

E-Discovery in the United States

By Katheryn A. Andresen¹

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¹ Ms. Katheryn (“Kate”) A. Andresen is partner with the law firm of Hellmuth & Johnson, PLLC. Ms. Andresen is an experienced transactional attorney, with an emphasis in technology and intellectual property considerations. She is a frequent author and guest speaker on technology law related matters, both nationally and internationally. Ms. Andresen authored the second edition of THE LAW AND BUSINESS OF COMPUTER SOFTWARE (West Services, Inc., 2007-2011). This article was provided as part of a presentation at the Barcelona annual EU conference hosted by the International Technology Law Association in November 2008 and is based, in part, on materials originally drafted in November 2007 for a National Business Institute E-Discovery seminar in Minneapolis, Minnesota in 2007.

E-Discovery and the United States Federal Rules

In the United States, civil litigation is ruled by the Federal Rules of Civil Procedure (“FED. R. CIV. P.”). Unlike other common law countries, the United States is unique in requiring the litigating parties to handle the discovery process amongst themselves without significant judicial oversight. The FED. R. CIV. P. are intended to govern that process by clearly identifying each party’s obligations with regards to requests for, and responses to, discovery requests, whether by documents, interrogatories, or testimony by witnesses. The FED. R. CIV. P. were initially drafted in 1938 by the United States Supreme Court under the Rules Enabling Act of 1934.² The FED. R. CIV. P. have been modified from time to time, generally based upon the recommendation of the Judicial Conference of the United States. Most states have adopted their own versions of civil procedure rules based on the FED. R. CIV. P. model.

Under the FED. R. CIV. P., Rules 16 and 26, the parties to a litigation action must meet to discuss discovery and other pre-trial matters and propose a scheduling order to the court addressing such discovery timelines. Rule 26 allows a plaintiff to request the production of documents relevant to the matter and the defendant has the obligation to preserve and produce such documents unless they are protected by privilege. With the widespread use of computers, the Internet, electronic mail, and back up systems, most parties have at least some information that would be deemed “electronically stored information” (“ESI”). Prior to the change in December 2006, Rule 26 meant that a defendant would have to preserve and search through all forms of electronic media for documents responsive to a discovery request. The cost and time burdens to respond to requests for ESI under the previous version of Rule 26 were often significant. In response to motions to the courts and judicial rulings having to address exceptions to Rule 26 for ESI production on the basis that compliance was too costly and unduly burdensome, the United States Judicial Conference proposed changes which were enacted as of December 1, 2006.

Rule 16 and 26 Preliminary Conferences

FED. R. CIV. P., Rule 16 governs Pretrial Conferences and Scheduling Management. Under the revised rules, Rule 16 now requires the parties to deal early on in the litigation with the issue of ESI discovery, if such discovery is intended to occur.³ In conjunction with Rule 16, FED. R. CIV. P., Rule 26(f) directs the parties to discuss ESI discovery. “Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties’ proposal for the court to enter a case-management or other order adopting such an agreement.”⁴

Specifically, the December 2006 changes renumbered Rule 16 (b) (5) and (6) to (7) and (8) and added the following new (5) and (6) requirements for items that “[t]he scheduling order may also include”⁵:

- (5) provisions for disclosure or discovery of electronically stored information;
- (6) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production;

² 28 U.S.C. § 2072.

³ See Committee Notes to Rule 16(b); a copy of the changes and Committee Notes may be found online at: http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. References to Committee Notes throughout this paper refer to this document.

⁴ Committee Notes following Rule 16.

⁵ FED. R. CIV. P., Rule 16(b).

The Rule 26(f) conference required at the start of the litigation must address ESI if such information is to be produced. In particular, the parties are expected to discuss the types of information systems used in storing or accessing ESI. In addition, the parties are required to discuss the format of the production of the ESI. Due to the extensiveness of such information, the parties may also mutually agree that production will precede the final review for privilege, with the understanding that privilege will be asserted as soon as reasonably ascertainable and plaintiff will be precluded from asserting that the privilege was waived in that circumstance.

Rule 26 Changes for Reasonably Accessible Data

Ironically, the fact that information is stored electronically should make access, and therefore production, easier than traditional paper files. A typical request for documents might require production of “all originals and non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise.” In reality, to fully comply with such a request, backup copies of ESI would need to be restored, reviewed and due to the sheer volume typically of ESI and the multiple copies of backup tapes potentially saved, the cost for such restoration, review and filtering for “non-identical copies” can cost a significant amount of money. In extremely complex and large litigation cases, it would not be unlikely that the production would result in millions of unique documents and having to review against multiple backup tapes for possible variations could take months in addition to the cost for such a review.

The December 2006 changes revised Rule 26(b)(2) by numbering the first two sentences as subparagraph (A) and the last half as (C) and inserting the following (B):

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The Committee Notes for this addition recognize the possible substantial burden and/or cost associated with the production of some ESI and requires the parties to recognize this and address it during the discovery conference. The focus is on the phrase “reasonably accessible.” The defendant may respond that production of a certain request is not appropriate due to substantial burden or cost (i.e. the ESI is not reasonably accessible), but any refusal to produce due to this burden requires the identification “by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”

Even if a party does not have to produce ESI under this new section, it will still have the statutory obligation to preserve such information.

If the parties do not agree about the ESI to be produced or not due to this new section (B), the courts may still rule on either a motion to compel discovery or a motion for a protective order. In preparing to rule on such a motion, the responding party may have to: (i) conduct a sampling of the information contained on the sources “not reasonably accessible”; (ii) allow for some form of inspection of such sources; and (iii) produce a witness to testify about such information systems.

Even if the ESI is deemed not reasonably accessible, a court still has the discretion to compel production upon review of the “good cause” for requesting the motion to compel as well as a review of the issues balancing the need for the information against the burdens and costs. According to the Committee Notes to Rule 26 (b) amendments:

“Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.”

The burden of proof for such a hearing is split, the producing party bears the burden with regard to its assertion that the information is “not reasonably accessible” and the requesting party bears the burden for showing good cause that the need for the information outweighs the burdens and costs. The court in ruling on such a motion may conclude that some or all of the cost associated with an order to compel may be shifted to the requesting party. According to the Committee Notes: “The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party’s willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause.”

Rule 26 Post Production Privilege Assertions

Due to the sheer volume of information typically generated as ESI, the risk of waiver as to privilege for producing an otherwise privileged document and the time and effort required to avoid such a waiver increase dramatically. In order to address this concern, the changes to Rule 26 allow for a post-production assertion of privilege and the other party may be precluded from asserting a waiver argument as to such production. Both the FED. R. CIV. P. Rule 26 (b)(5)(B) and Rule 26 (f) address the subject of privilege assertions post-production and the right, or not, of the other party to assert a waiver argument to permit use of the document.

Under Rule 26 (f), the parties during the pre-trial discovery conference can agree to allow for quicker release of ESI, provided that the producing party has the right to assert privilege claim with respect to any produced document as soon as the producing party has ascertained the privilege exists. In such a pre-trial arrangement, the scheduling order may expressly acknowledge the post-production privilege assertion as well as the loss of the receiving party to assert a waiver argument. The parties may agree upon other caveats as to the timing and/or timeliness of such a post-production privilege claim. Additionally, they may agree as to when a claim of waiver may still be validly brought with such post-production privilege assertions.

The December 2006 changes did not affect the court’s authority to rule on discovery motions and/or consider arguments both for and against either the post-production privilege assertion or the right of the receiving party to argue waiver of such a privilege. As the Committee Notes state for Rule 26 (b)(5)(B): “Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.” Under Rule 26 (f), the Committee Notes state: “On other occasions, parties enter agreements — sometimes called “clawback agreements”— that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances.”

The case management, scheduling order, or other such order may incorporate any agreement the parties came to during the Rule 26 (f) conference. The Committee Notes added: "Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case management or other order."

Rule 33 and 34 Specification of Form

Both the FED. R. CIV. P. Rules 33 (Interrogatories to Parties) and 34 (Production of Documents and Things...) were amended in the December 2006 amendments to expressly incorporate ESI. Rule 33 (d) and Rule 34 (a) both have the same broad definition of ESI. The purpose of this modification according to the Committee Notes is: "[m]uch business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well."

Rule 33 was changed to allow for ESI, but the Committee Notes recognized that "[s]pecial difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system." This means that substitution of ESI for an interrogatory is permitted "only if the burden of deriving the answer will be substantially the same for either party." If the responding party provides ESI under a Rule 33 response, the responding party may also be responsible to provide technical support or information on the application software to ensure the interrogating party may locate and identify the response to the interrogatory. Additionally, as indicated in the Committee Notes, "the responding party must give the interrogating party a 'reasonable opportunity to examine, audit, or inspect' the information." Again, such audit or examination may require the responding party to provide technical support or information on the application software.

If the production of ESI under Rule 33 (d) means that the interrogating party must have access to the responding party's information system to adequately locate and identify the response, then the responding party may be obligated ascertain and provide the information itself if there is a security concern to protect sensitive interests of confidentiality.

The FED. R. CIV. P. Rule 34 was amended in 1970 to reflect that "documents" might mean different things depending on changes in technology. The obligation for computer information was that when the data could only be obtained through a device, the responding party may be required to use such device to translate the data into a useable form (e.g. printing a report from an electronic database.) In the December 2006 changes, Rule 34 was amended to make ESI on an equal footing to traditional documents. The Committee Notes remarked: "[t]he change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined."

Rule 34 now encompasses documents or ESI "stored in any medium" to account for new developments in technology. The requirement of Rule 34 for ESI to be translated from one medium into another, does not, however, require translation into another language.⁶

As with Rule 26, Rule 34 may allow for a requesting party to sample or test a medium containing ESI in addition to the requesting party's right to inspect or copy such information. Recognizing this right may be a problem, the Committee Notes acknowledge that: "[a]s with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c)." The Committee also acknowledged

⁶ See *In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

that inspecting information systems for ESI “may raise issues of confidentiality or privacy.” The express right to test or sample was not added “to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances.” Rather the Committee noted that the courts should guard against undue intrusiveness under this right.

Under Rule 34, a producing party must produce documents as they are “kept in the usual course of business.” The production of ESI is subject to a comparable requirement to, as the Committee noted, “to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party.” The December 2006 amendments to Rule 34 also allow the requesting party to specify the format to be used for production of ESI. Especially with ESI, the form of production may be critical to the usefulness of the production. If the requesting party fails to specify the format to be used for the production of ESI, the producing party has the discretion to produce in any reasonable format it chooses. It would be wise, however, for the parties to discuss and agree upon format prior to production as any disagreement may end up with a court compelling the producing party to re-produce the ESI in another format if the requesting party can show that the originally produced format is “not reasonably usable.”

If the parties cannot agree to the format for ESI under a Rule 34 production, “the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel.”⁷ If the parties cannot agree, the court decides and has discretion to order production in any format the court deems appropriate.

Producing parties under Rule 34 must translate ESI into a form that is “reasonably usable”. As noted under the Rule 33 changes, if necessary, the producing party may be required to provide technical support or information on the application software to the requesting party to ensure the form of production is “reasonably usable.” If ESI production involves “‘legacy’ data that can be used only by superseded systems”, then the question of whether production is required at all or in another format will be handled under Rule 26 (b)(2)(B) considerations.

Rule 45

The FED. R. CIV. P. Rule 45 allows for party to subpoena “evidence or to permit inspection”. The December 2006 changes allow for a subpoena of ESI, including the specification of the form of such production. As with Rule 34, the parties may agree to the form, challenge a requested form, or change the “reasonably usable” quality of the form produced. Rule 45 expressly prevents a producing party from having to produce information in more than one form.

Additionally, Rule 45 allows for the producing party to object to the request or the form requested as unduly burdensome or expensive. As with Rule 26, the parties either work these issues out amongst themselves, or the court will issue an order as to the right for production and or the right to avoid production on the basis that production would be unduly burdensome or expensive.

Rule 45, as with Rule 34, allows for testing or sampling, provided that such right does not constitute a burden or affect confidentiality or privacy obligations. The considerations and right for court discretion to rule on such Rule 45 disputes is equivalent to the discussion under Rule 34. As with Rule 26, the producing party also has the right to assert privilege post-production. Upon notice of the privilege, the Committee Notes explain:

⁷ See Committee Notes for Rule 34.

“After being notified, a party 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. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.”

Electronically Stored Information (“ESI”) as Interpreted by Common Law

In December 2006, the Supreme Court amended the FED. R. CIV. P. rather significantly to account for electronically stored information (“ESI”). The motion practice and case law leading up to these changes made it clear that certain presumptions in the pre-2006 rules were no longer appropriate given the sheer volume of ESI involved in most cases. Under the pre-2006 rules, a typical discovery request might be for “all original documents, including all non-identical copies when different from the original due to notations of any kind on such copies” responsive to some topic. Due to the wide spread use of various information systems, backup systems and even disaster recovery systems, it became increasingly apparent that ESI might mean numerous copies of the original which would need to be reviewed and vetted to determine which copies were “non-identical”. This process was time consuming, often costly and usually required a burden on the producing party in terms of personnel and disruption of business to conduct the search.

“During 2003 and 2004, United States District Court Judge Shira A. Scheindlin issued five groundbreaking opinions in the case of *Zubulake v UBS Warburg*. *Zubulake* is generally considered the first definitive case in the United States on a wide range of electronic discovery issues. These issues include:

- The scope of a party's duty to preserve electronic evidence during the course of litigation;
- Lawyer's duty to monitor their clients' compliance with electronic data preservation and production;
- Data sampling;
- The ability for the disclosing party to shift the costs of restoring “inaccessible” back up tapes to the requesting party;
- The imposition of sanctions for the spoliation (or destruction) of electronic evidence.”⁸

ESI Production in Complex Litigation

Quoting the Manual for Complex Litigation (Fourth Edition), the district court in the *In re Seroquel* case recognized its guidance for dealing with such vast amounts of data:

“Computerized data have become commonplace in litigation. The sheer volume of such data, when compared with conventional paper documentation, can be staggering.... One gigabyte is the equivalent of 500,000 type-written pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion [sic] typewritten pages of plain text. Digital or electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, hand-held devices, automobiles, or household appliances; or it can be accessible via the Internet, from private networks, or

⁸ *Kroll Ontrack's Legal Resources: Zubulake v. UBS Warburg*; found online at <http://www.krollontrack.co.uk/legalresources/zubulake.aspx>.

from third parties. Any discovery plan must address issues relating to such information, including the search for it and its location, retrieval, form of production, inspection, preservation, and use at trial.

For the most part, such data will reflect information generated and maintained in the ordinary course of business. As such, discovery of relevant and nonprivileged data is routine and within the commonly understood scope of Rule 26 and 34. Other data are generated and stored as a byproduct of the various information technologies commonly employed by parties in the ordinary course of business, but not routinely retrieved and used for business purposes. Such data include the following:

Metadata, or "information about information." This includes the information embedded in a routine computer file reflecting the file creation date, when it was last accessed or edited, by whom, and sometimes previous versions or editorial changes. This information is not apparent on a screen or in a normal printout of the file, and it is often generated and maintained without the knowledge of the file user....⁹

The district court continued its quote from the Manual for Complex Litigation to address production of ESI:

"There are several reasons to encourage parties to produce and exchange data in electronic form ...

-- production of computer data on disks, CD-ROMS, or by file transfers significantly reduces the costs of copying, transport, storage, and management--protocols may be established by the parties to facilitate the handling of documents from initial production to use in depositions and pretrial procedures to presentation at trial;

-- computerized data are far more easily searched, located, and organized than paper data; and

-- computerized data may form the contents for a common document depository.

The goal is to maximize these potential advantages while minimizing the potential problems of incompatibility among various computer systems, programs, and data, and minimizing problems with intrusiveness, data integrity, and information overload....¹⁰

Production of ESI in an electronic form is not mandated however under Rule 34.

"A leading resource on dealing with electronic discovery is the Second Edition of the Sedona Principles, on which AZ relied at the July 26, 2007 hearing on the Motion for Sanctions. Principle 3 states, "Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities." *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery* (The Sedona Conference Working Group Series, 2007)."¹¹

ESI Production – One Court's Guide

In the O'Bar case,¹² the Western District of North Carolina specified the guidelines to be used by the parties in their Rule 26(f) conference based on the District Court of Maryland's guide.¹³ The following is a shortened paraphrase of the guide as quoted in the O'Bar case:

⁹ In re Seroquel Products Liability Litigation, 244 F.R.D. 650, 654 (M.D.Fla. 2007).

¹⁰ *Id.* at *4-5.

¹¹ *Id.* at *6 (footnote omitted).

¹² O'Bar v. Lowe's Home Centers, Inc. 2007 WL 1299180 (W.D.N.C.)

¹³ O'Bar, 2007 WL 1299180 at *4, fn 2 (noting location of the guide found online at: <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>.)

- A. The anticipated scope of requests for, and objections to, production of ESI, as well as the form of production of ESI and, specifically, but without limitation, whether production will be of the Native File, Static Image, or other searchable or non-searchable formats.
- B. Whether Meta-Data is requested for some or all ESI and, if so, the volume and costs of producing and reviewing said ESI.
- C. Preservation of ESI during the pendency of the lawsuit, specifically, but without limitation, applicability of the “safe harbor” provision of the FED. R. CIV. P. Rule 37, preservation of Meta-Data, preservation of deleted ESI, back up or archival ESI, ESI contained in dynamic systems, ESI destroyed or overwritten by the routine operation of systems, and, offsite and offline ESI (including ESI stored on home or personal computers). This discussion should include whether the parties can agree on methods of review of ESI by the responding party in a manner that does not unacceptably change Meta-Data.
- D. Post-production assertion, and preservation or waiver of, the attorney-client privilege, work product doctrine, and/or other privileges in light of “clawback,” “quick peek,” or testing or sampling procedures, and submission of a proposed order.
- E. Identification of ESI that is or is not reasonably accessible without undue burden or cost, specifically, and without limitation, the identity of such sources and the reasons for a contention that the ESI is or is not reasonably accessible without undue burden or cost, the methods of storing and retrieving that ESI, and the anticipated costs and efforts involved in retrieving that ESI.
- F. Because identifying information may not be placed on ESI as easily as bates-stamping paper documents, methods of identifying pages or segments of ESI produced in discovery should be discussed, and, specifically, and without limitation, the following alternatives may be considered by the parties: electronically paginating Native File ESI pursuant to a stipulated agreement that the alteration does not affect admissibility; renaming Native Files using bates-type numbering systems, e.g., ABC0001, ABC0002, ABC0003, with some method of referring to unnumbered “pages” within each file; using software that produces “hash marks” or “hash values” for each Native File; placing pagination on Static Images; or any other practicable method. The parties are encouraged to discuss the use of a digital notary for producing Native Files.
- G. The method and manner of redacting information from ESI if only part of the ESI is discoverable.
- H. The nature of information systems used by the party or person or entity served with a subpoena requesting ESI, including those systems described herein. Counsel should be prepared to list the types of information systems used by the client and the varying accessibility, if any, of each system.
- I. Specific facts related to the costs and burdens of preservation, retrieval, and use of ESI.
- J. Cost sharing for the preservation, retrieval and/or production of ESI, including any discovery database, differentiating between ESI that is reasonably accessible and ESI that is not reasonably accessible; provided however that absent a contrary showing of good cause, e.g., the FED. R. CIV. P. Rule 26(b)(2)(C), the parties should generally presume that the Producing Party bears all costs as to reasonably accessible ESI and, provided further, the parties should generally presume that there will be cost sharing or cost shifting as to ESI that is not reasonably accessible.
- K. Search methodologies for retrieving or reviewing ESI such as identification of the systems to be searched; identification of systems that will not be searched; restrictions or limitations on the search; factors that limit the ability to search; the use of key word searches, with an agreement on the words or terms to be searched; using sampling to search rather than searching all of the records; limitations on the

- time frame of ESI to be searched; limitations on the fields or document types to be searched; limitations regarding whether back up, archival, legacy or deleted ESI is to be searched; the number of hours that must be expended by the searching party or person in conducting the search and compiling and reviewing ESI; and the amount of preproduction review that is reasonable for the Producing Party to undertake in light of the considerations set forth in the FED. R. CIV. P. Rule 26(b)(2)(C).
- L. Preliminary depositions of information systems personnel, and limits on the scope of such depositions. Counsel should specifically consider whether limitations on the scope of such depositions should be submitted to the Court with a proposed order that, if entered, would permit Counsel to instruct a witness not to answer questions beyond the scope of the limitation, pursuant to the FED. R. CIV. P. Rule 30(d)(1).
 - M. The need for two-tier or staged discovery of ESI, considering whether ESI initially can be produced in a manner that is more cost-effective, while reserving the right to request or to oppose additional more comprehensive production in a latter stage or stages.
 - N. The need for any protective orders or confidentiality orders, in conformance with the Local Rules and substantive principles governing such orders.
 - O. Any request for sampling or testing of ESI; the parameters of such requests; the time, manner, scope, and place limitations that will voluntarily or by Court order be placed on such processes; the persons to be involved; and the dispute resolution mechanism, if any, agreed-upon by the parties.
 - P. Any agreement concerning retention of an agreed-upon Court expert, retained at the cost of the parties, to assist in the resolution of technical issues presented by ESI.

Required Form of Production

During the pre-trial conference, or Rule 26(f) conference, the parties to litigation must discuss ESI if such discovery is contemplated in the action. This means that both parties must have a clear understanding of what ESI exists, what type of systems store such information and what efforts would be required to access and/or restore such information. Once the parties determine what the ESI is, how and if it is to be produced, the parties must also agree on the form of production. The actual order of the produced documents is to be as the documents are kept in the ordinary course of business.¹⁴

In *MGP Ingredients, Inc. v. Mars, Inc.*, the District Court of Kansas held that “Subsection (i) [of Rule 34] makes it very clear that the producing party must either produce the documents as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.”¹⁵ The District Court continued its analysis to conclude the producing party had the option to produce in either of those two formats. If the producing party can substantiate that the form in which it produced the ESI is how the information was kept in the ordinary course of business, then the production is sufficient, despite the difficulty for the receiving party to review and/or match the discovery to the requests. The District Court also noted other rulings permitting the producing party’s discretion in the form of production as long as it complied with one of the two prongs in Rule 34:

“See *Pamlab, L.L.C. v. Rite Aid Corp.*, No. Civ. A. 04-1115-DJB-SS, 2005 WL 1588238, at * 1-2 (E.D. La. June 27, 2005) (producing party has the right to choose between the two production formats authorized by Rule 34(b)); *In re Adelpia Commc’ns Corp.*, 338

¹⁴ The FED. R. CIV. P., Rule 34(b)(i) provides that “[u]nless the parties otherwise agree, or the court otherwise orders ... a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request...”

¹⁵ *MGP Ingredients, Inc. v. Mars, Inc.*, 2007 WL 3010343, *3 (D.Kan. 2007).

B.R. 546, 553 (Bankr.S.D.N.Y.2005) (“Rule 34(b) gives the producing party the option of labeling and organizing the documents or giving the discovering party access in the usual course of business,” and, thus, producing party retains right to choose between the two production formats); *In re G-I Holdings Inc.*, 218 F.R.D. 428, 439 (D.N.J.2003) (“The plain phrasing of Rule 34(b) reveals that the producing party has the option of presenting information in one of two ways.”); *Rowlin v. Al. Dep’t of Pub. Safety*, 200 F.R.D. 459, 462 (M.D.Ala.2001) (Rule 34(b) leaves it to producing party to decide which of the two ways it will produce its records, so long as the records have not been maintained in bad faith); see also 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2213at p. 431-32 (2d ed. 1994) (“[T]he producing party should retain the right to choose between the [two] production formats authorized by Rule 34(b)....”).¹⁶

Are the requirements as to form of production the same under Rule 33 and Rule 34? The answer is yes, with a caveat. The Rule 34 production options listed above apply as well to a responding party’s choice to produce documents in response to interrogatories under Rule 33. The caveat is that the receiving party must be able to discern the answers from such production. If, for example, the information were archived haphazardly in cardboard boxes, the production of such originals for review would probably not meet the intent of Rule 33 and a court could order the responding party to modify the form of production to more clearly identify which documents respond to which interrogatories.

In *Oklahoma, ex rel. Edmundson*, the Northern District of Oklahoma assessed the similarities and distinctions between production responsive to Rule 33 and Rule 34.¹⁷ “Rules 34(b) and 33(d) are intended to complement each other. The 2006 Federal Rules Civil Advisory Committee note makes clear that for electronically stored information ‘Rule 33(d) is amended to parallel Rule 34(a).’”¹⁸ Although the “responding party has a duty to indicate, with some degree of specificity, from what documents the answer can be ‘derived or ascertained.’”¹⁹ While a court may order that the response to a Rule 33 interrogatory be clearly labeled (or indexed or bates numbered), it is not necessary for such restrictions on a Rule 34 production where the production is in the form of the information is kept in the course of ordinary business.²⁰ The court in *Oklahoma* held “the pivotal consideration in deciding discovery challenges under rule 34(b), like the defendant’s in this case, where a large number of documents have been produced based on an ‘as they are kept in the usual course of business’ election is whether the filing system for the produced documents ‘is so disorganized that it is unreasonable for the [party to whom the documents have been produced] to make [its] own review.’”²¹

The courts modify the right to produce as such documents are kept in the ordinary course, when such production does not appear to have any order or the normal course actually works to conceal rather than make the answers readily ascertainable.²² The court in *Oklahoma*, required the producing party to either point the receiving party to the responsive documents, or to provide

¹⁶ *MGP*, 2007 WL 3010343 at *3, fn. 8.

¹⁷ *Oklahoma, ex rel. Edmundson*, 2007 WL 1498973 (N.D.Okla. 2007).

¹⁸ *Oklahoma*, 2007 WL 1498973 at *2.

¹⁹ *Oklahoma*, 2007 WL 1498973 at *2.

²⁰ *Washington v. Thurgood Marshall Academy*, 232 F.R.D. 6 (D.D.C.2005); see also *Renda Marine, Inc. v. U.S.*, 58 Fed. Cl. 57, 63 (U.S.Cl. 2003)

²¹ *Oklahoma*, 2007 WL 1498973 at *2 (citing *Renda Marine* at 64).

²² See *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 610-11 (D.Neb.2001) (“producing large amount of documents in no apparent order does not comply with a party’s obligation under Rule 34”); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D.Mass.1976) (stating that a party “may not excuse itself from compliance with Rule 34... by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition.”).

a key or index of the information to the receiving party to aid that party's review of the produced documents.²³

With regards to ESI, the courts may also require that the form of production preserve "hidden" metadata. In *Williams v. Sprint*,²⁴ the district court required that ESI be produced in its "native format" to preserve such metadata. The *Williams* court went into a detailed analysis of what metadata is and how and when it is subject to discovery.

What is Easily Accessible Data versus Inaccessible Data?

While the modified Federal Rules of Civil Procedure allow for ESI, such information is "on equal footing with discovery of paper documents."²⁵ "Consequently, without a qualifying reason, plaintiff is no more entitled to access to defendant's electronic information storage systems than to defendant's warehouses storing paper documents."²⁶ The FED.R.CIV.P., Rule 34 amendments were designed to have the parties negotiate between themselves about the production of ESI and for addressing issues of non-production on the basis that the information is "not readily accessible." The Southern District of Ohio in assessing the accessibility of discovery clarified in detail what this means in terms of ESI:

"The discovery process is designed to be extrajudicial, and relies upon the responding party to search his records to produce the requested data. In the absence of a strong showing that the responding party has somehow defaulted in this obligation, the court should not resort to extreme, expensive, or extraordinary means to guarantee compliance. Imaging of computer hard drives is an expensive process, and adds to the burden of litigation for both parties, as an examination of a hard drive by an expert automatically triggers the retention of an expert by the responding party for the same purpose. Furthermore, as noted above, imaging a hard drive results in the production of massive amounts of irrelevant, and perhaps privileged, information. Courts faced with this inevitable prospect often erect complicated protocols to screen out material that should not be part of discovery. See, e.g., *Playboy Enters.*, 60 F.Supp.2d 1050, 1054 (S.D.Cal.1999) (appointing court's expert to conduct examination). Again, this adds to the expense and complexity of the case. . . .

Plaintiff in this case requests intrusive examination of its opponent's computer systems on the mere suspicion, based solely on the nature of the claims asserted, that defendant may be withholding discoverable information. Plaintiff's speculation is, in the view of this Court, entirely insufficient. Plaintiff's few allegations of misconduct, which are adequately explained by defendant, simply do not justify Court-mandated access to defendant's information storage systems. Cf., e.g., *Playboy Enters.*, 60 F.Supp.2d at 1054 (allowing access to party's computer system on a finding of systematic deletion of relevant e-mails after litigation had commenced). See, e.g., *Williams v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 144, 146 (D.Mass.2005) (denying motion to appoint computer forensic expert because moving party failed to present any "credible evidence that Defendants are unwilling to produce computer-generated documents"); *Bethea v. Comcast*, 218 F.R.D. 328, 329-30 (D.D.C.2003) (denying motion to compel because, "[i]n the context of computer systems and computer records, inspection or seizure is not permitted unless the moving party can demonstrate that the documents they seek to compel do, in fact, exist and are being unlawfully withheld"); *Simon Prop. Group L.P. v. Simon, Inc.*, 194 F.R.D. 639, 641 (S.D.Ind.2000) (allowing plaintiff to inspect defendant's computer

²³ *Oklahoma*, 2007 WL 1498973 at *4.

²⁴ *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640 (D. Kan. 2005).

²⁵ The FED. R. CIV. P. 34 Advisory Committee's Note on 2006 Amendments.

²⁶ *The Scotts Co., LLC v. Liberty Mutual Insurance Co.*, 2007 WL 1723509, *2 (S.D. Ohio)

system because plaintiff demonstrated "troubling discrepancies with respect to defendant's document production"); *Ameriwood Indus. Inc. v. Liberman*, Case No. 4:06CV524-DJS, 2006 WL 3825291, *1 (E.D.Mo. Dec.27, 2006) (unpublished) (granting motion to compel imaging of defendant's hard drive because the court had "cause to question whether defendants have produced all responsive documents"); *Balboa Threadworks, Inc. v. Stucky*, Case No. 05- 1157-JTM-DWB, 2006 WL 763668, at *4 (D.Kan. Mar.24, 2006) (unpublished) (permitting imaging of defendants' computer where defendants' representation that no responsive materials existed on computer was contradicted by their production of e-mail created on that computer)."²⁷

As with traditional discovery, the requesting party bears the burden of proof that the request is reasonable, narrowly tailored to the information needed, and that the requesting party has reason to believe such information exists as part of the producing party's ESI. The Southern District of New York in the first of the five *Zubulake* decisions held that cost-shifting for the production of discovery may be appropriate when the information sought is inaccessible.²⁸ "It is worth emphasizing again that cost-shifting is potentially appropriate only when inaccessible data is sought. When a discovery request seeks accessible data—for example, active on-line or near-line data—it is typically inappropriate to consider cost-shifting."²⁹

Privilege Issues

"Discovery may not be obtained regarding matters which are privileged. See FED.R.CIV.P. 26(b)(1). Thus, if a discovery privilege exists, information may be withheld, even if relevant to the case. See *Baldrige v. Shapiro*, 455 U.S. 345, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982). The question of privilege is determined by reference to the Federal Rules of Evidence. See *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir.1979). Generally, questions of privilege "... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED.R.EVID. 501. However, in civil actions which do not raise a federal question, the question of privilege is determined by state law. See FED.R.EVID. 501. But, "when state privilege law is consistent, or at least compatible with, federal privilege law, the two shall be read together in order to accommodate the legitimate expectations of the state's citizens."³⁰

"The attorney-client privilege is properly invoked where:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made
 - a) is a member of the bar of a court [and] ...
 - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed
 - (a) by his client
 - (b) without the presence of strangers
 - (c) for the purpose of securing primarily either
 - (i) an opinion on law or
 - (ii) legal services or

²⁷ *The Scotts Co.*, 2007 WL 1723509 at *2.

²⁸ See *Zubulake v. UBS Warburg LLC* ("*Zubulake I*"), 217 F.R.D. at 323, 2003 WL 21087884, at *12 ("A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.") (emphasis in original).

²⁹ *Zubulake v. UBS Warburg LLC* ("*Zubulake II*"), 216 F.R.D. 280 (S.D.N.Y. 2003).

³⁰ *Gaston v. Caden*, 2007 WL 2727142 (E.D.Cal. 2007) (citing *Pagano v. Oroville Hospital*, 145 F.R.D. 683, 687 (E.D.Cal.1993) *overruled on other grounds* (the holding that comity requires federal law to consider state law was overruled, but the holding that if there is no inconsistency between the state law and the federal law – the two should be read together)).

- (iii) assistance in some legal proceeding [and] ...
- (4) the privilege has been
 - (a) claimed and
 - (b) not waived by the client.”³¹

When a party invokes the attorney-client privilege by providing a privilege log, “the description of each document and its contents must be sufficiently detailed to allow the court to determine whether the elements of attorney-client privilege ... have been established.”³²

“The work product doctrine, codified for the United States Court of Federal Claims in RCFC 26(b)(3), is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal strategy ‘with an eye toward litigation,’ free from unnecessary intrusion by adversaries.”³³ It is not, however, intended to protect from general discovery materials prepared in the ordinary course of business such as factual investigations prepared by insurance companies.³⁴

“As a general rule, the voluntary production of a privileged document waives any claim of privilege with respect to that document.”³⁵ However, the inadvertent production of privileged documents does not waive privilege unless the producing party's conduct was “so careless as to suggest that it was not concerned with the protection of the asserted privilege.”³⁶ Inadvertent disclosure of privileged communications, require the Court to assess the reasonableness of precautions taken to preserve the privilege.³⁷

Courts routinely engage in a four-factor balancing test, in which no single factor is dispositive, to determine whether the inadvertent production of privileged documents waives privilege. The four factors are:

- (1) the reasonableness of precautions taken to prevent inadvertent disclosure;
- (2) the time taken to rectify the error;
- (3) the extent of disclosure relative to the scope of discovery; and
- (4) overreaching issues of fairness.³⁸

The *Amgen* court modified this waiver assessment under a five factor test:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure,
- (2) the amount of time it took the producing party to recognize its error,
- (3) the scope of the production,

³¹ *Pac. Gas & Elec. Co. v. United States*, 69 Fed.Cl. 784, 810 (2006) (*PG & E I*) (alterations in original) (citing *First Fed. Sav. Bank of Hegewisch v. United States*, 55 Fed.Cl. 263, 266 (2003) (*First Federal*) (citation omitted)).

³² *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 475 (E.D.Pa.2005) (*SmithKline*) (alteration in original) (citation omitted).

³³ *Deseret Management Corp. v. U.S.*, 76 Fed.Cl. 88 (Fed.Cl. 2007) (footnote omitted) (citing *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

³⁴ *Centrale Citrus Juices USA, Inc. v. Zurich Am. Ins. Group*, 2004 WL 5215191 *2 (M.D.Fla. September 10, 2004) (citing *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Co.*, 123 F.R.D. 198, 202 (M.D.N.C.1988)).

³⁵ *United States v. Rigas*, 281 F.Supp.2d 733, 737 (S.D.N.Y.2003).

³⁶ *Atronic Int'l, GMBH v. SAI Semispecialists of Am., Inc.*, 239 F.R.D. 160, 163 (E.D.N.Y.2005) (citing *SEC v. Cassano*, 189 F.R.D. 83, 85 (S.D.N.Y.1999)).

³⁷ See, *In the Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd (Bermuda)*, 425 Mass. 419, 422, 681 N.E.2d 838, 841 (Mass.1997); *Abamar Housing & Dev. v. Lisa Daly Lady Decor, Inc.*, 698 So.2d 276, 278-79 (Fla.3d App. Dist.1997).

³⁸ *Lois Sportswear v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y.1985); see also *Rigas*, 281 F.Supp.2d at 738 (S.D.N.Y.2003).

- (4) the extent of the inadvertent disclosure, and
- (5) the overriding interest of fairness and justice.³⁹

As before the amendment of the FED.R.CIV.P., a claim of privilege may be challenged under a crime-fraud exception. The Third Circuit recently upheld a district court's ruling to compel production of documents withheld under the attorney-client privilege due to the crime-fraud exception rule.⁴⁰

A court may compel the production of discovery otherwise properly withheld on a claim of privilege. However, the court must still take into consideration the FED.R.CIV.P. caveat under Rule 26(b)(3) that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

A writ of mandamus may be requested to overrule an order to compel otherwise privileged information, however:

"Ordinarily, pretrial discovery orders involving a claim of privilege are unreviewable on interlocutory appeal, "and we have expressed reluctance to circumvent this salutary rule by use of mandamus." *In re W.R. Grace & Co.*, 984 F.2d 587, 589 (2d Cir.1993). At the same time, the writ is appropriate to review discovery orders that potentially invade a privilege, where: (A) the petition raises an important issue of first impression; (B) the privilege will be lost if review must await final judgment; and (C) immediate resolution will avoid the development of discovery practices or doctrine that undermine the privilege. *Chase Manhattan Bank, N.A. v. Turner & Newall PLC*, 964 F.2d 159, 163 (2d Cir.1992); *In re Long Island Lighting Co.*, 129 F.3d 268, 270 (2d Cir.1997). (Although the County argues that any single showing is enough, the test sprouts three prongs; in any event, the County prevails on all three.)"⁴¹

Imposition of Sanctions

The intent of the modified rules for discovery was that the parties would work out amongst themselves the basic issues with regards to production of relevant discovery. As always, the courts still have the final word on discovery issues which cannot be worked out and to the extent a party fails to produce discovery as required under the FED. R. CIV. P., courts may also impose sanctions. Courts generally allow for pretty broad leeway in the production of discovery. When a producing party produces ESI, the courts may require that such production include technical assistance as necessary to make the information useable for the discovery purposes.

In the *In re Seroquel* case, the parties had agreed to the production of ESI which included: "electronic documents being produced with searchable load files, bates-stamped TIFF's and various metadata fields."⁴² Four months after a case management order had been finalized, the requesting party (plaintiffs) filed a motion to compel the production of the discovery identified in the case management order. The court elected not to compel discovery, but rather denied the motion without prejudice "to allow the parties time to confer 'in good faith and *in extenso*' on the issues described in the Motion to Compel; . . . [and] alerting the parties:

³⁹ *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 291 (D.Mass.2000).

⁴⁰ *Newman v. General Motors Corp.*, 228 Fed.Appx. 245 (3rd Cir. 2007).

⁴¹ *In re County of Erie*, 473 F.3d 413, 416-417 (2nd Cir. 2007).

⁴² *In re Seroquel Products Liability Litigation*, --- F.Supp.2d ----, 2007 WL 2412946, *2 (M.D.Fla. 2007).

ANY PARTY WHOSE CONDUCT NECESSITATES THE EVIDENTIARY HEARING SHOULD EXPECT THE IMPOSITION OF SANCTIONS FOR ANY UNREASONABLE OR INAPPROPRIATE CONDUCT OR POSITION TAKEN WITH RESPECT TO THESE MATTERS.”⁴³

After failure to produce or respond to discovery issues identified directly to the defendant, plaintiffs brought a motion for sanctions. In deciding to award sanctions, the court reviewed the standards for electronic discovery in complex litigation.⁴⁴ The court noted that “[a]s businesses increasingly rely on electronic record keeping, the number of potential discoverable documents has skyrocketed and so also has the potential for discovery abuse.”⁴⁵ In particular, the court acknowledged that Rule 37 sanctions should require that the party upon which such sanctions may be imposed be aware of such a possibility, typically through a motion to compel.

“[O]n its face, [Rule 37] does not require that a court formally issue an order compelling discovery before sanctions are authorized.... [T]he absence of either a motion to compel filed by the government or an order of the court compelling discovery, the violation of which might implicate Rule 37, rendered inappropriate the imposition of the types of sanctions levied here” [i.e., default judgment].⁴⁶

The court, however, “may also impose sanctions based on its inherent power to manage its docket and its cases. *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir.1995) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir.2002) (court’s has the “inherent power to manage its own affairs” via sanctions).⁴⁷ In such an instance, however, “[a] finding of bad faith, however, is required to impose sanctions based on the Court’s inherent powers. *In re Mroz*, 65 F.3d at 1575.”⁴⁸ The court concluded the defendant had been “purposely sluggish” in responding to discovery requests.

The “sluggish” production may be deemed unreasonable delay subject to sanctions:

“Prejudice from unreasonable delay is presumed. *In re Eisen*, 31 F.3d at 1452-53. Failure to produce documents as ordered is sufficient prejudice, whether or not there is belated compliance. *Id.* at 1453 (taking action after the defendant’s motion to dismiss was pending does not excuse taking no action before); *Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir.1997) (noting that last-minute tender of documents does not cure prejudice or restore other litigants on a crowded docket to the opportunity to use the courts); see also *Adriana*, 913 F.2d at 1413 n. 6 (recognizing that refusal to produce evidence presumptively shows that an asserted claim or defense is meritless). The risk of prejudice is exacerbated where each delay potentially affects the discovery and remand schedule in hundreds of other cases.”⁴⁹

The production of ESI in electronic form is acceptable, even when it is not identical to the version “kept in the ordinary course of business” where the ESI is searchable and therefore responsive to a Rule 34 production.⁵⁰ As in the *In re Seroquel* case, the *De Technologies* court had to consider whether to impose sanctions for the failure to produce 57 documents. The *De*

⁴³ *In re Seroquel*, 2007 WL 2412946 at *3 (capitals and bold in the original).

⁴⁴ *Id.*; see also *supra* on ESI Production in Complex Litigation.

⁴⁵ *Id.*

⁴⁶ *United States v. Certain Real Property Located at Route 1*, 126 F.3d 1314, 1317 (11th Cir.1997).

⁴⁷ *In re Seroquel*, at *7.

⁴⁸ *Id.*

⁴⁹ *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1236-37 (9th Cir.2006).

⁵⁰ *De Technologies, Inc. v. Dell, Inc.*, 2007 WL 128966, *2 (W.D.Va.)

Technologies court reviewed first whether a prior motion to compel had been filed, and concluded that where it had not preceded the motion for sanctions, sanctions were not appropriate:

“As the United States Court of Appeals for the Fourth Circuit has noted, “Rule 37(b) sanctions apply only to violations of a court order to permit or provide discovery, or one in regard to a discovery conference.” *Buffington v. Baltimore County*, 913 F.2d 113, 133 n. 15 (4th Cir.1990). Furthermore, a motion to compel is a more appropriate reaction when a party is dissatisfied with a discovery response. *Hartz and Co. v. Prod. Control Info. (PCI) Ltd.*, 1995 U.S.App. Lexis 32063 (4th Cir.1995) (citing *Buffington*, 913 F.2d at 133).”

Several cases have imposed heavy sanctions on parties failing to produce discovery as required under the FED.R.CIV.P.⁵¹ One such case, *Qualcomm Inc. v. Broadcom Corp.*, resulted in the court awarding “all reasonable attorneys’ fees, court costs, expert witness fees, travel expenses, and any other litigation costs reasonably incurred by Broadcom in litigating the present Action.”⁵² According to news reports, “Qualcomm already has been fined \$8.5 million and ordered to pay Broadcom’s attorney fees.”⁵³

Admissibility of ESI

Despite the years of debate and rulings dealing with ESI prior to the 2006 amendments, “[v]ery little has been written, however, about what is required to insure that ESI obtained during discovery is admissible into evidence at trial, or whether it constitutes ‘such facts as would be admissible in evidence’ for use in summary judgment practice. Fed.R.Civ.P. 56(e).”⁵⁴ As the court noted in *Lorraine*, “[t]his is unfortunate, because considering the significant costs associated with discovery of ESI, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted. The process is complicated by the fact that ESI comes in multiple evidentiary ‘flavors,’ including e-mail, website ESI, internet postings, digital photographs, and computer-generated documents and data files.”⁵⁵

In particular, the *Lorraine* court laid out the steps for admissibility of ESI:

“Whether ESI is admissible into evidence is determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence. Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible.

Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered:

(1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be);

⁵¹ *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003) (imposing a ; *Coleman (Parent) Holdings, Inc., v. Morgan Stanley & Co., Inc.*, 2005 WL 4947328 (Trial Order) (Fla.Cir.Ct. Mar 01, 2005) (imposing an adverse inference for failure to produce emails which the producing party had been order to produce.)

⁵² *Qualcomm Inc. v. Broadcom Corp.*, 2007 WL 2261799 (S.D.Cal. 2007).

⁵³ Newsfactor.com’s *Qualcomm Lawyers Face Sanctions*, dated October 15, 2007 7:43AM; found at http://www.newsfactor.com/story.xhtml?story_id=55986.

⁵⁴ *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 537-538 (D.Md. 2007).

⁵⁵ *Id.* at 538.

- (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be);
- (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807);
- (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001- 1008); and
- (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance.

Preliminarily, the process by which the admissibility of ESI is determined is governed by Rule 104, which addresses the relationship between the judge and the jury with regard to preliminary fact finding associated with the admissibility of evidence. Because Rule 104 governs the very process of determining admissibility of ESI, it must be considered first.”⁵⁶

The *Lorraine* court continue its detailed assessment of admissibility of ESI by recognizing that courts realize “that authentication of ESI may require greater scrutiny than that required for the authentication of “hard copy” documents, they have been quick to reject calls to abandon the existing rules of evidence when doing so.”⁵⁷ See also *In re F.P.*, 878 A.2d 91, 95 (Pa.Super.Ct.2005) (“Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages.... We believe that e-mail messages and similar forms of electronic communications can be properly authenticated within the existing framework of [the state rules of evidence].”).

Conclusion

The recognition of ESI issues in the modified Federal Rules of Civil Procedure do not resolve all discovery issues related with ESI. The FED. R. CIV. P. Rules 26 and 34 were amended to ensure that ESI and its complex issues were discussed between the parties early in the litigation at the Rule 26(f) conference. Each court may establish its own local rules addressing ESI, but the key consideration is that the information be preserved and ultimately produced where feasible in a manner consistent with the intent of permitting the receiving party to reasonably use such produced ESI.

⁵⁶ *Id.*

⁵⁷ *Id.* at 542-543.