ELECTRONICALLY STORED INFORMATION

By Michael D. Berman

On December 1, 2006, amendments to Federal Rules of Civil Procedure 16 (pretrial conferences and scheduling management), 26 (discovery), 33 (interrogatories), 34 document requests), 37 (sanctions), and 45 (subpoenas), went into effect. Form 35 was also modified. Proposed rules relating to similar topics are pending in the Maryland Standing Committee on Rules of Practice and Procedure.

Among other things, the amendments created a new category of information, known as Electronically Stored Information (ESI). ESI includes a wide range of traditional electronic material, such as email, word processing documents, and spreadsheets. It also includes information from many other electronic sources, such as core operating system data, voice mail, personal digital assistants, cell phones, and web sites.

Under the Federal Rules, counsel now need to be able, directly or through experts, to: locate responsive ESI; preserve it in a forensically sound manner; transfer, receive, manage, review, redact, and produce it; and, use it in deposition and trial. This involves, at a minimum, a general understanding of how electronic data is created, stored, archived, destroyed, and recovered.

ESI presents new challenges. It has been reported that 10% of corporate lawyers settled at least one case rather than incur the costs of e-discovery. It is estimated that over 90% of information is created electronically; however, only 3% is converted to paper. Approximately 35 billion email messages are sent daily in the United States. World-wide, up to two exabytes of information are created annually. That equates to more than one trillion books. One study reported that more than $1 billion was spent on outside e-discovery services in 2005. Courts have imposed substantial sanctions for failure to properly handle ESI. *E.g., U.S. v. Phillip Morris USA, Inc.,* 327 F.Supp.2d 21, 26 (D.D.C. 2004).

ESI is different than paper in many ways. *Thompson v. HUD,* 219 F.R.D. 93, 96-97 (D.Md. 2003), *subsequent opinion,* 404 F.3d 821 (4 Cir. 2005). First, under Rule 34, ESI is not a "document." It is a separate category of information. Second, ESI comes in much greater volume than paper. A forty gigabyte hard drive may hold thousands of file cabinets of information. Third, ESI is not stored like paper. There are no file cabinets; instead, there is system architecture. Fourth, while paper is static, ESI is dynamic. It may change without any input from the operator. Fifth, unlike paper, some ESI becomes meaningless when separated from the original electronic system. Sixth, while paper comes in only one form, ESI may be "native" or "static." "Native" is the form in which a computer stores the ESI, such as a Word or WordPerfect document. "Static" form is an image of the native document, such as Portable Data Format ("PDF") or Tagged Image Format ("TIFF"). There are important differences between the two forms. Seventh, ESI is electronically searchable, while paper is not. Finally, unlike paper, ESI may include embedded data, such as spreadsheet formulae, or metadata. Metadata is "data about data." *Williams v. Sprint/United Mgt. Co.,* 230 F.R.D. 640, 646 (D.Kan. 2005), *subsequent opinion,* 2006 WL 3691604 (D.Kan. Dec. 12, 2006).

"Metadata" is information that is stored in or with ESI, and it is not generally visible on the computer screen. Metadata may be viewed using either specified settings in the program, or through other software. The metadata stored varies from program-to-program, and by the user settings for the program. For example, Microsoft states that metadata in Word documents may include: the author's name and organization; name of the computer; name of the drive where the document is saved; nonvisible portions of embedded documents; names of previous authors; document revisions, including text that is no longer visible; hidden text; comments; and, the template used to create the document. *Id.* at 647. Metadata often includes information such as the date the document was created and the date it was last edited. Some programs record the amount of time spent editing the document.

It is not unethical for the recipient of ESI to review the metadata. *See* MSBA Ethics Op. 2007-09 (Oct. 19, 2006). To prevent this, metadata may be "scrubbed" from a document. "Scrubbing" involves use of a software setting or program that removes some or all of the metadata. For example, when Attorney A emails a word processing file to opposing Attorney B for comments and revision, the file may contain A's revision history, and it may be prudent for A to "scrub" the metadata before sending the electronic file to B. In a litigation context, however, scrubbing may present multiple issues. *Sprint,* 230 F.R.D. at 647, 651-52. As this discussion demonstrates, ESI differs from paper in many significant ways.

Because of these differences, ESI requires different skills, tools, and tactics. At the most general level, ESI presents at least three problem areas: preservation; form; and privilege. First, *preservation* of ESI may be more difficult than paper. ESI is part of a dynamic, changing system and ESI may be transitory. For example, computers may overwrite or delete data with-

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out operator knowledge or input. This may result in the loss of relevant information. Second, ESI presents *form* of production issues. For example, it may be less expensive from an information technology viewpoint to produce "native" files; however, because of metadata, the cost of attorney review may be markedly higher for "native" production. Third, the volume of ESI may preclude direct review of all ESI by an attorney prior to production. This presents issues related to assertion and waiver of *privileges*.

These problem areas are most pronounced in the interplay of two related, but differing, duties: the duty to preserve; and, the duty to produce. The "duty to preserve" involves, as its name implies, the duty to prevent the destruction of discoverable information. The "duty to produce" is the litigation-related task of reviewing and transferring discoverable ESI during a lawsuit. The duties are not always co-extensive and it may be necessary to preserve ESI that one need not produce.

The two duties may best be understood chronologically. Before litigation is anticipated, it is sometimes stated that there is no duty to preserve ESI, and, during litigation amended Rule 37 precludes sanctions "under these rules" for destruction of ESI by the routine, good faith operation of a computer system. It may, however, be argued, that, absent a proper document management policy (sometimes called a "document retention" or "document destruction" policy), and absent compliance with regulatory requirements, destruction of ESI, even before litigation is anticipated, will not be protected, at least where there is an improper purpose. *See generally, e.g., Phillip Morris,* 327 F.Supp.2d at 26 n. 1; *Broccoli v. Echostar Comm., Corp.,* 229 F.R.D. 506 (D.Md. 2005), *subsequent opinion,* 164 Fed.Apx. 374 (4 Cir. 2006)(unpublished); *Lewy v. Remington Arms Co., Inc.,* 836 F.2d 1104, 1111-12 (8 Cir. 1987). In some circumstances, destruction, even under a retention plan, may be improper. *Stevenson v. U. Pac. R.R. Co.,* 354 F.3d 739, 748 (8 Cir. 2004).

When litigation becomes "reasonably anticipated," a common law duty to preserve arises. That duty is imposed on: the client; the attorney; and, third parties within the client's control. It encompasses information that a party should have known may be relevant to future litigation. *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212 (S.D.N.Y. 2003)(one of a series of opinions); *Thompson,* 219 F.R.D. at 99 (citing *Silvestri v. General Motors Corp.,* 271 F.3d 583, 591 (4th Cir.2001)("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation. . . . If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.")(plaintiff had duty to preserve automobile in products liability action)); *Stevenson,* 354 F.3d at 748. When litigation is reasonably anticipated, counsel should conduct preservation discussions, not only with clients ("key players"), but also with information system personnel and assistants to key players. Topics to discuss include, but are not limited to, preservation of: active data; archival information ("backup tapes"); deleted and fragmented information, *e.g., Thompson,* 219 F.R.D. at 96; *Antioch Co. v. Scrapbook Borders, Inc.,* 210 F.R.D. 645 (D.Minn. 2002), *subsequent opinion,* 291 F.Supp.2d 980 (D.Minn. 2003); and, legacy information (old computer systems). At this stage, imposition of an effective "litigation hold" is mandatory. In this regard, it should be noted that merely "booting" a computer may destroy some information that may be subject to the duty to preserve. *See Antioch Co.,* 210 F.R.D. at 652-54; *Sprint,* 230 F.R.D. at 646.

When litigation is commenced, it may be necessary to revisit the duty to preserve in light of the information disclosed in the lawsuit. In short, there may be new information that changes the scope of the duty to preserve. And, reminders will likely be needed, because the duty to preserve is ongoing. Additionally, once discovery commences, there may be a duty to produce ESI. Here, issues of form, privilege, and accessibility become focused:

• Form: As previously noted, form of production may be significant because of competing considerations. *E.g., Sprint,* 2006WL 3691604, *7. Conversion to "static" format will remove some or all metadata. The ABA has stated that metadata is rarely significant. ABA Formal Op. 06-442 at 3 (Aug. 5, 2006)("most [metadata] is probably of no import."); *but cf. Sprint,* 230 F.R.D. at 647, 651, 653. Thus, in many instances, the practical solution may be to produce the majority of documents without metadata, while producing a smaller subset with metadata, although this approach is vigorously debated among practitioners. *See Sprint,* 2006 WL 3691604, *7. Under the Rules, the requesting party may designate the form *or forms* it desires. The responding party may then counter-designate. Agreements regarding form may be binding. *Id.* at *6. Given the costs, the parties should resolve any dispute prior to actual production. Note that Rule 34 is *procedural,* not evidentiary, and if the parties agree to production without metadata, they may also wish to discuss and resolve any evidentiary issues related to offering into evidence a document without its attendant metadata.

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• Privilege: How does one review 40 gigabytes of data for privilege and work product? It may be impossible from cost or practical perspectives to review ESI document-by-document. *Hopson v. Mayor and C.C. of Balt.*, 232 F.R.D. 228, 244 (D.Md. 2005). One alternative is to: search the ESI for key words, such as attorney names, law firm names, the word "privileged," etc.; review the subset of documents that has been located; and, produce the remainder under a "clawback" or "quick peek" agreement. The pitfalls of this approach, and prudent procedures to follow, have been described in *Hopson*, 232 F.R.D. at 228.

• Not Reasonably Accessible: The amendments recognize a subset of ESI that is "not reasonably accessible because of undue burden or cost." ESI within this category often includes archival, legacy, deleted, and fragmented data. In short, given the economic value of the case, and Rule 26(b)(2) factors, this is ESI that is too costly to produce. It is here that the difference between the duty to preserve and the duty to produce become most pronounced. A party may be obligated to preserve, but not to produce, inaccessible ESI where, for example, it would cost $100,000 to produce it, but the damages requested are only $75,000. While the producing party will generally be required to bear the cost of producing active data, cost shifting may be appropriate where the requesting party demands ESI that is not reasonably accessible because of undue burden or cost. *Thompson*, 219 F.R.D. at 96. The party asserting undue burden or cost should, when it makes that assertion, do so with particularity. *See Thompson*, 219 F.R.D. at 98 - 99.

Throughout the process, from its inception to its conclusion, manipulation of ESI requires new tools. There are many vendors that can assist in locating, preserving, processing, reviewing, and producing ESI. There are also several litigation support software packages that are available to import ESI (including metadata), review it, convert it to static images, and export it.

Except in specified circumstances, the amendments provide for a "conference of the parties" pursuant to Rule 26(f). A joint committee of the Maryland State Bar Association and the Federal Bar Association, Maryland Chapter, is drafting a proposed protocol to assist counsel in preparing for and conducting the conference. Additionally, the *Hopson* opinion contains a comprehensive discussion of these issues.

One aspect of the amendments to the Rules and the "conference of the parties" is to "front load" ESI discovery issues. Counsels are expected to discuss issues related to preservation, production, and privilege early in the case. Then, before the expenditure of significant sums of money, agreements regarding ESI, including those that require Court approval under *Hopson*, as well as disagreements, can be presented to the Court for inclusion in the scheduling order or for resolution. "It cannot be emphasized enough that the goal of the meeting to discuss discovery is to reach an agreement that then can be proposed to the court. The days when the requesting party can expect to 'get it all' and the producing party to produce whatever they feel like producing are long gone." *Hopson*, 232 F.R.D. at 245.

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TIMELINE OF DUTIES

Jan 1, 2000 - Mar 31, 2000

Litigation not anticipated: Follow a reasonable Document Management Policy.

Apr 1, 2000

Employee tells supervisor: "Tell it to my attorney."

Litigation is reasonably anticipated: Place "litigation hold" on ESI that is reasonably calculated to lead to relevant information.

Aug 1, 2000 - Dec 31, 2000

Litigation commenced: Re-evaluate "litigation hold" in light of lawsuit; Duty to produce may soon arise; What is reasonably accessible without undue burden or cost?

Form of production;
Waiver of privilege.

Jan 2000 | Feb 2000 | Mar 2000 | Apr 2000 | May 2000 | Jun 2000 | Jul 2000 | Aug 2000 | Sep 2000 | Oct 2000 | Nov 2000 | Dec 2000

GREEN LIGHT — TO RED — RED LIGHT