

Thursday, December 7, 2006

10:45 A.M. – 12:00 P.M.

Session E6

A View from the Federal Bench:
Perspectives on Construction Disputes
in the Year 2006 and a Review of Recent
Trends and the New Rules That Will Impact
Construction Disputes in the Federal Courts

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By

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I. INTRODUCTION

Absent congressional interference, on December 1, 2006, an amended version of the Federal Rules of Civil Procedure will go into effect¹, one that recognizes and embraces the now-widespread use of information technology in the discovery process. “Electronically stored information” (“ESI”), a term now codified by the amended rules, is critical to complex litigation, often accounting for the majority of discoverable information. The proposed rule changes relating to electronic discovery specifically affect Rules 16, 26, 33, 34, 37, and 45 and Form 35. The amendments address several key areas in the discovery of electronically stored information including the scope of discovery, the identification of inaccessible sources, preservation decisions, meet and confer / early discussion, form of production, inadvertent production, and spoliation sanctions.

The impact of the amended rules in litigation involving construction disputes will be far-reaching, effecting all parties to a project, including owners, contractors, architects, engineers, and suppliers. As such, it is imperative that leaders in the construction industry be cognizant of their obligations under these new amendments and rules, and be prepared not only to address them when it comes time for litigation, but also to adopt them into their everyday business world.

As with most industries, the ever-expanding role of email communication — and its contemporaneous, casual, and candid nature — requires serious attention from construction industry professionals. The expanded scope of discovery to include ESI does not simply reflect a change in the format or medium of document production; rather it represents a major expansion of the breadth of what is considered discoverable information. Now, electronic data that may never have been intended to be reduced to paper, or even data that was deleted, may have to be

produced to an adversary in readable and useable form. The routine use of email in daily communications, coupled with the affirmative obligations contained in the amended rules relating to storage and production of such communications, is of particular concern in the construction industry. In the past, controversial or heated discussions on a construction project typically occurred in a field-office trailer, over the phone, or alongside the ongoing work, often obscured by the buzz of heavy machinery and not memorialized for any future record. Today, those conversations (often including colorful and blunt assessments of a party's position) are more and more likely to occur over email, creating a tantalizing target for discovery, and a permanent record to be exposed during litigation, or worse, on front page headlines. As the amended rules promote both access to and searchability of such electronic data, employers must educate their personnel about the discoverability of email communications and implement appropriate document retention and destruction policies. Moreover, as construction litigation is typically preceded by lengthy settlement discussions and negotiations (long before involvement of counsel or ever reaching litigation) special precautions should be considered to protect those settlement-related communications from later discovery, as appropriate.

In addition the amended rules now explicitly expand discovery beyond the traditional definition of "documents," and are geared to promote the exchange of "data...stored in any medium." In the Architecture/Engineering/Construction context, this expanded scope of discovery has far-reaching implications. For example:

¹ The amendments and the accompanying Committee Notes can be found at www.uscourts.gov/rules/EDiscovery_w_Notes.pdf

- Contractors' internal bidding software now may be mined for bid data far beyond what the contractor historically would disclose to an Owner on paper bid forms, or even maintain in its own estimating file. Electronic bid data, including embedded notes or a history of modifications, may reveal an estimator's thought process, how the contractor's estimate may have evolved over time, and may provide potentially noteworthy information like what last-minute modifications, adjustments, or balancing, may have occurred.
- Similarly, a demand for a contractor's electronic scheduling data, beyond ordinary paper submittals, offers another potential goldmine of information. As with electronic bid data, scheduling data is likely to contain embedded information which would not otherwise be accessible, and is likely to provide a historical timeline of development and modifications made to a schedule. Often, although changes to a schedule are noteworthy, the timing or circumstances surrounding those changes can be further enlightening. Moreover, as the amended rules promote both access and the ability to use/analyze electronic data, production of scheduling data in a "reasonably useable form," allows immediate and efficient searching and analysis of scheduling information.
- In addition to estimating and scheduling data, the ability to access and analyze contractors' electronic accounting or job cost data (instead of reams of accounting ledgers) is likely to provide substantially more information, of particular use in analyzing and rebutting a contractor's assertion of damages.

- Architects and engineers will be affected as well. For example, electronic CADD data will reflect information far beyond that which paper discovery historically provided. In the proper format, CADD data is likely to provide a complete history of any drawing, from its inception to final revision.
- Even owners will be significantly affected; especially those who maintain project-wide computer information systems. To the extent that those systems provide integrated correspondence and document management, submittal logs, accounting and payment information, and even issue/claim tracking, that electronic data is, again, likely to provide substantially more information than previous discovery rules contemplated, and will be a likely target for discovery requests.

To take full advantage of the amended rules, which are explained in detail below, and protect themselves from other parties' use of those rules, construction industry professionals are well-advised to:

- Understand their own internal Information Technology Systems, to implement effective policies on document retention and destruction, and to properly preserve their rights to utilize certain electronic information in litigation.
- Understand their potential adversaries' Information Technology Systems (as best they can), to make prompt and effective discovery requests/arrangements should litigation arise; and
- Involve counsel as early-on as possible.

Courts have already started applying the proposed amendments to existing cases, and many states have codified or embraced them in some way. Obviously, not all ESI issues can be resolved by the amendments, but they do provide an important starting point for litigants.

II. BACKGROUND

The amendments were a product of a six-year long process. It all began in 1999, when the Chair of the Advisory Committee on Civil Rules set forth a plan to understand and address the issues relating to the discovery of electronically stored information.² This learning process culminated in the publication for public comment of a series of amendments by the Advisory Committee in August 2004. Public comment on the amendments was received until February 15, 2005. On June 15-16, 2005, the Committee approved the changes/revisions to the amendments made in response to public comments, and the new rules and amendments were submitted to the Judicial Conference on July 25, 2005 for consideration at its September 2005 session. The Judicial Conference unanimously approved the amendments on September 20, 2005, and transmitted the amendments to the Supreme Court. On April 12, 2006, the United States Supreme Court approved, without comment or dissent, the entire proposed package of amendments, and the new rules and amendments were transmitted to Congress. Thus, the new rules and amendments will take effect on December 1, 2006, absent congressional action.

² See Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure, p.22 (Sept. 2005), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

III. ESI: ELECTRONICALLY STORED INFORMATION

It is undeniable that paper discovery alone is no longer sufficient for a successful litigation. More than 90% of all information is now created electronically, and litigation strategies must be adjusted accordingly. To put it into perspective, consider the following:

A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measure[d] in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 million typewritten pages of plain text.³

Thus, in preparing to address appropriate claims and defenses, litigants must be prepared to locate, preserve, retrieve, disclose and produce a wealth of electronic data.

The amendments to the rules address the growth in importance of electronic discovery in litigation and endeavor to equip litigants to handle the production of electronic discovery. First, electronic data is formally christened “Electronically stored information.”⁴ “Electronically stored information,” is defined to include “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium.”⁵ Proposed Rule 26(a), which addresses required disclosures, has been appropriately amended to provide for the disclosure of electronically stored information. This means that litigants must identify at this early stage any ESI they plan to use to support claims or defenses.

³ Manual for Complex Litigation § 11.444 (4th ed., 2004).

⁴ See Proposed Rule 34(a).

⁵ Id.

The Committee Note to Proposed Fed. R. Civ. P. 34(a) highlights the following:

When originally adopted, Rule 34 focused on discovery of “documents” and “things”. In 1970, Rule 34(a) was amended to include the discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic...but it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of “document.”

Now, pursuant to the amendments, a Rule 34 request for production of “documents” should be understood to encompass, and the response should include, electronically stored information, unless discovery in the action has clearly distinguished between electronically stored information and “documents.”

IV. ADDRESSING ESI WITH YOUR ADVERSARY- MEET AND CONFER PROVISIONS

One of the key goals of the new amendments is to make sure that parties engage in early and productive communication regarding electronic discovery. Known as the “meet and confer” amendments, the proposed amendments to Rule 26, Rule 16 and Form 35, require parties to meet and address electronic discovery issues early on, a strategy which will hopefully help to avoid the deletion of important data and facilitate production.

A. Proposed Rule 26(f)

Proposed Rule 26(f) requires in general that parties meet and confer regarding “any issues relating to preserving discoverable information” as soon as practicable for inclusion in the Rule 16(b) scheduling order. At a minimum, parties are required to meet 21 days before a scheduling conference with the Court is held. Thus, under Proposed Rule 16(b), litigants have

120 days from the inception of suit to prepare for a scheduling conference where they must address their electronic discovery requests and plan. Proposed Rule 26(f) specifically directs parties to include as part of their discovery plan:

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or protection as trial preparation material, including- if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order.⁶

The Committee Note to Proposed Rule 26(f) advises the parties to “pay particular attention” to finding a balance between the need to ensure relevant evidence is preserved and the need to “continue routine operations critical to ongoing activity.”⁷ The Committee Note further advises that in finding this balance, parties should keep in mind the goal of these discussions, which is to agree on reasonable preservation steps. Meeting early to discuss preservation obligations should have the beneficial effect of avoiding inadvertent deletion of key evidence, and eliminating the need to over preserve.

B. Proposed Rule 16(b)

Proposed Rule 16(b) incorporates the changes provided for in Proposed Rule 26(f)(3-4). In contemplating the 16(b) scheduling order, it specifically requires that “provisions for the disclosure or discovery of electronically stored information” be included as part of the scheduling order issued by the Court.⁸ The aim of this requirement is “to alert the Court to the

⁶ Proposed Fed. R. Civ. P. 26(f)(3-4).

⁷ See Committee Note to Proposed Fed. R. Civ. P. 26(f).

⁸ See Proposed Rule 16(b)(5).

possible need to address the handling of electronically stored information early in the litigation if such discovery is expected to occur.”⁹ The scheduling order may also include “any agreements the parties reach for asserting claims or privilege or protection as trial-preparation material after production.”¹⁰

Thus, twenty-one days before the scheduling conference is even held, parties must sit down with one another to agree on what form or procedure they will employ in conducting their electronic discovery. This is a big change from existing electronic discovery motion practice, where discussions don’t often begin until document production requests are received.

C. Proposed Form 35

Form 35, which has been traditionally been used by parties to respond to the court on various case management and scheduling issues, is amended so as to require a brief description of the parties proposals on handling the disclosure or discovery of electronically stored information. Proposed Form 35 also requires a brief description of any provisions of a proposed order agreed to by the parties addressing privilege or protection.

V. FORM OF PRODUCTION

A. Proposed Rule 34(b)

Pursuant to Proposed Rule 34(b), a party making a Rule 34 document request shall “specify the form or forms in which electronically stored information is to be produced.”¹¹ A response to such a request shall include “an objection to the requested form or forms for

⁹ See Committee Note to Rule 16(b).

¹⁰ See Proposed Rule 16(b)(6).

¹¹ See Proposed Rule 34(b).

producing electronically stored information, stating reasons for the objection.”¹² Furthermore, “if objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request- the responding party must state the form or forms that it intends to use.”¹³ Should a request for electronically stored information fail to specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.¹⁴ Finally, a party need not produce the same electronically stored information in more than one form.¹⁵ What is notable about Proposed Rule 34(b) is that it provides for the reality that it is often not feasible for ESI to be provided or produced in the same form. As anyone familiar with ESI is well aware, there are a variety of forms in which electronic data can be produced:

- Digital Communications (e.g., e-mail, voice mail, instant messaging)
- Word Processed Documents (e.g. Word or WordPerfect documents and drafts)
- Spreadsheets and tables (e.g. Excel or Lotus 123 worksheets)
- Accounting Application Data (e.g. QuickBooks, Money or Peachtree data files)
- Image and Facsimile Files (e.g., .pdf, .tiff, .jpg, .gif images)
- Sound Recording (e.g., .wav and .mp3 files)
- Video and Animation (e.g. .avi and .mov files)
- Databases (e.g. Access, Oracle, SQL Server Data, SAP)
- Contact and Relationship Management Data (e.g. Outlook, ACT!)
- Calendar and Diary Application Data (e.g. Outlook PST, Yahoo, blog tools)
- Online Access Data (e.g. Temporary Internet Files, History, Cookies)
- Presentations (e.g. PowerPoint, Corel Presentations)
- Network Access and Server Activity Logs
- Project Management Application Data
- Computer Aided Design/Drawing Files
- Back Up and Archival Files (e.g., Zip, .GHO)¹⁶

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ List reprinted from Ball, Craig, The Perfect Preservation Letter (2006), available online at <http://www.craigball.com/ppl.pdf>.

Typically, however, electronic data is produced in 1) native form, 2) databases transferred to a usable electronic format such as an .xls files 3) quasi-paper form (i.e. pdf, .tiff files), and 4) paper form. Litigants must be aware what form their ESI is stored in, as well as the easiest and most-cost effective way it can be produced. For example, if your adversary only asks you to produce a small amount of electronic data, quasi paper form or paper form remains useful and cost-effective. This form is also referred to as “image production” because it is essentially a digital “picture” of word-processed documents, emails, and databases.¹⁷ This format is easy to introduce into evidence, lending itself to the familiar Bates stamping process. However, this format is not always practical because it doesn’t always account for embedded information such as metadata. As the Committee Note to Proposed Rule 34(b) cautions “[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that significantly degrades this feature.” Thus, when an electronically searchable feature is of utmost importance, the producing party may want to produce in native format, where the producing party provides exact copies of the actual data files that contain the responsive information, along with copies of the software used to create and manipulate the data.

Thus, it is important that Rule 34 requests include specific formats for ESI production. This will require detailed discussion with opposing counsel and discussions with the IT department. The Committee Note suggests that “under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on

¹⁷ Ball, Craig, Rules of Thumb for Forms of ESI Production, Law Tech. News (July 2006).

application software, or other reasonable assistance to enable the requesting party to use the information.”¹⁸ The following list of forms in which data is produced may be helpful as a rough guide.¹⁹

- Word Processed Documents
 - .tiff or .pdf files for small production
 - .doc, .wpd, or .rtf files for larger production where electronic searchability is required

- Emails
 - .tiff or .pdf for small productions
 - Larger Production
 - ◆ individual emails exported to generic email format such as .eml or .msg files
 - ◆ .tiff or .pdf with accompanying data layers or load file, hosted production or native production in email storage format such as .pst for Outlook, .nsf for Lotus Notes, .dbx for Outlook Express

- Spreadsheets
 - .pdf or .tiff for simple tabular data
 - .xls or native format when you need formulas or methodology

- PowerPoint Presentations
 - .pdf or .tiff for basic, non-animated presentations
 - .ppt file for more complicated presentations

- Voice Mail
 - .wav or .mp3 files
 - request metadata such as recipient’s name, time and date of message, time of receipt

- Instant Messaging
 - .wpd file or .ascii
 - Note: messages usually aren’t stored unless user activates logging or network captures traffic.

¹⁸ Committee Note to Proposed Fed. R. Civ. P. 34(a).

¹⁹ Ball, Craig, Rules of Thumb for Forms of ESI Production, Law Tech. News (July 2006).

- Databases
 - Request data to be imported into .xls file or .csv file

B. Cases of Interest²⁰

In Re Priceline.Com Inc Securities Litigation, 223 F.R.D. 88 (D.Conn. 2005)

Securities class litigation that addressed the distinction between native format and .tiff and .pdf files. A detailed order issued by the Court addressed forms of production; it rejected “native format” as a default form of production, instead preferring .tiff or .pdf images with Bates numbering, with an accompanying searchable database of accompanying metadata, but with all relevant data preserved in native format.

Zakre v. Norddeutsche Landesbank Girozentrale, 2004 WL 764895 (S.D.N.Y. Apr. 9. 2004).

Where Defendant produced over 200,000 email messages on two CDs in a word-searchable electronic format, court held that defendant produced the email messages in “as close a form as possible as they are kept in the usual course of business,” and would not be compelled to produce an index or be “further obliged to organize and label them to correspond with [plaintiff’s] requests.”

In re Verisign, Inc., 2004 WL 2445243 (N.D. Cal. Mar 10, 2004).

Magistrate Judge issued order requiring defendants to produce all documents in electronic form. The order stated that “production of TIFF version alone is not sufficient,” and that “[t]he electronic version must include metadata as well as be searchable.”

²⁰ Case note annotations are reprinted from Withers, Kenneth J. Annotated Case Law on Electronic Discovery (2006). Available at www.fjc.gov.

VI. PRIVILEGE

One of the pitfalls of electronic discovery is undoubtedly the potential violation of privilege. Production requests can encompass 50 gigabytes of information. That number may not look very big but every 1GB= 75,000 pages = 35 banker boxes. So, 50GB of data is the equivalent of 1,750 banker boxes of documents. Thus, it goes without saying that there is a large risk that privileged data will be disclosed inadvertently. The amendments to Rules 26(f) and 26(b) reflect this concern.

A. Proposed Rule 26(f)

Pursuant to Proposed Rule 26(f), the parties are required to discuss, at their meet and confer, any potential procedures or agreements that will be used for asserting claims of privilege after production. Should parties choose to use privilege agreements, they must also discuss whether they plan to ask the Court to make it part of the Rule 16(b) scheduling order. Accordingly, Proposed Rule 16(b)(6) provides that “any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production” may be included in the scheduling order. These are sometimes referred to as a claw back arrangements or quick peek/sneak peek arrangements, where parties essentially agree to return to one another any privileged materials inadvertently produced. The Committee Note to Proposed 26(f) describes a quick peek arrangement as an agreement wherein, “the responding party will provide certain requested materials for initial examination without waiving any privilege or protection...the requesting party then designates the documents it wishes to actually have produced” (via the Rule 34 request). The Committee Note also describes claw back arrangements, which provide that “production without intent to waive privilege or protection

should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances.”²¹ It is important to be aware, however, that these provisions are not recognized in all jurisdictions.

B. Proposed Rule 26(b)(5)(B)

In the event the parties do not agree upon a privilege agreement pre-production, Proposed Rule 26(b)(5)(B) sets forth a specific default procedure to be followed when privileged information is produced in discovery:

If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

C. Cases of Interest

United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co., 53 Fed. R. Serv. 3d (West) 60 (S.D.N.Y. 2002):

In a surety action, defendants provided their testifying experts with more than 50 CD-ROM disks containing 1.1 million documents, including many attorney-client communications and work product documents. Plaintiffs claimed defendants had waived any privilege when they provided experts with unfettered access to databases, and that

²¹ Committee Note to Proposed Fed. R. Civ. P 26(f).

defendants were required to produce the entire database under Fed. R. Civ. P. 26(a)(2) as material considered by experts. The Court held entire database discoverable, finding that burden rested on party resisting discovery to clearly identify for the Court any material that the expert did not consider, and defendant here failed to provide such guidance.

United States v. Stewart, 287 F.Supp 2d 461 (S.D.N.Y. 2003).

One year before her indictment on charges related to securities fraud, but after the investigation had been made public, Martha Stewart prepared a detailed email relating her side of the facts and sent it to her attorney. The following day she forwarded the same email to her daughter, without making any changes. Later, attorneys for MSLO (Martha Stewart Living Omnimedia) produced documents and computer files in response to a grand jury subpoena. Both emails appeared on MSLO's privilege log; however, only the email to the attorney was removed from the actual production. An assistant U.S. attorney later found the copy sent to the daughter. Stewart objected to MSLO's production of the email on the grounds that it was privileged. The Court held that the email to the attorney would have been privileged as attorney-client communication, but that Stewart waived the privilege when she forwarded the email to her daughter. However, Court found that work product protections offered by Fed. R. Civ. P. 26(b)(3) and Fed R. Crim. P. 16(b) are broader than the attorney-client communication privilege, and that sharing factual work product with a family member did not waive those protections.

Hopson v. The Mayor and City Council of Baltimore, 232 F.R.D. 238 (D.Md. 2005).

Putative class action lawsuit alleging race discrimination in the Baltimore Fire Department. Discovery became bogged down over a number of procedural issues, one of which was the time and cost of reviewing the Defendant's voluminous document collection for privilege prior to production. Citing the proposed amendments to Fed. R. Civ. P. 26(b)(5), the magistrate judge encouraged the parties to enter into a "claw back" agreement. Recognizing that 'claw back' agreements raise difficult issues of privilege waiver, the judge stated that the agreement would be framed as a court order, bolstering the argument that no waiver was taking place and offering some privilege protection against parties in parallel or future litigation. However, the court noted that such an order would not relieve the parties of the duty to perform a reasonably thorough privilege review, as time and resources allow, nor would it act as an ironclad protection against a "privilege waiver" claim being raised in another jurisdiction, particularly one that takes a strict view of waiver.

VII. ACCESSIBILITY- NEW TWO-TIERED APPROACH TO DISCOVERY

A. Proposed Rule 26(b)(2)

Proposed Rule 26(b)(2) provides that:

[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On 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. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the

limitations of Rule 26(b)(2). The Court may specify conditions for the discovery.

Thus, to achieve its goal of fostering the production of easily accessible electronic data whenever possible, Proposed Rule 26(b)(2) sets forth a two-tiered approach for tackling the problem of the expense and burden associated with the identification and production of electronic data. First, the producing party must provide all reasonably accessible electronically stored information, and specifically identify any sources which it deems to be not reasonably accessible because of perceived undue burden or cost. Should the requesting party move to compel discovery of the inaccessible information, the producing party then has to demonstrate why the electronically stored information withheld is not reasonably accessible. Once that showing is made, the court can order production for good cause. Thus, pursuant to Proposed Rule 26(b)(2), a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible. With respect to good cause, the Committee Note to 26(b)(2) outlines a number of factors to be taken into account in assessing whether ESI not reasonably accessible should be ordered produced. These factors include:

- The specificity of the discovery request.
- The quantity of the information available from other, more easily accessed sources.
- The failure to produce relevant information that seems likely to have existed but is no longer available from more readily available sources.
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.
- Predictions as to the importance and usefulness of the requested information
- The importance of the issues at stake in the litigation
- The parties' resources

B. Cases of Interest

Bob Barker Co. v. Ferguson Safety Prods., Inc., 2006 WL 648674 (N.D. Cal. Mar. 9, 2006).

In a Lanham Act lawsuit, the plaintiff requested that the defendant produce all “financial software databases utilized in the operation of business.” The court observed that the request was unclear, in that a “database” is a dynamic collection of data. While the defendant would not be required to produce the database in response to this request, it would still be required to produce any other information in the database and documents generated using the database responsive to other requests.

Fenster Family Patent Holdings, Inc. v. Siemens Medical Solutions USA, Inc., 2005 WL 2304190 (D.Del September 20, 2005).

In a patent infringement suit, the plaintiff moved for access to the defendant’s Intranet site. The Court denied the motion, stating that the plaintiff had failed to demonstrate that the defendant was not producing documents as requested, either in electronically searchable form or as kept in the ordinary course of business.

Marcin Engineering, LLC v. Founders at Grizzly Ranch, LLC, 219 F.R.D. 516 (D.Colo. 2003).

In a construction-engineering suit, the defendant’s motion for an extension of time for discovery of plaintiff’s computer drafts and preliminary work was denied. The motion came five days before the deadline for expert disclosure and the defendants had for five months delayed reviewing paper materials originally produced to them. The court stated that delay and carelessness in requesting electronic discovery are not compatible with the showings of diligence and good cause necessary to extend discovery deadlines or summary judgment under Fed. R. Civ. P. 56(f). Furthermore, the defendant had been

repeatedly advised by the court that its proposed discovery, “when considered in the light of the amounts claimed as damages, made no economic sense.”

VIII. SPOILIATION -POTENTIAL SANCTIONS FOR FAILURE TO PRODUCE ESI

A. Proposed Rule 37(f)

Proposed Rule 37(f) provides that “Absent exceptional circumstances, a court may not impose sanctions...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.” “Routine” losses have been described as those which stem from “programs which recycle storage media kept [for disaster recovery]” and those from “programs that automatically discard information that has not been accessed within a defined period.”²²

Some argue that the so called “safe harbor” of Rule 37(f) is nothing more than an illusion.²³ For instance, the inclusion of the phrase “absent exceptional circumstances” gives discretion to the judge in considering the appropriateness of sanctions. Furthermore, it remains to be seen what case law will decide is indeed a “routine, good-faith operation.” What is clear, however, is that if information is inadvertently lost because of routine operations, a party may avoid spoliation sanctions if it can show that it was acting in good faith.

B. Cases of Interest

Zubulake v. USB Warburg LLC, 220 F.R.D. 212 (“Zubulake IV²⁴”) (S.D.N.Y. 2003):

The Court held that a duty to preserve arises when the party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future

²² See Standing Committee Report to the Judicial Conference (2005), Rules App. C-83.

litigation. Furthermore, the court ordered defendant to bear the costs of re-deposing key witnesses for the limited purpose of inquiring the destruction of electronic evidence.

Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005).

Court granted plaintiff's motion for adverse jury instruction, where defendant had overwritten emails for twelve months, despite an SEC regulation requiring it to retain emails for two years.

Sheppard v. River Valley Fitness One, L.P. 203 F.R.D. 56 (D.N.H. 2001).

Plaintiff made motion for sanctions against the defendants' counsel for abuses of discovery. Numerous times the plaintiff requested electronic documents, but was only given information from floppy disks in the defendants' counsel's office. The court attributed the defendants' attorney's failure to produce requested computer records to lack of diligence as opposed to intentional obstruction of discovery, hence he was fined \$500.

Invisions Media Communications, Inc. v. Federal Insurance Co., 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004).

In insurance dispute stemming from business disruption caused by 9/11 attacks, plaintiff and defendant filed cross motions to compel discovery and for sanctions. Two of the many incidents alleged involved electronic discovery. In the first incident, plaintiff's

²³ See Withers, Kenneth J., "We've Moved the Two Tiers and Filled in the Safe Harbor." 52-DEC Fed. Law. 50 (November/December 2005).

²⁴ The Zubulake case refers to a series of five opinions issued in 2003 and 2004 by the Hon. Shira A. Scheindlin, U.S.D.J. for the Southern District of New York in Zubulake v. UBS Warburg. Zubulake was ground-breaking because of Judge Scheindlin's in-depth consideration of variety of electronic discovery issues.

general counsel testified that as the company's offices were closed and the employees laid off, she directed that hard drives of those employees computers be "wiped." The defendant requested sanctions for spoliation, which were denied by the court in the absence of any showing that the wiped hard drives would have rendered relevant evidence. In the second incident, the defendant requested emails from a three-month period around September 2001. The plaintiff initially responded that there were no responsive e-mails, as the policy has been to delete all emails after two weeks. However, the emails were eventually found and produced. The court found that a "reasonable inquiry by the plaintiff's counsel proper to responding to [the defendant's] document request...would have alerted counsel that the plaintiff possessed electronic mail that fell within the scope of [the defendant's] document request." The plaintiff was directed to pay costs and reasonable attorneys' fees resulting from the additional discovery required.

IX. STATE ADOPTION OF AMENDMENTS

Many states have taken the proposed amendments very seriously and used them in addressing electronic discovery issues. Below are the new changes incorporated into state rules of procedure in California, Idaho, and New Jersey.

A. California

It has been proposed that Rule 212 of the California Rules of Court be amended to include the preservation and discovery of electronic data on the list of (1) matters on which

parties must meet and confer in civil cases and (2) subjects to be considered at civil case management conferences.²⁵

B. Idaho

The Idaho Rules of Civil Procedure were amended effective July 1, 2006.²⁶ I.R.C.P 33(c) and 34(a) were amended to include the term “electronically stored information.” I.R.C.P 34(a) was amended to add the following language:

To obtain discovery of data or information that exists in electronic data storage devices in any medium, the requesting party must specifically request production of such data and specify the form or manner of delivery in which the requesting party wants it produced.

Rule 34(b) was amended to add the following language:

As to electronic or data storage devices in any medium, the responding party must produce the data that is responsive to the request and is easily reasonably available to the responding party in its ordinary course of business. If the responding party cannot through reasonable efforts retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules...If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

C. New Jersey

A majority of the proposed amendments to the Federal Rules of Civil Procedure were incorporated into the New Jersey Rules of Civil Practice, effective September 1, 2006²⁷.

²⁵ See Summary, Invitations to Comment, SPRO6-13, available at <http://www.courtinfo.ca.gov/invitationstocomment/documents/spr06-13.pdf>

²⁶ See In Re Amendment of I.R.C.P. - Discovery + New Rules- March 17, 2006, effective July 1, 2006, available at http://www.isc.idaho.gov/rules/Discovery_Rule306.htm.

However, New Jersey did not incorporate the “meet and confer” requirements of Fed. R. Civ. P. 26(f) or the initial disclosures required under Fed. R. Civ. P. 26(a)(1).

X. TIPS FOR ENSURING SUCCESSFUL E-DISCOVERY

- A. Speak to your client about their existing electronic data retention policy. Or if you are a construction manager, speak with you attorney/general counsel to make sure you are doing everything possible to ensure compliance with the amended rules.
- B. Meet with your adversary at least 21 days before the 16(b) scheduling conference. Be prepared to talk freely about your client’s electronic data policies and systems, and to address any preservation issues.
- C. Find out who is your “go-to” person for ESI. This maybe an IT person at your client’s office, or an outside vendor that handles your client’s ESI needs. Whoever it is, make contact and establish a relationship.
- D. Specify the specific form or forms you require in your discovery request. The more specific you are, the better your chances are you will get what you want.
- E. Be prepared to explain to the court why you deem certain forms of ESI to be inaccessible. Be willing to compromise.
- F. Be patient. Electronic discovery can lead litigants into muddy waters. Not everyone will be on a level playing field when it comes to terminology and

²⁷ See Rules Governing the Courts of the State of New Jersey, Part IV, Rules Governing Practice in the Superior Court, Tax Court and Surrogate’s Courts, available at www.judiciary.state.nj.us/rules/part4toc.htm

processes. Be willing to help your adversary- it will work in your favor in the long run.

XI. CONCLUSION

The proposed amendments to the Federal Rules of Civil force each and every one of us to confront e-discovery. Going forward, litigants must be prepared to comply with new obligations imposed by the amendments, such as the need to meet and confer with adversaries, to be able to produce electronic data, and to be ready to comply with detailed electronic stored information requests. We cannot bury our heads in the sand like ostriches; rather, we must embrace the tools available to us and use them to cultivate an enlightened culture in construction industry litigation.