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# Down to the Wire: 21st Century Litigation

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**ABSTRACT**

The proposed Federal Rules of Civil Procedure require lawyers to discuss and plan for the discovery of "electronically stored information."

Electronically stored information can be highly portable, in any source, and in virtually in any form. Backup tapes, MP3 players, and URL history is just the beginning of what electronic data is discoverable in litigation. Understanding how to handle electronically stored information is necessary to manage a case and control costs.

Technology can help command the volumes of electronically stored information and fully convey your client's case in trial.

# Contents

# Introduction

We are in a watershed period. At the turn of the last century, the watershed was the first powered flight of an airplane. Sixty-six years after the Wright Flyer, a human being walked on the Moon. Today, we are able to cross continents in the span of a few hours rather than the months it would have taken before the aviation watershed.

Watershed periods are typically openly accepted or flatly rejected. Centuries ago, Socrates spoke out against written language, claiming it would cause individuals to be forgetful and "neglect their memory."[1] Conversely, Thomas Edison thought motion pictures would make text books obsolete.[2]

In 1970, Federal Rule of Civil Procedure 34 was amended in accord with "changing technology" to include electronic data compilations under the definition of "documents."[3] For the last 36 years, many attorneys have been fighting "electronic data," trying to avoid not just changes in technology, but forcing the use of paper documents in a digital world.

Our watershed is the electronic age. Lawyers have moved from dictating briefs to preparing motions on computers to carrying PDAs. Information is abundant at every turn. One author found that 93% of all information created today is done digitally.[4] Other studies have found there are 547.5 billion e-mail messages sent each year.[5] The electronic age is here and continuously evolving.

The new Federal Rules of Civil Procedure are evolving with technology watershed. The crux of the Rule Amendments is the creation of a third category of discovery, "electronically stored information." New Jersey has embraced this evolution, adopting the proposed Federal Rules to address electronically stored information.[6] The effort has been exported internationally as British Columbia developed a "Practice Direction" for electronic discovery.[7]

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[1] "[Written language and books] will produce forgetfulness in the minds of those who learn it, by causing them to neglect their memory, inasmuch as, from their confidence in writing, they will recollect by the external aid of foreign symbols, and not by the internal use of their own faculties."

Eric Ashby, Machines, Understanding, and Learning: Reflections on Technology in Education, 7 Graduate J. 59, 360 (1967) (citing Plato, The Phaedrus 104 (J. Wright trans., 1921)).

[2] Larry Cuban, Teachers and Machines: The Classroom Use of Technology Since 1920, New York, Teachers College Press, c1986, page 11.

[3] Federal Rule of Civil Procedure 34, notes on the 1970 Amendments, Subdivision (a).

[4] Kenneth J. Withers, *Electronic Discovery: The Challenges and Opportunities of Electronic Evidence,* Address at the National Workshop for Magistrate Judges (July 2001).

[5] THE SEDONA CONFERENCE, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production 3-4 (March 2003), at http://www.thesedonaconference.org/publications_html [hereinafter THE SEDONA PRINCIPLES].

[6] Mary P. Gallagher, *N.J. High Court Jumps EDD Rules Train*, NEW JERSEY LAW JOURNAL, August 15, 2006, http://www.law.com/tech

[7] See, the British Columbia Practice Direction re Electronic Evidence, http://www.courts.gov.bc.ca/sc/whats%20new/Practice%20Direction%20-%20Electronic%20Evidence%20-%20July%201,%202006.pdf

**NOTE:** This paper supplements the seminar *Down to the Wire: eDiscovery and 21st Century Litigation* and was developed by Joshua Gilliland, Esq. This seminar is one of three complimentary seminars pertaining the new Federal Rules of Civil Procedure conducted by CT Summation Professional Development Associates. To see when CT Summation will be in your area, visit http://www.ctsummation.com/News/Seminars/schedule1.aspx.

# eDiscovery: Evolving Laws and Case Management

Those who do not change with the times often find themselves at a disadvantage. Understanding eDiscovery is a necessity, since it can also be referred to as *electronic evidence discovery* (EED), *electronic data discovery* (EDD), *electronic document discovery* (also EDD) or the discovery of *electronically stored information* (ESI). Virtually anything that is electronic can be subject to discovery, from Microsoft Word documents, to images from a digital camera, to the phone numbers dialed on a cell phone. To think of this another way, all the tools (or toys) we use that hold data can be subject to eDiscovery.

One example of misunderstanding how to manage eDiscovery is from *Rowe Entertainment v. William Morris*, where defendants attempted to handle electronic evidence in a paper format. Under defendants' proposal, corporate email messages would be printed by the truckload and delivered for scanning, optical character recognition (OCR), and processed for review.[8] The entire cost of this huge production was estimated at $9 million. The defendants sought to have the plaintiffs share in this cost. In turn, the plaintiffs claimed they could review the data in native format for only $500,000. In the end the defendants were ordered to produce native electronic data, *including privileged material*. A claw-back provision was ordered thereafter.

[8] *Rowe Entertainment v. William Morris*, F.Supp.2d, 2002 WL 975713 (S.D.N.Y.)

# The New Amendments to the Federal Rules of Civil Procedure

The new Federal Rules of Civil Procedure are evolving with technology. The crux of the Rule Amendments is the creation of a third category of discovery, "electronically stored information." Moreover, states such as New Jersey are also evolving, adopting the proposed Federal Rules as their own.[9] In Canada, British Columbia developed a "Practice Direction" for electronic discovery.[10]

### ESI: ELECTRONICALLY STORED INFORMATION

The upcoming Federal Rules of Civil Procedure will take effect on December 1, 2006, absent Congressional intervention. These new Rules have defined the following, when created, stored, or used digitally, as *electronically stored information* under Rule 34(a):

- Writings
- Drawings
- Graphs
- Charts
- Photographs
- Sound recordings
- Images
- Other data or data compilations stored in any medium that can be translated into a reasonably useable form

Basically, anything that can be stored on a computer is electronically stored information. This may include voicemail, MP3 files, VoIP, URL history and many other examples.

The form of ESI production in discovery is governed by Rule 34(b). Under this Rule, the form of production of ESI can be :

- Specified by the requesting party in a request
- Defined by a responding party in a response if the requesting party doesn't specify
- If neither party specifies the form of production, it must be produced in the form in which it is maintained in the ordinary course of business (native file format) or reasonably useable form.

### REQUIRED DISCLOSURES

- Rule 16(b) scheduling orders permit the courts to include provisions for disclosure or discovery of ESI.
- Parties are *required* to include ESI in their initial disclosures under Rule 26(a).
- Parties are *required* to discuss preservation and disclosure of ESI at Rule 26 planning conferences.

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[9] Mary P. Gallagher, *N.J. High Court Jumps EDD Rules Train*, NEW JERSEY LAW JOURNAL, August 15, 2006, http://www.law.com/tech

[10] See, the British Columbia Practice Direction re Electronic Evidence, http://www.courts.gov.bc.ca/sc/whats%20new/Practice%20Direction%20-%20Electronic%20Evidence%20-%20July%201,%202006.pdf

**INADVERTENT PRODUCTION OF PRIVILEGED MATERIAL**

- Rule 26(b)(5) has a *claw-back* provision for the return of inadvertently produced privileged material. However, waiver is analyzed on a case-by-case basis under the governing legal principles of the venue.
- Practice note: U.S. jurisdictions are fairly evenly split three ways on waiver:
  - You always lose. (Claw-backs aren't enforced.)
  - You always win. (Waiver *must be* intentional.)
  - Each situation is different.

**SAFE HARBOR**

- Rule 37(f) limits the Court's ability to sanction a party, except in "exceptional circumstances" when it fails to produce ESI "as a result of the routine, good-faith operation of an electronic information system."
- Otherwise known as the "Safe Harbor" Rule, this amendment is the most controversial, and there is little guidance supplied in the notes and commentary as to what "exceptional circumstances" means.

# Metadata

The metadata of a document is basic computer-generated information embedded in a native file. This "data about the data" is discoverable. One Court has held that ". . . the producing party should produce the electronic documents with their metadata intact."[11]

The production of metadata is important because this data can be used to prove authentication or spoliation of electronically stored information. Moreover, it can show when the document was created, who accessed it last and other important evidence.

The argument can now be made that metadata fits squarely into the definition of ESI, in and of itself.

Lawyers are often confused by metadata and what to do about metadata in specific instances. On the one hand, exchanging documents electronically would include the exchange of metadata that is problematic in a transactional sense. To protect against inadvertent disclosure of sensitive information via metadata, lawyers use tools or processes to ensure metadata is "scrubbed" of unintended content.

On the other hand, metadata created by clients or parties during the course of events of the underlying dispute must be maintained. Scrubbing digital versions of evidentiary information of its metadata may lead to serious procedural and ethical consequences. It is essential that lawyers understand metadata and how it provides context for the content of ESI, how it can be inadvertently or intentionally changed, and how it should be handled in a particular matter.

[11] *Williams v. Sprint/United Management*, 2005 WL 2401626 (D. Kan. Sept. 29, 2005).

# Spoliation and Preservation

**SPOLIATION**

One of the absolute worst situations to be in is being sanctioned for the spoliation of evidence. Case law defines *spoliation* as "…the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[12] Sanctions for spoliation can be severe, ranging from dismissal, to suppression of evidence, to adverse inference instructions, fines and costs.[13]

The danger of spoliation is great with electronic data because every time a file is opened, its metadata is changed. Moreover, attorneys and clients who do not know how to execute a litigation hold run the risk of losing potentially discoverable data.

One early eDiscovery spoliation case was a copyright infringement claim regarding whether the defendant illegally used a source code.[14] During pre-lawsuit settlement attempts, the defendant revised the code at issue and retained only the current "working" version of the code. After the lawsuit was filed, the defendant received a sanction for destroying the version of the code at issue. The Court found the defendant had an obligation to preserve the code because of the defendant's knowledge of the plaintiff's claims.[15]

There are recent cases where it was apparent the defendant actually destroyed electronically stored information. Courts have met such actions with harsh sanctions. In the case of *Paramount Pictures Corp., v. Davis*, a copyright infringement case involving the illegal download of an unreleased movie, the Court found that defendant erased his home computer hard drive 16 days after learning of the case with the hard drive at issue, and then sold the computer.[16] This act totally deprived the plaintiffs of any chance to review this evidence.

The Court sanctioned the defendant with a spoliation inference. The Court supported its findings based on:

- The information stored on the computer was within defendant's exclusive control.
- The defendant destroyed that information by erasing his hard drive after receiving notice of the action.
- The information destroyed was relevant to the plaintiff's copyright infringement claim.
- The defendant knew or should have known that the information stored on his computer was necessary to prove or disprove the copyright infringement claim.[17]

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12 *Mosaid Techs., Inc. v. Samsung Elecs. Co., Ltd.*, 348 F.Supp.2d 332, 335 (D.N.J. 2004).

13 Id.

14 Source Code is the human-readable program statements written in high-level or assembly language. COMPUTER DICTIONARY, 367 (Casey Doyle, eds., 2nd ed., 1994).

15 Computer Assoc. Int'l v. American Fundware, Inc., 133 F.R.D. 166-169 (D. Colo. 1990).

16 *Paramount Pictures Corp., v. Davis*, 234 F.R.D. 102, 2005 WL 3303861 (E.D.Pa.)

17 Id.

In a similar copyright and spoliation case, a defendant was sued for illegally acquiring a satellite television signal. In this instance, the defendant belonged to several "pirate groups," and had even purchased "how to pirate" materials. Within five weeks after the lawsuit was brought, the defendant used software named Evidence Eliminator to erase computer evidence requested by plaintiff. The Court found that the plaintiff was entitled to a presumption that the documents destroyed by defendant would not have favored his defense. Moreover, the Court ultimately granted a summary judgment in the plaintiff's favor.[18]

As the use of email for business has increased, so have the risks for spoliation. This is evident in many cases but especially so in three major cases where the sanctions are summarized below:

- *Zubulake* – Adverse inference instruction given; jury award of $29 million ($20 million in punitive damages)
- *U.S. v. Philip Morris* – Monetary sanction of $2.75 million for spoliation
- *Coleman v. Morgan Stanley* – Adverse instruction given; jury award of $1.45 billion ($850 million in punitive damages)

#### PRESERVATION: THE DUTY TO PRESERVE DATA

The duty to preserve data relates to all sources likely to have relevant information. The documents/data that must be preserved in a lawsuit are those:

- Subject of a pending discovery request
- Reasonably calculated to be requested and lead to admissible evidence
- Known or reasonably should be known by the party as relevant.[19]

#### DISCOVERY RESPONSE SYSTEM

Companies that create a lot of electronic information or that get sued often should consider forming a *discovery response system*. To do so, an attorney and their client should consider the following actions:

- Identify or define all the people and processes that make up your client's discovery response system today.
- Create a group of stakeholders.
  - IT
  - corporate information security
  - records management personnel
  - legal team
  - business unit managers
- Identify how requests are communicated and how the responses are collected.
- Identify your information or records universe.
- Create a plan, pilot the system, assess, adjust and implement.

#### DISCOVERY RESPONSE SYSTEM MINIMUM ATTRIBUTES

At a bare minimum, the discovery response system should have the following attributes:

- The system must err on the side of preserving potentially relevant information.
- The system must be designed to keep privileged or protected information confidential.

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18 *DirectTV, Inc., v. Borow,* F.Supp.2d, 2005 WL 43261 (N.D.Ill.)

19 *Zubulake v. UBS Warburg LLC, et al.*, 02-CV-1243 (S.D.N.Y.)

- The system should keep ESI in digital form.
- The system must be legally defensible.
- The system should be designed to minimize costly attorney review time.

#### DISCOVERY RESPONSE SYSTEM DESIRABLE ATTRIBUTES

- ESI should be gathered once but used as many times as is practical.
- The system should be integrated with the broader records retention and destruction policies of the corporation.
- The system should be integrated into any adjacent or ancillary compliance systems.
- The system should be well-integrated with the corporate IT environment.
- The system should be integrated with outside counsel.
- The system should be ready to integrate with third-party ASP hosting platforms.
- The system should incorporate a dashboard that can be used to monitor spending.

# Discovery: Propounding and Responding to eDiscovery Requests

Under the proposed Federal Rules of Civil Procedure Rule 26(b)(2), the "reasonably accessible" standard from *Zubulake* is codified. As such, ESI that is not reasonably accessible due to undue burden or cost need not be initially produced, but the party claiming inaccessibility has the burden of proving this contention.

However, there are attorneys who have forgotten, in the excitement of electronic evidence inaccessibility, that ESI discovery requests still must follow traditional discovery rules for relevancy, reasonable particularity and other discovery rules under FRCP 26(b)(2)(C). While litigants readily focus on the seven *Zubulake* accessibility factors, many have sidestepped the first requirement: the extent to which the request is specifically tailored to discover relevant information.

Recent cases have highlighted this issue. In the gender discrimination case *Quinby v WESTLB AG*, the defendant subpoenaed two non-parties (Time Warner Cable of New York City and Road Runner Corp.) for "all emails sent to or received by plaintiff's personal e-mail account during the period from October 2002 throughout July 2004, other than e-mails between plaintiff and her current and former counsel."[20]

The seven factors from *Zubulake*, 217 F.R.D. 309 at 332 (S.D.N.Y. 2003):

- The extent to which the request is specifically tailored to discover relevant information
- The availability of such information from other sources
- The total cost of production, compared to the amount in controversy
- The total cost of production, compared to the resources available to each party
- The relative ability of each party to control costs and its incentive to do so
- The importance of the issues at stake in the litigation
- The relative benefits to the parties of obtaining the information

The Court wasted little time with this request, stating defendant's subpoenas were "clearly overbroad and are quashed for that reason" and that defendants "entirely ignore[d] the requirement that a discovery request be limited to relevant material."[21]

Another case witnessed the same sort of requests, where the plaintiffs requested, "any and all information related to email…including messages."[22] The Court again struck this request, holding, "[t]he mere suspicion that a document containing relevant evidence might be located in defendant's computer files does not justify the production of all email communications or computer records."[23]

There is no question that a case may involve large volumes of email and other electronically stored information. However, the fact there is new information subject to discovery does not undo decades worth of discovery practices: Requests are still subject to relevancy and reasonable particularity.

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[20] *Quinby v WESTLB AG* 2006 WL 59521, 1 (S.D.N.Y) (Jan. 11, 2006).

[21] *Id.*

[22] *Thompson v Jiffy Lube International, Inc,* 2006 WL 1174040, 3 (May 1, 2006)

[23] *Id.*

The production of electronically stored information does not eliminate protecting a client's privileged material. There is no question native file production cost less then converting and producing as Tagged Image File Format (TIFF). However, it is necessary to convert a native file to TIFF to redact privileged information. Additionally, courts have found that producing as TIFFs is a "secure" form of production.[24] Moreover, under the proposed Rule 34, producing as TIFFS could be required if so requested by a propounding party or defined by a producing party.

However, in a patent infringement case, one court found that a defendant who produced designated electronic discovery as TIFFs had not produced "all of the relevant, non-privileged information contained in the designated electronic media."[25] Moreover, the court found the defendants had changed the evidence into new documents by converting native files to TIFFs.[26] The court noted in its reasoning that the defendants had not made any privilege claims with the electronically stored information that had been converted to TIFF. This case may have had a different result if the defendant had claimed any privileged material that required conversion to TIFF format.

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[24] In re Priceline.com Inc. Securities Litigation, 233 F.R.D. 88, 91 (D. Conn., Dec. 8, 2005)

[25] *Hagenbush v. 3B6 SIST EMI Electtronici Industriali S.R.I.*, Slip Copy, 2006 WL 665005, 3 (N.D.Ill., March 8, 2006)

[26] Hagenbush, 2.

# The Importance of Visual Trial Presentation

We live in a visual age. We have had over 20 years of home video games, movies with special effects and every shade of personal entertainment devices. Moreover, there is no shortage of lawyer and crime shows on TV. The society that makes up our jurors has set expectations on how a drama is presented and then neatly solved in an hour.

As one judge described, "…I have learned as a trial judge is that if your evidence is not memorable, you will not succeed."[27] This fact is vindicated in various studies that have found that jurors immediately forget two-thirds of what they hear, and, worse yet, what they do hear is misunderstood.[28]

Jurors remember facts better – retention can go up by 65% – when a lawyer presents their case with visual aids.[29] Imagine trying to explain how a mechanical heart valve failed or the four phases of combustion in an engine. When asked, many people try using their hands as a visual aid to explain an occurrence that is best done with a picture.

In addition to presentation features in CT Summation, other specialty tools may be used to present evidence in court. Specialty trial presentation software can organize and present various file formats, including computer animations. However, native files need to be converted to TIFF images if the attorney wishes to highlight, zoom, or redact sections of this evidence in their presentation.

Using trial presentation software is an effective means to communicate your point to a jury. Trial attorneys have been using visual aids for decades. Utilizing the tools available in today's electronic age only increases a lawyer's ability to effectively convey their case.

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[27] Justice B. T. Granger, Supreme Court of Ontario, *Using Realtime and Litigation Support Software in the Courtroom*, JOURNAL OF COURT REPORTING, February 2006

[28] Jeffrey R. Boyll, *Psychological, Cognitive, Personality and Interpersonal Factors in Jury Verdicts*, 15 LAW & PSYCHOL. Rev. 163, 173-4 (1991)

[29] Jane A. Kalinski, Note, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device?*, 27 Suffolk U. L. Rev. 789, n.2 (1993) and Theodore Ciccone (panelist) Symposium, Panel Three: Demonstration and Discussion of Technological Advances in the Courtroom, 68 Ind. L.J. 1081, 1082 (1993)

# About the Author

Joshua Gilliland is a Professional Development Associate for CT Summation. He is experienced in CT Summation products from cases including complex business and criminal appellate matters.

Josh conducts seminars and makes presentations for legal professionals regarding the use of CT Summation products and services including CT Summation Enterprise, iBlaze, WebBlaze and CaseVault. Josh has real world knowledge on how lawyers can increase efficiency and master factual issues from CT Summation experience.

Before joining the CT Summation team, Josh practiced construction defect litigation at Roger, Scott & Helmer. Josh worked as a contract attorney and consultant on complex civil cases and a Federal Habeas appeal in the San Francisco Bay Area where he gained experience in both CT Summation and Trial Director. He received his J.D. from the McGeorge School of Law, University of the Pacific in 2001 and holds an A.B. in Political Science from University of California at Davis.