation of relevant information. Finding that the defendant had breached its duty to preserve, the court issued an adverse inference to the jury: jurors were permitted to infer that, had the lost e-mails been produced, they would have been favorable to the plaintiff. In the end, the jury awarded the plaintiff some \$20 million in punitive damages.

Unfortunately, there is no "bright-line" rule identifying precisely when the preservation duty crops up. Generally, the duty is triggered by the anticipation of a claim. Getting affirmative acknowledgements of your requests to preserve and an agreement from the client to comply may help protect both you and your client from sanctions down the road.

On the other hand, a well-crafted, specific preservation letter sent to your adversary may be a critical exhibit to your successful spoliation claim. Such a letter cuts off the “It was an oversight” excuse since it (hopefully) will have educated your opponent about the importance of ESI and included a reminder to take prompt and affirmative steps to keep evidence “accessible.”

Before you send one out, get to know your adversary and its systems through any available public (e.g., press releases, public filings that include descriptions of IT assets) sources. Then draft a letter that is reasonable on its face to give your opponent enough information to support your argument later that a reasonable person should have known to preserve this particular piece of evidence. Give your adversary names, dates, locations and events wherever possible. As appropriate, ask your opponent to suspend routine destruction of potential evidence through server backup-tape rotation, shredding, hardware replacements and other maintenance routines. (And, of course, don’t forget paper documents.)

Courts may issue interim preservation orders if you can muster a preliminary showing that relevant or discoverable information may be destroyed or modified without one.

### **But aren’t we adversaries?**

After Dec. 1, 2006, federal courts will expect parties to provide one another with information about their respective retention policies, ESI preservation efforts and the scope of their collection.

A straightforward conference with opposing counsel now will go a long way toward showing a court (perhaps at a future sanctions hearing) that you started off in good faith. Before you meet with opposing counsel, get a thorough understanding of your theory of the case. You should also be prepared to speak accurately about: (1) your client’s efforts to preserve potentially relevant information; (2) the scope of the document preservation, collection, review and production you are proposing to undertake; (3) your client’s computer (and other) electronic systems; (4) the forms of production you are proposing (and why you should get what you want); (5) prospects to share or shift the costs of production; and (6) proposals you have (if any) to handle inadvertent disclosure of privileged documents.

If you are arguing that your client has potentially relevant information that should not be accessed because it is overly burdensome to do so, be prepared to provide the facts to back up your position.

Ideally, your client’s information technology liaison – someone thoroughly versed in the client’s systems and backup policies and practices – should be available to answer any questions.

Think you’re being too helpful? Or, maybe, your opponent isn’t wise to the new rules and refuses to provide you with information about your adversary’s systems. The alternative

is to receive (or propound) a Fed. R. Civ. P. Rule 30(b)(6) deposition notice for the withholding party's IT guru. What you don't give (or get) through the informal conference of counsel can be provided formally and under oath.

### **Surviving the sanctions hearing**

If the data is gone, the court will probably want to know (1) why (i.e., how you lost that data), (2) what that data was likely to say, and (3) whether there was prejudice to your opponent or bad faith or willfulness on behalf of your client.

Unfortunately, no bright-line rules exist to guide you (other than, of course, not engaging in misrepresentations, evidence hiding and e-shredding following the receipt of your opponent's preservation letter). You can't even rely on the "safe harbor" label to advise your client on what is, truly, safe. If the data lost is critical to your opponent, courts still retain the authority to issue sanctions.

Moreover, even if you escape the sanctions hearing without having to pay a monetary fee, be on the lookout for discovery orders that can amount to a sanction (e.g., orders that your client produce its voluminous, lately discovered information within days of trial). Monetary sanctions are not the only way a court can express its disfavor of your e-discovery conduct.

### **Let's not make a federal case of it**

The California Judicial Council's Civil and Small Claims Advisory Committee previously proposed amendments to (former) California Rule of Court 212 to address electronically stored information at the initial case management conference. The proposed rule would have essentially mirrored the new federal rules by requiring parties to consider, during their meet-and-confer before the initial case management conference, whether the case involves any issues related to the preservation of ESI and whether a case management order should include provisions for the preservation of such information.

The proposed rule of court also required the parties to consider identifying and resolving in advance any issues relating to the form of the production as well as to claims of privilege and work product. However, the committee decided to shelve the amendments for the present time. But don't bet that an e-data rule of court won't be enacted in the near future. As ESI becomes an important issue for litigants in civil cases, the courts will undoubtedly step in to manage the process.

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## **Test, 1 Hour MCLE Credit**

This test will earn one hour of MCLE credit.

- 1.** Where a client has represented that she does not have any electronically stored information (ESI), the attorney need not investigate further but may pass that representation to the opponent and the court.
- 2.** If you believe, in good faith, that your client's potentially relevant ESI is inaccessible because it is too costly or too burdensome to produce, you can advise your client to purge that information, so long as the purging is in the ordinary course of business and consistent with the client's usual document retention and recycling policy.
- 3.** Pursuant to newly amended Fed. R. Civ. P. Rule 26(b)(5), a party who inadvertently discloses attorney-client-privileged information preserves the privilege so long as the producing party notifies the receiving party of the inadvertent disclosure.
- 4.** Fed. R. Civ. P. Rule 34 allows the requesting party to dictate the form in which electronically stored information is produced.
- 5.** If ESI sought in discovery has been lost as result of the routine operation of an electronic information system, sanctions may not be imposed as long as the operation that resulted in the loss was performed in good faith.
- 6.** Amendments to Fed. R. Civ. P. Rule 34 redefine "documents" to include electronically stored information.
- 7.** A party may produce electronically stored information in the form in which it is ordinarily maintained under Fed. R. Civ. P. Rule 34, as amended.
- 8.** Specific preservation letters can ensure that you prevail on spoliation claims if your adversary causes the loss of discoverable electronically stored information after receiving one.
- 9.** Parties may still be ordered to produce electronically stored information determined to be "inaccessible."
- 10.** Monetary sanctions constitute the most punitive sanctions a court can order against a party for spoliation of ESI.
- 11.** A preservation letter may tip off an adversary as to the very information it needs to destroy.

- 12.** If your opponent does not provide you with information regarding its networks, its document retention policies, or the preservation of potentially relevant electronically stored information, your only choice is to move for sanctions.
- 13.** If your client loses potentially discoverable data, the court's primary concern will be whether your client acted willfully.
- 14.** So long as you don't engage in misrepresentations, hide evidence or destroy electronically stored information following the receipt of a preservation letter, you are safe from the threat of sanctions.
- 15.** As soon as your client receives a letter from an employee regarding a legal grievance, the client should begin to preserve information relating to that claim.
- 16.** In federal court, you do not have to worry about electronically stored information if your opponent does not ask you for such information during your Fed. R. Civ. P. Rule 26 conference.
- 17.** You have to allow your opponent "quick peeks" if your ESI production is voluminous.
- 18.** E-discovery only involves e-mails.
- 19.** Decisions issued prior to Dec. 1, 2006, should be cited to help construe the amendments to the Federal Rules of Civil Procedure.
- 20.** California Rule of Court 212 now requires parties to meet and confer about electronically stored information before the initial case management conference.

### **Certification**

- This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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Law Firm/Organization

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