

Countdown to Zero: The New Federal Rules of Civil Procedure

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Some lawyers are simply terrified. Most are worried. A few blissfully assume that they can go along in splendid ignorance, as they always have.

You may not need to quake in your boots, but if you practice in federal courts, it is well nigh time to bring yourself up to speed on the new Federal Rules of Civil Procedure, which go into effect on December 1st.

So why are otherwise stalwart litigators quaking in their boots? For the most part, it is the recent court-imposed sanctions that terrify them. The Morgan Stanley case, all by itself, caused a ripple of dread throughout the litigation realm.

By no means is Morgan Stanley alone. There is now a raft of cases out there, all bearing the same message to attorneys: Comply with e-discovery required practices or pay the piper. Sanctions have varied – most fines have been assessed against clients rather than attorneys, but judges have indicated that may change if the attorneys don't start toeing the line. More and more, judges have liberally handled out "adverse inference" instructions in cases of spoliation or "evidence gone missing," instructing juries that they may assume that the absent evidence was negative. Can you hear the other side happily exclaiming "SCORE!?" All of these penalties have been imposed without the benefit of having the new F.R.C.P. to back them up. Hence, the fear. Now that the duties are laid out clearly, what will it cost my client – or my firm – if I don't abide by them? Are malpractice claims a possibility for those who ignore the new rules? You betcha.

Mind you, nothing in the new rules is rocket science. But it behooves all lawyers in federal practice to understand the new rules before they become newspaper fodder as a result of their missteps.

So what do you need to know?

First and foremost, electronic evidence is now center stage. You must address it, and early on. No more agreements with opposing counsel that "I won't go there if you won't." No way, no how – you may not like it, but you're going to have to deal with it.

Though you need to read both the new amendments and the extensive commentary to them, here's a fast and dirty crib sheet.

ESI: WHAT'S IN A NAME? EVERYTHING.

Precise wording now counts. What we've all called electronic data for years now has the official moniker of "electronically stored information," or ESI. Get that right, and you're

already ahead of the crowd. Do you also remember how we all scrambled to insert in our pleadings a new, absurdly long definition of “document” that would include every imaginable kind of electronic information? No worries mate. From now on, “ESI” refers to all things electronic, whether you specify the nature of the information or media, or do not. The new rules are broadly written and the definition of ESI is, hopefully, so broad that it will encompass all sorts of technological change without the need for an amendment to the definition.

PRETTY PLEASE, CAN I TAKE A PEEK?

For years, opposing counsel has screamed about the undue burden of massive production. Under Amended Rule 34(a), where massive amounts of data may be in issue, you can now “sneak a peek” by sampling the ESI. If relevant information is found, game over – they have to produce. If it is not, you may have a very hard time convincing the court that you need still more data.

PICK ANY FLAVOR ICE CREAM YOU LIKE

Well, at least you can start out that way. Amended Rule 34(b) permits a requesting party to specify the format in which they would like to have ESI produced. Now, be wary - that isn’t precisely “endgame.” The other side may object to the format and some negotiation or a court hearing may be necessary. But the expectation on the part of electronic evidence experts is that the vast number of requests will be to have the data in native format, most often to preserve metadata or the ability to play with “what if” scenarios using the native format. If no format is specified, than the responding party is required to produce the ESI in the format in which is ordinarily maintained or in “reasonably usable” format. This amendment is expected to produce a few face-offs before case law settles the dust.

WE DON’T HAVE TO ANSWER YOUR STINKING QUESTIONS

This is true. Amended Rule 33(d) permits a responding party to produce ESI in answer to an interrogatory if the burden of deriving the answer will be substantially the same for both parties. A caveat here though - many attorneys suspect this is a minefield and would rather craft an actual answer rather than hand out data. If you choose to hand out data, the producing party must provide “sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained” and must allow the requesting party “reasonable opportunity to examine, audit or inspect” the records that are identified. Where privileged documents or proprietary information may be involved, allowing access to ESI could be the equivalent of opening Pandora’s box.

GIVE IT TO ME NOW!

Amended Rule 26(a)(1)(B) adds ESI to the list of what each party must disclose to the other during the opening stages of a case.

YOU CAN'T HAVE IT – IT'S INACCESSIBLE –SO THERE!

One amendment expected to cause some trouble is Amended Rule 26(b)(2)(B), which states that ESI need not be produced if the source is not reasonably accessible because of undue burden or undue cost. For instance, many companies no longer have the capacity to read some of their legacy back-up tapes. For years, it has been true that restoring ESI from tape was problematic, though the problems have lessened with technological advances. Still, it will take a number of court cases to sort out the definition of “inaccessible.” Saying data is inaccessible doesn't necessarily make it so, and the other side is likely to file motions to compel production. Saying it is too expensive may not work either – judges have become increasingly skeptical of statements that “it will cost millions of dollars” to restore ESI – they are beginning to demand alternative estimates from other vendors where they think the cost claims are excessive. Moreover, if the requested party can show that information is important, relevant, unavailable elsewhere, not such an undue burden considering respective resources, and that important issues are involved, the opposing party may be required to produce with all objections cast to the winds by the court.

PLEASE, PLEASE MAY I HAVE IT BACK?

Attorneys have lived in dread of having privileged documents inadvertently produced. Amended Rule 26(b)(5)(B) creates a “claw back” process whereby the producing party may inform the other side that privileged material has been produced, and the requester must “promptly return, sequester, or destroy the specified information and any copies it has” and “take reasonable steps to retrieve” any information already distributed. Of course, the receiving party may also bring the matter to the court if there is a dispute on the matter of privilege.

MY HOUSE OR YOURS?

The infamous “meet and confer” conference is going to be an earth shaker for many attorneys under the new rules, especially in jurisdictions where they could get away with an exchange of correspondence or picking up the phone and chatting with opposing counsel. Amended Rule 26(f) clearly states that that electronic evidence must be discussed at the pretrial conference and that agenda items must include: 1) the preservation of discoverable information; 2) issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced; and 3) issues regarding claims of privilege or protection as trial-preparation material, including whether to ask the court to include an agreement on non-waiver of privilege in an order.

Many parts of this new rule will compel interest, but here is our take: attorneys better make a quick call to their computer forensics/e-discovery expert and make sure that he/she attends this conference. Moreover, a senior representative from the IT department of both parties is going to be needed. If e-evidence is under discussion, the expert will

not, at that early juncture, have a full understanding of the IT infrastructure. Nor will the IT representative be qualified to discuss what is possible, desirable or best practice with respect to ESI preservation and production.

The heart of the new rule is an expectation that lawyers will work collaboratively and amiably early on to address e-discovery issues. We are not betting the mortgage money that this will go smoothly.

DEADLINE? DID I AGREE TO A DEADLINE?

Deadlines in e-discovery are ephemeral and subject to frequent morphing. However, Amended Rule 16(b) now insists that e-discovery and any claims or privilege or protection as trial preparation materials after production be made part of the scheduling order. Since even your experts may not know how much ESI there is to cope with in the early stages, this may be dicey. It is akin to Mr. Spock making “my best guess, Captain” and hoping for the best.

SOMEBODY THROW ME A LIFELINE!!!!

Somebody did, in the form of Amended Rule 37(f), at least – sort of. The so-called safe harbor rule says that “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.” Be wary of this rule. First, this does not obviate the requirements of a litigation hold (preserving evidence, suspending the provision of a document retention policy as needed, etc) – indeed, abiding by the litigation hold is part of the very definition of good faith. Moreover, though the court may not impose sanctions under these rules, nothing prohibits the court from imposing sanctions based on other rules, statutes or regulations and many commentators expect that they may do exactly that.

THE MEN IN BLACK SPEAK

We have had the opportunity to hear several federal judges speak about the new amendments recently. Judge T.S. Ellis III, from the Eastern District of Virginia, says candidly that he was opposed to the rules because he doesn’t believe amendments should be passed until the barbarians are at the gate. To his own surprise, he came to believe that the barbarians were indeed at the gate and dropped his opposition. He is pleased that the rules are modest in scope and largely incorporate electronic information into current practice. He is quick to note that lawyers who are unreasonable or do not act in good faith with respect to the new amendments will not like anything he has to say. He also notes that, even if he chooses not to sanction unreasonable or bad faith attorneys, the reputation they’ve established with him will remain in his memory banks. His words certainly didn’t seem to bode well for those who might not try wholeheartedly to comply with the new amendments.

Magistrate Judge Thomas Rawles Jones,, Jr., also from E.D.V.A. says he is concerned about the potential for abuse that the rules provide. Just as with paper, he is worried about lawyers who seem always to play the game of “hiding the ball.” He expressed a low tolerance for such behavior. He notes that “Litigation is the highest form of gambling and electronic evidence has upped the ante. Your job is to come to a reasonable resolution. It is a high stakes crap game to get involved in a lawsuit.” When asked how he would define “bad faith,” the judge noted simply “I know it when I see it.” A sidebar concern for Judge Jones is that litigious folks may try to “stick up” a corporation by filing a lawsuit where the electronic discovery would be so crippling and costly that the corporation might fold its cards and cave in to settlement rather than go through the pain. This problem, he says, will have to be sorted out on a case by case basis.

Magistrate Judge Michel Urbanski, from the Western District of Virginia, observed “this is hard stuff: all these changes reflect a generation gap. Many in the room (at a CLE) have not actually held a Bates stamper. These new rules are more a sea change for lawyers than judges – the lawyers’ duties have really changed much more than ours.” He also suggests that these rules cannot be read alone – that the comments to the rules are invaluable and will be used by judges to formulate their opinions because they contain a lot of background and “meat” not in the rules themselves.

Lastly, he predicts that “it will take a while to sort these rules out. Judges are here to help you. If you have problems, come talk to me and I’ll do my best to help.”

All three judges seemed to hold that opinion. So are you still scared? The basic message we heard from the men in black was to act ethically, reasonably and in good faith, bringing any concerns to them.

There’s your crib sheet, and in the immortal words of Sean Connery in *The Untouchables*, “Here endeth the lesson.”

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