E-DISCOVERY IN THE FEDERAL COURTS

Panel Presentation
March 7, 2007

"The production of too many useful things results in too many useless people."
-Karl Marx

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Lisa Psaute's assistance in preparing these course materials is greatly appreciated.

I. Summary of Amendments

The amendments to the Federal Rules of Civil Procedure alter discovery of electronically stored information (ESI). Although ESI is not specifically defined, the drafters intended the definition to be as broad as possible, including any type of information that may be stored electronically. The changes are summarized as follows:

- **Rule 16(b):** Allows the inclusion of provisions concerning electronically stored information in the court's pre-trial scheduling order.
- **Rule 26(a)(1):** Initial disclosures must now include a copy, or a description by category and location, of all electronically stored information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, if in their possession, custody, or control.
- **Rule 26(b)(2):** A party has no duty to produce data reasonably identified by the responding party as inaccessible, due to undue burden or cost. The court may still order production upon good cause (factors considered include: specificity of discovery request; if the information is available from readily accessible sources; party's failure to produce relevant information no longer available in accessible sources; likelihood of finding relevant information not in accessible sources; estimated importance and usefulness of information; importance to issues at stake in the litigation; and the parties resources) and order limitations (including payment by the requesting party of the reasonable costs of obtaining the inaccessible information). On a motion to compel or produce, the responding party must show the data is inaccessible due to undue burden or cost.
- **Rule 26(b)(5):** Creates a "claw back" procedure whereby a party can request the return of privileged information inadvertently produced by notifying any party that received the information of the claim and the basis for it. Additionally, the amendments provide that the information must be returned, sequestered or destroyed and may not be used or shared by the receiving party until the claim of privilege is resolved. If the receiving party disclosed the information prior to notification of the claim of privilege, it must take steps to retrieve the information. The receiving party may present the information under seal for the court to determine the claim.
- **Rule 26(f):** Parties must meet and confer on e-discovery issues, including the form or forms in which it should be produced, before the pre-trial scheduling conference.
- **Rule 33(d):** Parties may reference "electronically stored information" as a type of business record from which answers to interrogatories may be derived, allowing the requesting party direct access to the electronic records versus physically producing the records, where the burden of ascertaining the answer is substantially the same for both parties. The responding party may also be required to provide technical support or other assistance.
- **Rule 34:** Production request may specify the desired format of electronic data and the response must state any objection to requested format. If the request does not specify a form, the data is produced in its "ordinary" file format or in a form "reasonably useable."
- **Rule 37:** Provides that no discovery sanctions may be imposed for inadvertent electronic data loss if based on the "routine, good faith operation" of an IT system, absent exceptional circumstances.

II. Recent Case Law And Suggested Reading

Issues currently facing the courts include: what qualifies as not readily accessible; what conditions may be imposed; and whether metadata must be included with files. The following cases illustrate recent holdings on these subjects:

Not reasonably accessible: In defense of a business interference action, the defendants asserted that plaintiff's losses were caused by its own mismanagement and not the defendants' alleged misconduct. The defendants subsequently requested all communications and documents relating to the management of plaintiff's business for a period of six months. When the plaintiff objected that the information requested was not reasonably accessible, the defendants filed a motion to compel. The plaintiff had identified 52,124 potentially responsive emails and 4,413 additional computer files, such Microsoft Office files. The court found that, due to the volume of responsive documents, the request was unduly burdensome and turned to the defendants to show cause. After considering the Advisory Committee's seven factors without discussion, the court determined only that the defendants' request was not so narrowly tailored as to seek out only the information relevant to their affirmative defense. The court, therefore, determined that the defendants had failed to show good cause to order disclosure of the communications and denied their motion. *Ameriwood Industries v. Liberman*, No. 4:06CV524-DJS, 2007 WL 496716 (E.D. Mo. Feb. 13, 2007).

Timeliness of objections and conditioning production: In an action based on the Telephone Consumer Protection Act for the receipt of unsolicited text messages, the defendants argued that the plaintiff had first initiated contact with the defendants and sought production of the plaintiff's personal computer. The plaintiff failed to either respond, or object that his personal computer was not reasonably accessible, within the thirty days allowed by Rule 34 and the defendants filed a motion to compel. The court discussed the general rule that a failure to object waives the objection, however, the court stated that it was "axiomatic that any discovery must be relevant and not unnecessarily burdensome," and that to allow the requesting party unfettered access to the computer would be unduly burdensome on the responding party. While the court granted the defendant's motion to compel, the court conditioned the production on the use of an independent forensic examiner, the costs of which were to borne by the defendants. *Thielen v. Buongiorno USA, Inc.*, No. 1:06-CV-16, 2007 WL 465680 (W.D. Mich. Feb. 8, 2007).

Form of production: The defendants to a class action requested the production of electronic data in its ordinary format (as kept in the ordinary course of business). In response, the plaintiffs produced electronic documents using their own protocol, printing and scanning the files to create .tiff images, effectively scrubbing any metadata from the files. The plaintiffs then moved for a protective order exempting them from producing electronically stored metadata in its native format for all documents produced prior to the date of the hearing and going forward. The court considered the effect of the amended Rule 34, holding that although the plaintiffs were able to elect a "reasonably usable" form, they ran afoul of the Advisory Committee's proviso that data ordinarily kept in electronically searchable form "should not be produced in a form that removes or significantly degrades this feature." The court held that it would be unduly burdensome for the plaintiffs to re-produce in their native format the documents already produced to the defendants and, therefore, need only produce all electronic documents in their native form going

forward. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. MD 05-1720, 2007 WL 121426 (E.D.N.Y. Jan. 12, 2007).

An annotated bibliography of case law on electronic discovery issues compiled through June 1, 2006 by Kenneth J. Withers is available at: http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/196.

Suggested Reading:

Lee A. Rosenthal, *An Overview of the E-Discovery Rules Amendments*, 116 YALE L.J. POCKET PART 167 (2006), *available at* http://thepocketpart.org/2006/11/30/rosenthal1.html.

In the first of a seven-part series, Judge Lee H. Rosenthal, chair of the Judicial Conference's Advisory Committee on Civil Rules, introduces the new e-discovery amendments and the challenges they present for lawyers, litigants, and judges. Additional articles in the series, including an article on metadata and other issues relating to the form of production, are available at http://thepocketpart.org/2006/11/30/rosenthal.html.

Craig Ball, *Hitting the High Points of the New E-Discovery Rules*, LAW PRACTICE TODAY, October 2006, *available at* http://www.abanet.org/lpm/lpt/articles/tch10061.shtml.

In this article for legal practioners, the author offers an introduction to the new e-discovery rules amendments and their impact on discovery, particularly with regard to the duties of preservation and disclosure.

GEORGE L. PAUL & BRUCE H. NEARSEN, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (ABA 2006).

A comprehensive analysis of the e-discovery amendments, including such topics as: the concept of electronically stored information; the new approach to pre-discovery meetings, the form of production of electronic evidence, inaccessible evidence, preservation of evidence when routine processes may destroy it, the safe harbor, and privilege waiver issues.

IV.
Fish's Testimony Before
The United States Judicial Conference Re: Amendments

(See Attached)

V.
SAMPLE LETTER TO DEMAND ELECTRONIC RETENTION & ESTABLISH A SPOLIATION CLAIM

March 7, 2007

[Opposing Counsel]

Re: [Case Name and Number]

Dear _____:

This letter is urgent and demands immediate action.

To preserve highly relevant evidence under your client's control, we hereby demand that Defendant immediately take all actions necessary to ensure that any and all computers, electronic data (including but not limited to text files, spread sheets, e-mail, word processing files, computer system activity logs, and all file fragments), central drives, internal/external data drives, backup tapes and backup systems in your client's possession be immediately shut-down to the extent that they possibly relate in any way to the allegations in the complaint or any defense that Defendant (or any other potential party) may assert in this case. The continued use of the files or computer systems identified above may (and likely will) destroy relevant evidence.

In addition, immediately preserve and retain all emails (including attachments) for the following persons: _____.

I am prepared to immediately hire and pay for the services of a computer forensic expert to image and examine all drives and data identified in this letter.

The failure to immediately preserve the systems, computers, and data identified herein may constitute spoliation of evidence that could subject your client to legal claims for damages and court-imposed sanctions.

Please confirm in writing by no later than [_____] that Defendant has complied with the action requested herein.

I appreciate your cooperation in this regard. Please feel free to contact me if you have any questions.

Sincerely yours,

David J. Fish

Some of David's electronically reported decisions follow:

Pope v. Harvard Banchares, Inc., 2006 WL 3952052 (N. D. Ill. Nov. 16, 2006); *U.S. Can Co., Inc. v. Limited Brands, Inc*., 2006 WL 1049581, (N. D. Ill. Ap. 19, 2006); *PSN Illinois, Inc. v. Ivoclar Vivadent, Inc*., 398 F.Supp.2d 902 (N. D. Ill. Oct. 10, 2005); *Ace Hardware Corp. v. Marn, Inc.*, 2006 WL 4007863 (N. D. Ill. Dec. 27, 2006); *Sotelo v. DirectRevenue, LLC*, 384 F.Supp.2d 1219 (N. D. Ill. Aug 29, 2005); *Nelson v. UBS Global Asset Management (Americas), Inc*., 2005 WL 327034, (N. D. Ill., Feb 09, 2005); Bentley v. Honeywell Intern., Inc., 223 F.R.D. 471 (Sep 23, 2004); *First American Real Estate Information Services, Inc. v. Consumer Benefit Services, Inc.*, 2004 WL 5203206 (S. D. Cal., 2004); *Nietech Corp. v. CBS Data Services, Inc*., 2004 WL 5203205, (N. D. Cal. 2004); *Budget Rent A Car Corp. v. Harvey Kidd Automotive*, 249 F.Supp.2d 1048 (N. D. Ill., Mar 14, 2003); *Surface Shields, Inc. v. Poly-Tak Protection Systems, Inc*., 213 F.R.D. 307 (N. D. Ill. 2003); *Kiser v. Naperville Community Unit*, 227 F.Supp.2d 954 (N. D. Ill. 2002); *Allied Van Lines, Inc. v. Aaron Transfer and Storage, Inc*., 200 F.Supp.2d 941 (N. D. Ill. 2002); *Kennedy v. Village of Oak Lawn*, 2001 WL 1001167 (N.D. Ill. 2001); *Montgomery v. Taylor*, 2001 WL 831321 (N. D. Ill. 2001); *PSN Illinois, Inc. v. Ivoclar Vivadent, Inc***.,** 2005 WL 2347209 (N. D. Ill. 2005).

Publications:

David publishes the popular Litigation Blog (http://www.litigationblog.blogspot.com), which is repeatedly recognized in popular publications such as the Wall Street Journal online. Other articles written by David include:

Sotelo v. Direct Revenue, LLC, Paving the Way for a Spyware-Free Internet, 22 Santa Clara Comp & High Tech. L.J. 841 (2006).

Ten Questions to Ask Before Taking a Legal-Malpractice Case, Illinois Bar Journal.

The Use Of The Illinois Rules of Professional Conduct to Establish The Standard of Care In Attorney Malpractice Litigation: An Illogical Practice, Southern Illinois Univ. Law Review, 1998.

Zero-Tolerance Discipline In Illinois Public Schools, Illinois Bar Journal 2000.

An Analysis Of Firefighter Drug Testing Under The Fourth Amendment, International Jour. Of Drug Testing, 2000.

The Legal Rock and the Economic Hard Place: Remedies of Associates Attorneys Wrongfully Terminated for Refusing to Violate Ethical Rules, Univ. of W. Los Angeles Law Rev, 1999.

Physician Non-Compete Agreements in Illinois: Diagnosis – Critical Condition; Prognosis – Uncertain, DuPage County Bar Journal, October 2002.
Local government Web sites and the First Amendment, Government Law, November 2001, Vol. 38, No. 3.