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**REPORT**

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**FEDERAL PRACTICE**

It is the one year anniversary of the electronic discovery amendments to the Federal Rules of Civil Procedure which went into effect on December 1, 2006. During this last year, over 50 court opinions have been issued which have interpreted the various amendments. Judges across America have provided us with the real world application of the amended rules in a variety of factual scenarios. While some rules, such as Fed. R. Civ. P. 16(b)(5)(b), 35, and 33(d), have not received comment, this article will address a sampling of those which have been further clarified through court opinions.

## **What a Difference a Year Makes: How the Courts Have Interpreted The E-Discovery Amendments of the Federal Rules of Civil Procedure**

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### **Meet and Confer**

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**T**he amendment to Rule 26(f)(3) and (4) directed the parties to meet and confer to discuss any issues relating to electronic discovery including preservation, forms of production, and claims of privilege after production. This amendment was adopted to resolve electronic discovery issues early in the litigation in order to reduce costs and time spent on the litigation.

The case of *O'Bar v. Lowe's Home Centers, Inc.*, 2007 WL 1299180 (W.D.N.C., May 2, 2007) addresses the issue of resolving disputes early on in the litigation in order to reduce future disputes.

This is a racial discrimination case where discovery had already been conducted on the individual claims

but was pending on the class claims. There were numerous discovery disputes regarding the individual claims and the court was bracing itself for further disputes on the class claims and ordered a “specific and detailed precertification discovery plan”. *Id.* at \*3.

In order to alleviate some of the discovery agony, the court adapted guidelines from the Suggested Protocol for Discovery of Electronically Stored Information set forth by the U. S. District Court for the District of Maryland. Among other things, the parties were directed to meet and confer to discuss: scope of requests; metadata; preservation; clawbacks; reasonably accessible data; redaction; costs and burdens of preservation, retrieval and use of electronic information; cost sharing; search methodologies; protective and confidentiality orders; and sampling. *Id.* at \*4-7.

The court noted that the list was not inflexible and the parties should also consider the (1) nature of the claims; (2) amount in controversy; and (3) agreements of the parties. *Id.* at \*4.

**Failure to Communicate.** Perhaps one of the most sweeping changes of the electronic discovery amendments is the notion that attorneys will have to play nicely with each other regarding electronic data discovery. This idea of fair play is addressed in *In re Seroquel Products Liability Litigation*, 2007 WL 2412946 (M.D. Fla. July 3, 2007).

After several attempts to have the parties meet and confer on data issues, the court still found itself in the middle of a discovery dispute. Echoing Judge Sheindlin in *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 42 (S.D.N.Y. 2004), the court admonished the parties, observing:

“What we have here is ‘a failure to communicate.’ Worse, the posturing and petulance displayed by both sides on this issue shows a disturbing departure from the expected professionalism necessary to get this case ready for appropriate disposition. Identifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take.” *Id.* at \*11.

The court found their prior attempts to meet and confer to be “illusory.” In the end, the defendant was sanctioned for its “purposeful sluggishness” in producing documents and its uncooperativeness in resolving custodial issues which rendered “10 million pages of documents inaccessible, unsearchable, and unusable.” *Id.* at \*17. So, when the court asks you to play nice, please do so.

## Two Tier Approach

Under the newly amended Fed. R. Civ. P. 26(b)(2)(B), a party is obligated to produce data that is (1) relevant, (2) not privileged and (3) reasonably accessible. The responding party must be able to show that any unreasonably accessible data is not accessible due to undue burden or cost. The requesting party can access unreasonably accessible data upon a showing of good cause. The cases that have come out in the last year have addressed, among other things, the obligation to search for data in general, the obligation to search for data before announcing its inaccessibility, and data preservation.

Once you have assessed all of the places where your data lives then you have to be able to categorize it as ac-

cessible or not accessible. Accessible data is active online data, near line data and offline storage archives. Not reasonably accessible data is comprised of back up tapes and erased, fragmented or damaged data.

Ideally, this categorization is made when litigation is not looming. Once litigation has commenced, then you must identify sources containing potentially responsive information that you are neither searching nor producing. *In re Veeco Instruments, Inc. Securities Litigation*, 2007 WL 983987 (S.D.N.Y. April 2, 2007), (7 DDEE 77, 05/1/07).

Make no mistake, you are obligated to search your available electronic systems for the information demanded. Without doing so, you can not ask for cost-shifting: “Cost shifting does not even become a possibility unless there is first a showing of inaccessibility. Thus it cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary.” *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007). So please, assess and categorize your data such that you can address the court on what you have and what you have searched for.

**Litigation Holds.** It always pays to implement an effective litigation hold. For three years after the complaint was filed, the defendant in *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139 (D.D.C. 2007) failed to stop the automatic purging of its e-mail every 60 days. Even so, WMATA balked at providing its backup tapes on the grounds of burden and expense.

The court was not sympathetic and stated that, while the newly amended Federal Rules relieve a party from producing data that is not reasonably accessible due to burden and expense, the new rules do not help a party that fails to preserve accessible information and “then complain(s) about the inaccessibility of the only electronically stored information that remains.” *Id.* at 147.

This sentiment was echoed in *AAB Joint Venture v. United States*, 75 Fed. Cl. 432 (2007). The court found that it could not relieve the defendant from its burden to produce “merely because Defendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive.” *Id.* at 440. The adage “it always pays to implement an effective litigation hold” is quite literal, as you will pay in the end to restore your backup tapes.

## Assertions of Privilege

The amendment to Fed. R. Civ. P. 26(b)(5)(B) was an attempt to address the errors that will almost assuredly occur when dealing with high volume productions in a limited time frame. The advertising slogan “Hot and Ready” was at issue in the case of *Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc.*, 2007 WL 1960585 (D.S.D. July 3, 2007). During the deposition of Pinnacle’s president, he was questioned about the results of his patent attorney’s research. The president of Pinnacle stated that his patent attorney’s opinion was that the terms “Hot and Ready” were too general and would be too expensive to trademark. *Id.* at \*1. No objection was made to this testimony.

Thereafter, the patent attorney was subpoenaed and requested to bring material that had previously been identified as privileged to his deposition. *Id.* Pinnacle

moved to quash the subpoena citing inadvertent disclosure. *Id.*

Even though this case did not involve electronic data, the court held that the amendment to Fed. R. Civ. P. 26(b)(5)(b) was drafted broadly enough to encompass all types of discovery and the testimony could not be used. *Id.* at \*4.

## Production of ESI

The newly amended Rule 34 regarding the production of electronically stored information was updated to: (1) reflect that electronic information was governed by the rule; (2) clarify that testing and sampling applied to electronically stored information; (3) allow the requesting party to specify the form of production; and (4) allow the responding party to object to the form of production.

The case law of the last year has addressed the issues of ephemeral data; open access to electronically stored information; and, the form of production.

**Ephemeral Data.** Ephemeral data is data that does not last very long on a computer, perhaps for a few hours. *Columbia Pictures Industries v. Bunnell*, 2007 WL 2080419 (C.D. Cal. May 29, 2007) (7 DDEE 136, 07/1/07) is a case that has grappled with the capture and production of ephemeral data.

Specifically at issue was the Internet Protocol (IP) addresses stored in the Random Access Memory (RAM). The case was closely watched as corporate America sat on pins and needles waiting to see if it would have to begin preserving data that was just passing through their systems.

In the end, the court stated that the ephemeral IP addresses must be turned over. However, it should be noted that this is a very fact-specific case and in no way makes the preservation of information stored in RAM a mandatory exercise.

**Open Access.** *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 WL 1723509 (S.D. Ohio June 12, 2007) and *Butler v. Kmart Corp.*, 2007 WL 2406982 (N.D. Miss. Aug. 20, 2007) both address the open access to the electronically stored information of an opponent. In a nutshell, it will not happen absent a strong showing of discovery misconduct on the part of the responding party.

In *Scotts*, the plaintiff alleged it was entitled to have a forensic expert search the defendant's computer system and back up information. The court noted that the "discovery of electronically stored information stands on equal footing with paper documents." Without a qualifying reason plaintiff was no more "entitled to access to defendant's electronic information storage systems than to defendant's warehouses storing paper documents." *Scotts* at \*2.

Similarly, in the *Butler* case, plaintiffs were less than thrilled with Kmart's efforts to locate its electronically stored information and thus requested open access to Kmart's home office databases. The court remarked that Fed. R. Civ. P. 34(a) does not generally give the requesting party a "right to search the responding party's records" and that the plaintiff would have to produce evidence that Kmart acted improperly. *Butler* at \*3.

**Form of Production.** Several decisions have been handed down regarding the form of production. The rules allow for the requesting party to specify the form of production. If it fails to do so, then the responding party may produce the information in the form in which it is ordinarily maintained or in a form that is reasonably useable.

In the *Scotts* case, plaintiff sought a re-production of 6,400 pages of previously produced hard copy. Liberty Mutual objected, stating that plaintiff did not specify the form of production and Liberty should not be required to produce the information twice.

The court found that the responding party must identify the intended form before the production occurs. If

### PRACTICE POINTERS

- Meet and confer to resolve electronic discovery disputes early. Use the "Suggested Protocol for Discovery of Electronically Stored Information" from the United States District Court for the District of Maryland as a guide ([www.mdd.uscourts.gov/news/news/ESIProtocol.pdf](http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf)).
- Play nice at the meet and confer meeting and be ready to knowledgeably discuss what data you have, how you keep it, how to search it and how to produce it.
  - Document your search efforts for electronically stored information.
  - Keep track of production expenses for later hearings on cost-shifting.
  - Identify sources of data that you are not searching or producing data from and why.
  - Be prepared to show inaccessibility.
  - Be prepared to preserve data that was never meant to be captured, i.e. Instant Messaging, voice mail, RAM data.
    - If you want open access to the responding parties computer system, be prepared to provide evidence of their improper actions, such as failure to preserve or withholding evidence.
  - Both parties are involved in specifying the form of production. If the requesting party fails to state the form of production then it is incumbent upon the responding party to declare it in advance of production.
    - Pay attention to the format requested and object in a timely manner.
    - Immediately implement litigation hold and document the hold process.
    - Immediately assess the evidence destroyers in your case, i.e. automatic deletion of e-mail, recycling of back up tapes or routine wiping of hard drives.
      - If you receive a third-party subpoena be prepared to show that the cost of responding to the subpoena is not de minimus.
      - If you issue a third-party subpoena from a non-party you should request documentation that explains how the data is stored, restored, and searched so that you can discern whether the cost is de minimus.

the responding party fails to do so, then it runs the risk of having to re-produce the information — if the requesting party can show that the information is not reasonably useable. *Scotts* at \*4. The parties were then ordered to meet and confer in order to hash out their production issues.

**Metadata.** *In re Payment Card Interchange Fee and Merchant Discount*, 2007 WL 121426 (E.D.N.Y. Jan. 12, 2007) and *In re ATM Fee Antitrust Litigation*, 2007 WL 1827635 (D.D. Cal. June 25, 2007) address the stripping of metadata from a production.

Regarding *In re Payment Card*, plaintiffs provided a significant amount of discovery to defendant by printing the electronic data, scanning it to a TIFF image, and providing the OCR text. All of this was done without any objection from the defendant as to the form of production.

The court reiterated that data which is already in a searchable form should not be produced in a form that removes or significantly degrades its searchability. Fed. R. Civ. P. 34(b), 2006 Amendment, Advisory Committee's Note.

Therefore, spitting out electronic data into hard copy is not acceptable. However, because the defendant never objected to this method of production, the court suggested that future productions should be in a native format. *In re Payment Card* at \*4.

Similarly, the *In re ATM Fee* case found that the same TIFF/OCR production was done for two years as agreed to by the parties. The court refused to alter the agreement but allowed the parties to stipulate to a native production. *In re ATM Fee* at \*7.

## Safe Harbor Provision

Ever since the Safe Harbor provisions were published, attorneys have been waiting for some of the terms of this rule to be further defined. "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." Fed. R. Civ. P. 37(f). Three cases have addressed this rule since its publication.

The first case, *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139 (D.D.C. 2007) failed to apply the reasoning of the rule because plaintiffs did not seek sanctions for the failure to properly implement the litigation hold. *Id.* at 146.

The second case, *United States v. Krause*, 367 B.R. 740 (D. Kan. June 4, 2007) (7 DDEE 135, 07/1/07) grappled with "good faith" and "routine operation". This case dealt with an attorney who used a computer program to delete files from his computers in an attempt to avoid payment of taxes, although, attorney Krause alleged that he simply reinstalled the software after his computer had crashed. The wiping software was installed after he was ordered to turn over electronic evidence. Several issues were addressed:

*Issue 1:* Whether there was a duty to preserve and when was it triggered.

*Answer:* Yes, the debtor was on notice when the government commenced proceedings, obtained a temporary restraining order, and requested documents.

*Issue 2:* Was the debtor under a duty to preserve each and every e-mail and electronic document?

*Answer:* The debtor is obligated to preserve:

(a) what he knows or reasonably should know is relevant to the action;

(b) what is reasonably calculated to lead to discovery;

(c) what is reasonably likely to be requested during discovery; and/or

(d) what is the subject of a pending discovery request.

*Issue 3:* Was there good faith?

*Answer:* There was no good faith. The intentional use of a wiping software and the timing of its use equated to bad faith.

*Issue 4:* Was this a routine operation of a computer system?

*Answer:* No, this was not a routine use. A party cannot "exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." Fed. R. Civ. P. 37(f), 2006 Amendment, Advisory Committee's Note.

Krause was threatened with incarceration until he coughed up his backup media.

And finally, the third case addressing the Safe Harbor provision for the year is *Doe v. Norwalk Community College*, 2007 WL 2066496 (D. Conn. July 16, 2007).

In this Title IX case, plaintiff alleged that evidence was spoliated when hard drives were wiped clean; Microsoft Outlook files had been altered, destroyed and filtered; and the college failed to follow its document retention policy. Therefore, plaintiff requested an adverse inference instruction.

The court found that the college could not take advantage of Rule 37's Safe Harbor provision because it failed to suspend the destruction of evidence. "Thus in order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business." *Id.* at \*4.

The defendants in *Doe* were also deemed to not have a routine operation of an electronic information system. It appears that e-mails were backed up for inconsistent periods of time, i.e. one year and then later, six months or less.

The court found that the college did not have "one consistent 'routine' system in place." *Id.* Therefore, the college could not take advantage of the Safe Harbor provision.

## Third Party Subpoenas

Rule 45 was amended to conform the changes in subpoenas to the other discovery rules related to electronic discovery. Specifically, cost shifting to non-parties was addressed in the case of *Guy Chemical Co., Inc. v. Romaco AG*, 2007 WL 1521468 (N.D. Ind. May 22, 2007).

This was a breach of contract action where plaintiff asserted a loss of business from third parties. As a result, defendant's customer was subpoenaed in order to determine how much business was lost. It was estimated that the cost of the production would be \$7,200. *Id.* at \*1.

The court found that the material was reasonably accessible and that it could not be obtained anywhere

else; therefore, the client needed to produce the information. \*1-2. The court found that if a showing could be made that the burden on the third-party was de minimus then the third-party would be responsible for the cost of production. *Id.* at \*3. Such a showing could not be made as searching for and producing every day business documents is an expensive task. *Id.*

All in all, it was a pretty robust year for the judicial interpretations of the newly amended electronic discovery rules. We've learned a lot about how to grapple with our data issues. Hopefully, the cases handed down in 2008 will even further illuminate how to handle electronic data discovery.