The Rocky Mountain Record
Special Edition

VOLUME XIV, ISSUE 2 SUMMER 2007

E-Discovery & The New Federal Rules of Civil Procedure: What Agencies Need To Know

by Jason R. Baron and Daniel MacDonald

Effective December 1, 2006, the Federal Rules of Civil Procedure were significantly modified to expressly include a new legal term of art, "electronically stored information" (a/k/a "ESI"). The amendments to the Rules serve to highlight the rapidly growing importance of electronic records in litigation, an area of special significance to federal agencies given their recordkeeping responsibilities under a variety of statutes, including the Federal Records Act, the Privacy Act, and the Freedom of Information Act. This article will provide a brief synopsis of the Federal rules as newly amended, and is intended to inform you about what you need to know to get a better handle on the inevitable lawsuits your Agency may face in the future that involve ESI.

What constitutes "electronically stored information" or "ESI" that is subject to the new Rules?

Any information or records created or received by employees using their desktop computers may *potentially* constitute relevant ESI in a given lawsuit. This may mean: email (including any form of attachments), word processing, spreadsheets, powerpoints, instant and text messaging, voice mail, proprietary databases, Internet and intranet pages, wikis, blogs, data contained on PDAs, cell phones, recorded videoconferences or webinars, and associated audit trail and other "metadata." Sources of ESI may include: mainframe computers, online network servers, local hard drives, disaster recovery backup tapes, DVDs, CD ROMs, floppy disks, laptops, flash drives, iPods, and devices stored by third parties. Basically, if an agency deploys applications for employees to use, including but not limited to on their desktop PCs, the agency should fairly expect that such data is "fair game" for lawyers to possibly request in discovery.

What are the most important Rules changes?

Although the drafters tinkered with a number of provisions in the Federal Rules, there are three important changes in the Rules of which everyone should be aware. First, under the new "meet and confer" provisions in Rule 26(f), lawyers on both sides of a case are expected to engage in *early* discussions on such topics as what the scope of ESI holdings are (online, near-line, off-line), what format(s) ESI should be preserved in

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Letter from the Editor

Dear Readers:

I am especially excited about this edition of the Rocky Mountain Record for two reasons. First, I was honored that Jason Baron, Director of Litigation in NARA's Office of General Counsel, in Washington, D.C., agreed to write the featured article. I questioned myself whether to ask him to add yet another commitment to a litany of ongoing projects. However, with the buzz about e-discovery and my admiration for his expertise in the subject matter, I set aside my trepidation. Secondly, just two years ago, I joined the Rocky Mountain Region, as Management and Program Analyst. I was a recent graduate from the University of Denver College of Law that coincided with my retirement from the United States Air Force as Chief of Medical Records for the Air Reserve Personnel Center. With law degree in hand, and a records management background, I found NARA. I asked myself, would records management and my quest to become a lawyer lead to a happy marriage? I'm excited to say that I've found my niche! E-Discovery and records management are an inseparable pair.

In closing, I hope that you enjoy the featured article as much as I did. As for Records Managers, the future now beckons us to sit at the coveted e-records management table with General Counsel, IT, Agency Heads and others to implement quality e-records and information management programs throughout Federal agencies. Enjoy!

Patricia Capers, Management & Program Analyst Rocky Mountain Region — Patricia.capers@nara.gov

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(native, PDF, TIFF, etc.), and how ESI will be accessed or searched. This discussion necessarily will require that agency lawyers, IT staff, and records managers work together to establish intellectual control over their electronic holdings, so as to be able to meaningfully assist the Justice Department in engaging in the meet and confer process and responding to inquiries posed.

Second, under Rule 26(b)(2)(B), while agencies will need to preserve and generally identify all known relevant ESI in whatever form it is in, the duty of an agency to pro-actively search ESI that is not reasonably accessible will be more limited, where the duty will most likely arise only when a motion has been filed to compel production. In such a case, the agency will have the opportunity to say why conducting such a search would prove unduly burdensome and/or costly. Although the drafters left open what forms of ESI could be deemed "not reasonably accessible," current case law recognizes substantial hurdles faced by agencies when attempting to restore information from disaster recovery backup tapes, and other select forms of legacy media. The determination of whether ESI is not reasonably accessible will, however, have to be made on a case-by-case basis, given the rapid pace of change in underlying technologies.

Third, Rule 37(f) provides that sanctions will not be imposed for a party failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system. This provision is intended to function as a limited form of "safe harbor," which presumably will protect agencies from sanctions in all cases where backup tapes may have been recycled or e-mail has been automatically deleted by systems administrators, prior to reasonable steps being taken to implement some form of litigation hold during the pendency of a case. The exact scope of this provision – including how "safe" the harbor turns out in fact to be – will only become clear as future cases are decided depending on the facts of each case.

How do an Agency's obligations under the new Federal Rules match up with its existing recordkeeping obligations under the FRA and related statutes?

Federal agencies operate in a different world than does the private sector. The Federal Records Act (FRA) requires that agencies put recordkeeping practices into place that ensure the adequate and proper documentation of their policies and transactions, 44 U.S.C. 2904(a). In turn, the longstanding definition of what constitutes a "federal record" is very broad, including "machine readable" records (i.e., ESI) created or received by an agency in connection with the transaction of public business and preserved or "appropriate for preservation" as "evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government." 44 U.S.C. 3301. (Additionally, a variety of other statutes, including the Freedom of Information Act and the Privacy Act, to name just two, impose their own separate requirements and expectations on agencies.)

Accordingly, even before the new Federal rules, agencies have had the obligation to manage and preserve all forms of ESI that qualify as federal records. Various sub-provisions of General Record Schedules 20, 23 and 24 (covering such diverse categories as email, word processing, transitory records, and backup tapes) all provide guidance on how to manage electronic versions of such records, and many agencies have their own records schedules (SF-115s) approved by the Archivist, covering records unique to their programs in the form of databases and other types of electronic records. Agencies would certainly be well advised to put into place some form of review mechanism of their existing agency records schedules, so as to determine whether such schedules have gaps or

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need updating in light of e-government initiatives the agency has participated in -- before litigation is reasonably foreseeable on the horizon.

Most importantly, because certain lawsuits will necessarily require a great deal of knowledge as to what forms of ESI are stored within an agency, it cannot be recommended too highly that agencies designate key personnel – including from General Counsel's headquarters and regional offices, IT shops, and tapping headquarters and regional records officers and records liaisons -- as a form of litigation "SWAT" team. This agency SWAT team should be charged with anticipating where issues affecting the preservation, formatting and access to ESI may arise, and putting procedures in place (including consideration of an agency-wide holds policy) that are of practical benefit.

How should an Agency go about meeting its litigation obligations to preserve relevant evidence?

When a lawsuit arrives at the doorstep, or even where litigation may be reasonably anticipated, special actions should be taken "over and above" day to day recordkeeping practices in order to ensure that relevant evidence to a lawsuit is preserved. Agencies would be well advised to consider now how they would best communicate a general obligation to preserve relevant evidence to a particular lawsuit, including through the issuance of a litigation "hold." As recent case law recognizes, best practices in this area consist of an agency recognizing that it has a *continuing* duty to monitor compliance with preservation instructions issued by Justice Department counsel or internal senior officials and lawyers of the agency itself. Counsel for the agency, as well as records officers and IT staff, all have a role to play in creatively coming up with defensible measures for preserving ESI from a technical standpoint, and documenting ongoing compliance, including having in place an agency-wide hold policy; issuing specific notices in a given case; using intra-web notices and banners and spot-checking actual compliance. Agencies should also consult with counsel of record in litigation regarding whether they have an obligation to pull one or more days' worth of backup tapes, to preserve relevant ESI that might be lost due to routine recycling or system-wide deletion of email.

Every lawsuit will have unique aspects to it, and there is no "cookie cutter" approach that will ensure that an agency's e-discovery obligations are fully met. Agencies will differ widely in their technical capacity to implement changes and in the resources they have to devote to responding to e-discovery obligations. However, agencies can take reasonable steps in planning for the next litigation "crisis," including thinking through who the key players are and putting into place procedures and protocols for handling e-discovery obligations as they may arise. (END)

Supplemental readings on e-discovery:

E-Discovery Amendments and Committee Notes, *available at* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf

The Sedona Principles, Second Edition (2007), *available at* *www.thesedonaconference.org* (white paper providing best practices in e-discovery, with up to date case law under Federal rules)

Jason R. Baron, "Information Inflation: Can The Legal System Adapt?," 13 Richmond J. Law Technology 10 (2007) (with co-author George L. Paul), *available at* http://law.richmond.edu/jolt/v13i3/article10.pdf

Authors Note,

Mr. Baron is Director of Litigation in NARA's Office of General Counsel, College Park, Maryland. As NARA's representative to The Sedona Conference®, Mr. Baron serves as Editor-in-Chief of the Sedona Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery. Contact: jason.baron@nara.gov. Daniel MacDonald, George Washington Law School Class of 2009, is a law clerk in NARA's Office of General Counsel.

A Summary of the E-Discovery Amendments to the Federal Rules

Rule 16(b) (5)	Includes discovery of ESI as a possible topic in a pretrial scheduling order.
Rule 26(a)(1)(B)	Includes ESI along with other documents and tangible things subject to the mandatory "initial disclosures" required of parties at the start of every case.
Rule 26(b)(2)(B)	Permits a party to exclude from discovery any ESI "not reasonably accessible because of undue burden or cost," except that "[o]n 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." Additionally, even "if that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause."
Rule 26(b)(5)	Allows parties to reclaim inadvertently produced documents and ESI that are otherwise considered to be privileged. The Advisory Notes recognize that "the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of [ESI] and the difficulty in ensuring that all information to be produced has in fact been reviewed."
Rule 26(f)(3)	Includes "any issues about disclosure or discovery of [ESI], including the form or forms in which it should be produced," as a topic for discussion at the parties' initial "meet and confer" discovery conference.
Rule 33(d)	Allows parties to answer interrogatories by producing business records derived or ascertained from ESI.
Rule 34(a)(1)	Broadly allows any party to serve on any other party a request to produce ESI "stored in any medium from which information can be obtained." The request may specify the form or forms in which ESI is to be produced, and may also include a request for a "sample."
Rule 37(f)	Prohibits a court form imposing sanctions, "[a]bsent exceptional circumstance. . .on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."

FY 2008 Workshops

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Date	Course Title	Location
November 7	Basic Records Operations (BRO)	Denver, CO
January 15-16	Basic Electronic Records Management (BER)	Denver, CO
February 12-13	(KA-2) Creating and Maintaining Agency Business Information	Denver, CO
February 14-15	(KA-4) Records Schedule Implementation	Denver, CO
March 12-13	(KA-2) Creating and Maintaining Agency Business Information	Albuquerque, NM
March 25-26	(KA-3) Records Scheduling	Albuquerque, NM
March 27-28	(KA-4) Records Schedule Implementation	Albuquerque, NM
April 1-2	(KA-5) Asset and Risk Management	Albuquerque, NM
April 3	(KA-6) Records Management Program Development	Albuquerque, NM
June 11-12	Emergency Planning & Response for Vital Records & Essential Information	Denver, CO
June 18-19	(KA-2) Creating and Maintaining Agency Business Information	Pojoaque, NM
June 23	Basic Records Operations (BRO)	Rapid City, SD
June 24-25	Basic Electronic Records Management (BER)	Rapid City, SD
July 8-9	(KA-3) Records Scheduling	Pojoaque, NM
July 10-11	(KA-4) Records Schedule Implementation	Pojoaque, NM
August 19-20	(KA-5) Asset and Risk Management	Pojoaque, NM
August 21	(KA-6) Records Management Program Development	Pojoaque, NM