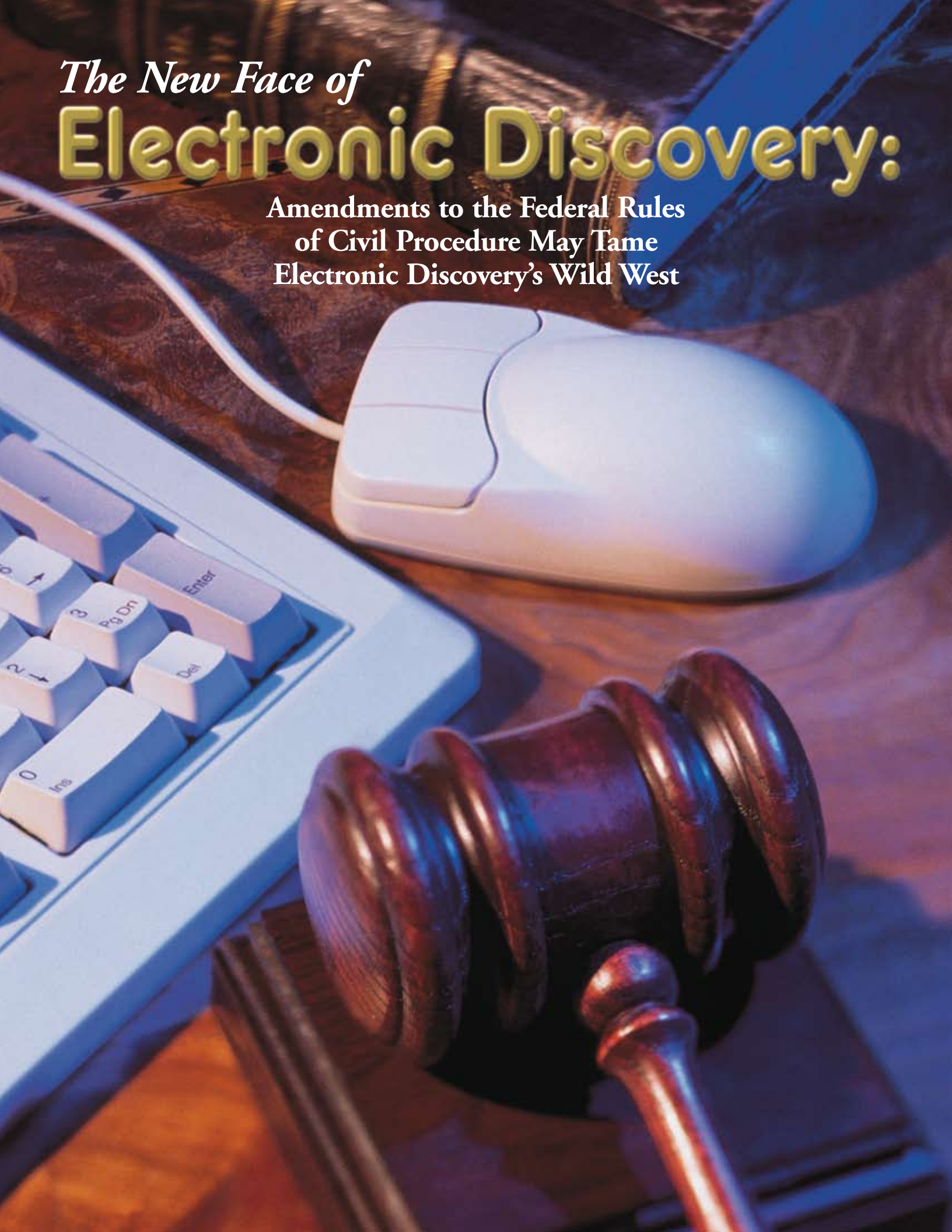
The New Face of Electronic Discovery:

Amendments to the Federal Rules of Civil Procedure May Tame Electronic Discovery's Wild West



While the scope of potentially discoverable evidence expands with technology, the rules governing the discovery of electronic evidence in the federal courts, the Federal Rules of Civil Procedure, have remained still.

By third-year student Aaron L. Walter

The original version of this article was awarded second place honors in the Third Annual Law Student Writing Contest of the American Bar Association Tort Trial & Insurance Practice Section and can be found online at www.law.uga.edu/news/advocate. *Please note the version below has been adapted specifically for the* Advocate. *Also note further changes may have been incorporated into the proposed amendments submitted to the Supreme Court after this article was written. For the most current version please go to* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf.

Electronic discovery refers to the requesting and acquiring of digitally based documents during pre-trial discovery. Since a 1970 amendment to Rule 34 of the Federal Rules of Civil Procedure, courts have uniformly held that computerized data may be subject to discovery rules.

Though discovery rules are clearly applicable to electronic discovery, no one can agree on what to call the field. It has been referred to as ED, EDD, digital discovery, e-discovery (with or without a hyphen) and as I simply describe it – electronic discovery. While electronic discovery is not a new phenomenon for some practitioners and private discovery firms, it is cutting edge enough that there is not even a standard name for the legal genre.

Recent court decisions reveal the need for standard rules within the federal courts for dealing with electronic discovery. Amendments to the Federal Rules of Civil Procedure to deal with the issue have been proposed, and it is expected there will be vigorous public debate as to the final structure of any amendment or whether the rules should be amended at all.

Plaintiffs' attorneys, led by the American Trial Lawyers Association, argue there is no need for adding special amendments to the Federal Rules of Civil Procedure. They argue information is information and rules governing paper discovery are equally applicable to the electronic variety.

Plaintiffs' attorneys are likely candidates for placing initial discovery requests for electronic documents. It is understandable they would not want special rules to develop that might hinder their ability to access these documents or increase the costs of such actions.

However, their stance flies in the face of the many fundamental differences between printed and electronic information as well as between traditional business methods and the modern world of technology.

Many large corporations, insurance providers and defense attorneys endorse the development of special rules and guidelines pertaining to electronic discovery.

Most importantly, they would like safe harbors that would allow for the regular destruction of electronic documents during the normal course of business and a shifting of costs back to the requesting party if recovery was too costly. This would effectively deny many plaintiffs access to potentially pertinent information. Alternatively, it may shift a great financial burden to requesting parties should they want access to certain electronic records.

The better policy is to provide for new rules that acknowledge the fundamental differences between electronic documents and paper documents and provide specific guidelines as to how they should be handled. This would ensure the courts are not left to make ad-hoc decisions or adopt competing tests to make important determinations.

The proposed amendments to the Federal Rules of Civil Procedure represent an important realization that electronic discovery is different and it needs special rules and standards to guide attorneys, parties and judges. While some provisions of the amendments are wise and require little change, others may need to be re-thought so this ball that is rolling towards a very important finish line creates rules that solve problems and does not create new ones.

Background

Usage of electronic data

To understand why electronic discovery has become such an invaluable part of litigation, it is important to understand the scope of electronic document usage in the United States.

The volume of potential electronic evidence continues to rise each year and e-mail usage is beginning to replace many traditional phone conversations. Use of e-mail in the business setting has grown immensely in the past 10 years and is now a primary form of business communication. Estimates have placed the total number of e-mails sent each day at 31 billion.

Another study estimates that 93 percent of actual documents currently generated are in electronic form, and only 30 percent of those documents are ever produced in hard copy. Instead of being converted to paper, an estimated 70 percent of these electronic documents are being created, revised, modified and stored entirely in electronic form.

Documents that do make it to paper are most often printed from a computer, which means the information exists in electronic form as well as paper.

The ability of modern technology to store huge amounts of digital information has created discovery dilemmas. Possibly the most critical issue is that as the volume of evidence a party wishes to

discover grows, so grows the costs inherent to its discovery.

While there is currently no uniform list of the many types of electronic information subject to discovery, numerous types of information can and have been considered.

Compared to their paper counterparts, electronic documents are much more difficult to eliminate. Paper documents can be shredded into tiny pieces. But, deleted electronic documents, especially e-mail, usually continue to be stored on hard drives or other storage devices.

It is a common misunderstanding that once a user deletes a document from his/her personal computer it cannot be recovered. The reality is that when the user deletes a file, only the indexing for the file is removed, leaving the file itself until it is overwritten or a software program is used to cleanse the drive of these files.

Since 90 percent or more of business documents are created in digital form, it becomes quite likely that even shredded paper documents have digital counterparts waiting to be discovered.

Many corporate electronic systems employ a scheduled backup system that duplicates information to backup tape drives, where the documents will likely be retained until the corporate schedule calls for their erasure.

Unlike paper records, electronic documents are often dynamic and cannot simply be secured at the onset of litigation. These records may be continuously modified or even deleted subject to routine destruction policies businesses may have in place.

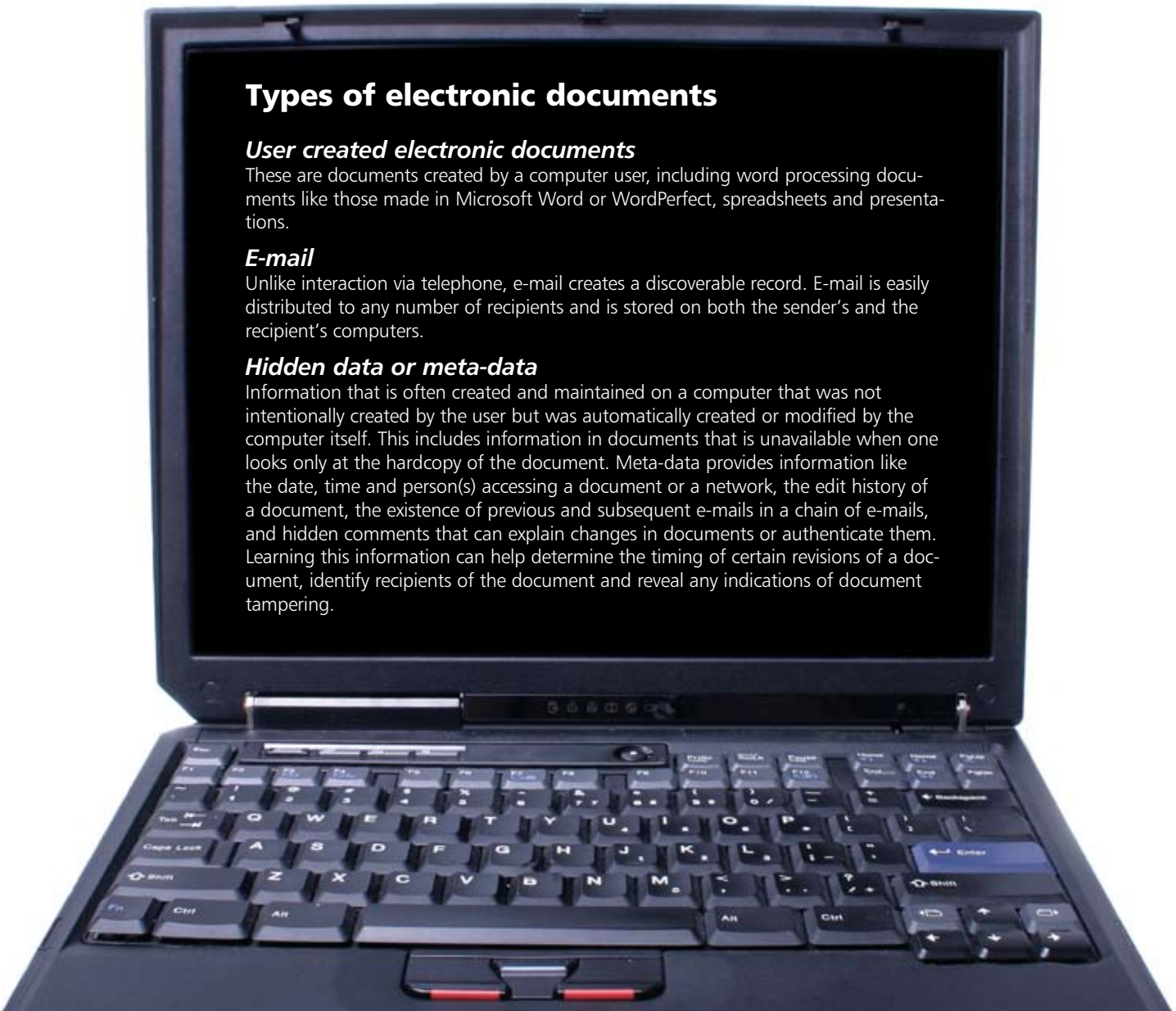
While paper documents subject to discovery are often found in filing cabinets or boxes, electronic documents could exist in any number of environments and mediums. Numerous copies of the very same document can end up in many different places within a company's umbrella.

One major hurdle to developing and following any rules for electronic discovery is that many attorneys and their clients simply do not understand its implications. Attorneys who are skilled in the ways of electronic discovery hope to use it to find the "silver bullet" which could win a case or force an opponent's hand in settlement.

Increasingly, e-mails are providing crucial pieces of evidence for litigators. In one case, computer forensics engineers were able to recover an e-mail from one company employee to another discussing the side effects of the drug Fen-phen.

The e-mail reportedly read, "Do I have to look forward to spending my waning years writing checks to fat people worried about a silly lung problem?" The estimated $3.7 billion settlement reached in this case was among the largest ever against a U.S. company.

A case like this encourages other attorneys to utilize electronic discovery to find information that would otherwise have remained hidden.



Types of electronic documents

User created electronic documents

These are documents created by a computer user, including word processing documents like those made in Microsoft Word or WordPerfect, spreadsheets and presentations.

E-mail

Unlike interaction via telephone, e-mail creates a discoverable record. E-mail is easily distributed to any number of recipients and is stored on both the sender's and the recipient's computers.

Hidden data or meta-data

Information that is often created and maintained on a computer that was not intentionally created by the user but was automatically created or modified by the computer itself. This includes information in documents that is unavailable when one looks only at the hardcopy of the document. Meta-data provides information like the date, time and person(s) accessing a document or a network, the edit history of a document, the existence of previous and subsequent e-mails in a chain of e-mails, and hidden comments that can explain changes in documents or authenticate them. Learning this information can help determine the timing of certain revisions of a document, identify recipients of the document and reveal any indications of document tampering.

Rules Governing Electronic Discovery

Federal Rules of Civil Procedure

While the scope of potentially discoverable evidence expands with technology, the rules governing the discovery of electronic evidence in the federal courts, the Federal Rules of Civil Procedure, have remained still. As one commentator has put it, "when it comes to electronic evidence, it seems that the law changes slowly or not at all." To this day, electronic evidence is subjected to rules that were created to solve problems associated with paperbound discovery.

One of the main purposes of the Federal Rules of Civil Procedure is to promote efficiency. Rule 1 states the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

With this underlying intent of promoting efficiency in mind, I turn our attention toward Rules 26 and 34, which govern the discovery of electronic media. Rule 26 provides for initial disclosures of "all documents, data compilations, and tangible things" the disclosing party may use to support its claims or defenses. Rule 34 goes on to broadly define "documents" as including electronic data.

Rule 34 was amended in 1970 in recognition of the need to include information in electronic form within the scope of the rules governing discovery. It was amended to provide that, upon request, a party is required to produce "any designated documents," including "writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained."

The original version of Rule 34(a) only permitted a party to request the production of "documents" or "tangible things."

The 1970 amendment adjusted the definition of "documents" to include a wide description of electronic data to adequately reflect the changes in technology.

While not specifically naming "computer data," it makes it clear that Rule 34 now applies to electronic data compilations from which information can only be obtained with the use of detection devices. Rule 34 does not address issues related to the manner in which information is to be disclosed.

In continuation of Rule 1's policy of promoting efficiency, Rule 26 protects parties from unduly burdensome, unnecessary or inefficient discovery.

While the literal language of Rule 26 is silent on electronic documents, the advisory notes clarify that disclosures "include computerized data and other electronically-recorded information ... ." Rule 26 operates to relieve the burden placed on responding parties by prohibiting cumulative or duplicative discovery requests.

However, Rule 26 does not directly provide us with guidance about how much information a party must actually produce or which party should bear the expenses of a potentially costly electronic discovery request.

It has become obvious from the burgeoning case law on the subject of electronic discovery that the time has come for the drafters of the Federal Rules of Civil Procedure to step up and set this house in order.

Proposed Amendments to the Federal Rules of Civil Procedure

The U.S. Judicial Conference Committee on Rules of Practice and Procedure has sought to answer the above questions and others in their recent draft of proposed amendments to the Federal Rules of Civil Procedure governing the discovery of electronic documents.

Published in August 2004 by a standing committee of the judicial conference, the proposed changes would modify rules 16 (Pretrial Conferences), 26 (General Provisions), 33 (Interrogatories), 34 (Production of Documents), 37 (Sanctions) and 45 (Subpoenas). Some of the proposed changes have near universal support, while others have been publicly criticized.

In the past year, the proposed amendments have been approved by the Civil Rules Advisory Committee, the Standing Committee on Rules of Practice and Procedure and, on September 20, the Judicial Conference approved the amendments. They will now be considered by the U.S. Supreme Court and then are subject to review by Congress.

Below, I discuss a few of the proposed amendments as promulgated by the Civil Rules Advisory Committee and suggest important points of discussion and possible changes that should be made before this process is foreclosed.

After public debate, some minor changes and notes have been added to the proposed amendments. In some cases, the rule makers have taken into account the type of issues I have raised below. The final version of proposed amendments submitted to the Supreme Court can be found at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf.

The various changes to the federal rules are intended to focus on five main areas of electronic discovery. First, the proposed changes deal with the need of early attention in potential litigation to electronic discovery issues. Second, they seek to adapt rules 33, 34 and 45 to electronic discovery. Third, they provide procedures for asserting privilege after the inadvertent production of privileged information. Fourth, they deal with limiting discovery of electronic information that is not reasonably accessible. Lastly, they deal with sanctions against parties for the spoliation of electronically stored information.

Arguably, the most controversial proposed amendment is the added subdivision (f) of Rule 37. As promulgated by the Civil Rules Advisory Committee, the rule would provide that "unless a court order requiring preservation of electronically stored information is violated, the court may not impose sanctions under these rules on a party when such information is lost because of the routine operations of its electronic information system if the party took reasonable steps to preserve discoverable evidence." Such an amendment is favored by large corporations, but is a matter of contention for plaintiffs' attorneys.

The changes to the Federal Rules of Civil Procedure will go into effect on Dec. 1, 2006, should they be approved, with or without revisions, by the U.S. Supreme Court, and then Congress.

Common Law Principles

Two major concerns regarding electronic discovery today are: (1) what happens to a party when they are found to have improperly disposed of digital evidence? and (2) who needs to pay for all of this?

Spoliation

Spoliation has been described in the federal courts as the destruction or alteration of evidence or the failure to properly preserve evidence in pending or reasonably foreseeable litigation. Spoliation, resulting from the use of electronic evidence, is an issue that has not been directly addressed in the Federal Rules of Civil Procedure.

As documents become more frequently maintained in electronic form, it has become much easier to delete or alter this evidence and much more difficult for litigants to craft policies to ensure all relevant documents to reasonably foreseeable litigation are properly preserved.

Unfortunately, examples of spoliation and sanctions for the destruction of electronic evidence are all too common. A recent case on the subject has received a great deal of attention.

In *Zubulake v. UBS Warburg*[1], an instruction of an adverse inference was granted against a company for deleting relevant e-mails during a discovery period that had lasted for two years. U.S. District Judge Shira Scheindlin determined the harsh sanction of an adverse inference was appropriate given the depth of the defendant's refusal to turn over certain documents and the deletion of others.

Scheindlin scolded the defendants and their attorneys for not monitoring the discovery situation more closely. The judge concluded UBS employees acted willfully in destroying relevant information and determined it was not sufficient for counsel to just notify employees there was a litigation hold on documents. From this action alone, counsel could not have reasonably expected that UBS would retain and produce all relevant information to the litigation.

Cost-shifting

A party's justifiable concerns over the cost of electronic discovery lead to the issues of (1) what costs, if any, should be shifted from a responding party to the requesting party and (2) when these cost shifts should properly occur.

In *Rowe Entertainment Inc. v. William Morris Agency Inc.*[2], the U.S. District Court for the Southern District of New York set forth an eight-factor test to determine the extent to which the cost of electronic discovery should be shifted to requesting parties. The defendants in the case estimated the production of e-mail backups would cost between $250,000-400,000 and asked the plaintiffs to take on these costs.

The court utilized a complicated eight-factor balancing test and determined the factors weighed heavily in favor of shifting the costs of production onto the plaintiffs, while requiring the defendants to bear the costs of reviewing the documents.

In 2003, *Zubulake* modified the *Rowe* factors and divided the analysis into typically accessible forms of data and "inaccessible data." The court concluded data contained in readable formats on a machine is typically accessible and must be produced at the expense of the producing party. Inaccessible data, like backup tapes, may require the requesting party to fund part of the financial burden of retrieval.

This decision reasoned that discovery does not automatically become burdensome merely because electronic evidence is involved. The court recognized that "cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations."

To determine whether to shift the costs of production, the court laid out its own seven-factor test, which has been influential in academic and judicial circles. The test includes such factors as the availability of the information and the cost of production relative to the amount in controversy.

Argument

It has become obvious from the burgeoning case law on the subject of electronic discovery that the time has come for the drafters of the Federal Rules of Civil Procedure to step up and set this house in order. To an extent, it is necessary for the Federal Rules of Civil Procedure to take the rulemaking process out of the hands of district courts so that a common rule can prevail, and parties can rest a little easier knowing they might have some semblance of order and protection.

Some argue that new standards are not necessary. In comments submitted to the Standing Committee on Rules of Practice and Procedure, the ATLA extolled the position that there should be no revision to the Federal Rules of Civil Procedure regarding electronic discovery.

The body argues that rather than a change in the federal rules, we should provide education for judges who are unfamiliar with specific technical matters.

The association also endorses relying on case law to save the day, comparing the challenge of developing standards for electronic evidence to earlier challenges with product liability, patent and antitrust litigation.

It also does not see "computer-based information" as a specific problem, likening it to the technological breakthrough of the photocopier, an advancement that did not require changes to the federal rules.

However, the ATLA's view does not properly account for the inherently different nature of electronic documents from paper documents.

Without action to amend the Federal Rules of Civil Procedure, the matter would be left entirely on the laps of the federal courts. There is no way to predict whether courts will impose broad or narrow obligations to preserve and produce electronic documents.

Different courts may impose different standards based on similar factual circumstances. This could turn what is for some litigators an already confusing technological situation into an even greater enigma when it comes to standards on such important rulings as spoliation.

Another wholly separate reason for wanting to amend the rules is to avoid obstructionalist tactics. There is a fear that where responding parties have previously tended to dump more paper documents on a requesting party than they could possibly handle, with the increased ability to search some electronic documents, responding parties will now do all they can to limit production.

The existence of rules and standards that specifically deal with electronic discovery's most basic elements will likely give obstructing parties less to hide behind.

Therefore, there is good reason to amend the Federal Rules of Civil Procedure in targeted ways that provide guidance to the courts

and litigants regarding notable issues in electronic discovery, but in ways that do not encourage and support obstructionalist tactics.

The proposed Rule 34(b) may be the most advisable, in principle, of all of those proposed. In my opinion, however, it contains an ill-advised default provision.

The proposed rule would allow a requesting party to designate the form in which it wants electronic data produced. Because of the varying forms in which electronic data can be produced, this becomes a more important element than with paper discovery. If the requesting party desires, they can request that electronic data be produced in hard copy format.

There is, however, a default provision in the proposed rule where, if no specific form is requested, the responding party must produce the information in the manner it is usually maintained (presumably its "native" format) or in a searchable form.

The Microsoft Corporation, in commentary sent to the Advisory Committee on Rules, revealed their displeasure over this provision. Microsoft states it is their belief that "the rules should not favor or specify any particular format of production." They suggest a rule where the requesting party can specify a form of production, but if the parties do not concur to the method, it would be brought to the attention of the court, which would presumably decide the form of production.

In my opinion, the greatest value in this provision is that it gives a degree of power to the party who requests a specific format. If the requesting party asks for production in ".doc" files or other searchable text files, the responding party would be obligated to comply.

I can imagine a situation in the electronic context, similar to a party requesting a single paper file only to receive a warehouse full of documents in return, of a party asking for information without specifying format receiving their information in a format that is unreadable to the human eye, like ASCII.

Proposed Rule 26(b)(2) would allow that a responding party would not need to provide the discovery of electronic information that is not "reasonably accessible." It is a well-accepted principle that even deleted electronic information is subject to electronic discovery.

Deleted information may be quite difficult and costly to recover. A rule allowing a party to effectively render documents un-discoverable until a court says otherwise could be read to conflict with this notion that information, even deleted, must be produced.

However, as discussed in *Zubulake*, the rationale behind cost-shifting was in understanding that some electronic data may be "inaccessible" and the requesting party may need to want the evidence so badly they will cough up money, just to receive the information.

The *Zubulake* court did express fears that large companies would move towards paper free environments and that a frequent use of cost-shifting would have a crippling effect on discovery in discrimination and retaliation cases.

Also of significant consideration are the genuine fears that corporations and insurance companies, typical responding parties, have.

Theresa M. Marchlewski, first vice president and senior counsel of Washington Mutual Bank, in her comments to the Advisory Committee on Civil Rules, explained how she is often required by the courts to produce information of "marginal relevance but extremely costly to obtain." These experiences are echoed in a number of responses to the committee.

On its own, Rule 26(b)(2) is a sensible, possibly necessary, rule to make the process of electronic discovery reasonable for responding parties. However, its application, in light of proposed Rule 37(f), calls into question the more sinister ways these two provisions could interact.

Proposed Rule 37(f) seeks to create a "safe harbor" provision from discovery sanctions for a party that fails to produce electronically stored information if that party "took reasonable steps" to preserve discoverable information and this failure resulted from routine operation of the party's electronic information system. The committee notes to the proposed rule point out that it only addresses sanctions for the loss of electronic data *after* the commencement of an action.

While the rule would create a "reasonableness" standard to weigh what the party knew or should have known when it took (or did not take) steps to preserve electronic information, it does nothing to protect data prior to the commencement of an action.

If a producing party has a liberal deletion policy for electronic data, prior to the commencement of legal action, this could easily *make* electronic evidence "inaccessible."

If the evidence is then "inaccessible," it would be protected by proposed Rule 26(b)(2) and the requesting party would need to show cause to force the producing party to give up the information.

Further, under the current status of cost-shifting after *Zubulake*, the costs or part of the costs of retrieving this "inaccessible" data can be shifted back to the requesting party.

This would give many potential defendants (often large corporations) the ability to burden plaintiffs seeking information by making evidence inaccessible as to qualify for protection and cost-shifting.

As such, at a minimum, Rule 26(b)(2) may need to further define "reasonably accessible" so it does not become an excuse not to offer a plaintiff relevant records.

It is possible that the biggest problem with proposed Rule 37(f) is not with the rule itself, but with the lack of sound electronic retention standards. Some businesses are required by state or federal law to retain certain electronic documents for specified periods of time. However, the policies are not as clear for other business documents.

Unless there are wholesale changes in the electronic document retention policies of many businesses, there is no place in the amended rules for the safe harbor provision of Rule 37(f).

Conclusion

When all is said and done, the proposed amendments to the Federal Rules of Civil Procedure are just that – proposals. They are an excellent starting point and represent the consciousness that something needs to be done to right this ship. If these rules are going to be successful and fair, however, they need to address the uniqueness of electronic discovery from paper discovery, but protect both the requesting parties and responding parties as well as third parties and employees who are affected.

Endnotes

[1] *Zubulake v. UBS Warburg*, 382 F. Supp. 2d 536 (S.D.N.Y. 2004).

[2] *Rowe Entertainment Inc. v. William Morris Agency Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).