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Emerging Issues in Electronic Discovery—An Alert for Appraisers

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On December 1, 2006, the Federal Rules of Civil Procedure were amended.

Why do you care?

The recently amended Federal Rules of Civil Procedure change the requirements and procedures regarding electronic discovery and electronically stored evidence. The new Federal Rules have raised the compliance stakes for all parties to federal civil proceedings by imposing duties to preserve and protect all forms of relevant electronic data. These duties apply not only to all named parties but also to all potential parties, when they become aware that possible claims may be asserted against them in the litigation.

Essentially, the new responsibilities require the parties or potential parties (collectively, the "parties") to institute steps to preserve all relevant, discoverable data, including taking protective measures to prevent the destruction of electronic evidence. This new duty will impact business appraisers and valuation specialists in their roles as requestors, recipients, and suppliers of information in litigation matters.

When are the new federal rules effective?

The new rules went into effect December 1, 2006, in federal courts and in any jurisdictions that adopt the Federal Rules. (For links to the amended rules and related resources, see the accompanying sidebar.) In state jurisdictions or other judicial venues, the rules may not apply; or the courts may consider them as guidance if no local rules apply.

Some state jurisdictions, such as Texas, have already defined their own electronic discovery rules. In Colorado, courts refer to the Federal Rules as guidance, but have not yet adopted any equivalent rules. (Note: Nothing in this article constitutes legal advice, and appraisers should always check with the attorney(s) whether the new rules apply or are relevant to the case they are working on.)

Where can I find the Amendments?	http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf The Advisory Committee notes are also included.
Which rules were amended?	Rules 16, 26, 33, 34, 37 and 45, and Form 35
List of local rules for the United States District Courts	http://www.ediscoverylaw.com/2007/05/articles/resources/updated-list-local-rules-of-united-states-district-courts-addressing-ediscovery-issues/
Articles and case resource	http://www.ediscoverylaw.com/

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What are the goals of the new rules?

The amendments to the Federal Rules arose from the need to recognize and standardize procedures regarding "electronically stored information" (what the rules refer to as "ESI") within the federal court system. The committee notes to the new rules also emphasize the overarching goals to minimize cost, reduce unnecessary "surprise," and increase the efficiency of federal litigation as these relate specifically to the discovery and production of electronic data.

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The most significant amendments focus on the early disclosure and preservation of electronically stored information that may potentially become evidence in a case. The new rules impose an affirmative duty on the parties to confer in the initial stages of the litigation regarding a plan to preserve and produce specific electronic evidence; and to provide that information in an electronic format that is readable by the requestor.

What are the major changes?

For litigants in federal court (or in a jurisdiction that has adopted the amendments), the new rules make it clear that discovery of electronically stored information now stands on equal footing with the discovery of paper documents. The new rules further provide the processes to facilitate the discovery of relevant electronic information, including:

- Parties must now address electronic discovery, including the format of electronic data, in the early stages of litigation. The new rules alert the judge and the parties about the need to develop a plan for expected electronic discovery, which the judge can incorporate into the case management order. Amendments to Form 35 now permit the parties to report to the court regarding their initial discussions.
- Should a dispute among the parties arise, the rules require a mandatory "meet and confer" effort prior to the filing of a motion to compel production of the requested electronic documents.
- The rules limit discovery for data that is not "reasonably accessible" due to "undue burden or cost" (a subjective standard, determinable by the court).
- The scheduling order may also contain a post-production, party-defined process to assert claims of privilege or work-product protection. This provision facilitates discovery by minimizing the risk of inadvertent waiver of those protections.

There is also a "safe harbor" provision for the destruction or loss of electronic data occurring "as a re-

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sult of the routine, good-faith operation of an electronic information system." The new rules recognize that routine computer operations and the ordinary use of technology may result in the alteration or destruction of electronic information. For example, many computer back-up systems involve the rotation of back-up tapes, when certain tapes are regularly written over by back-ups at a later date. However, the rules require parties to consider the systems in place and the possible destruction of electronically stored information when planning to preserve relevant information.

What duties do parties in litigation now have?

In sum, according to the amended rules, parties to federal proceedings must now:

- Produce electronic information in original or native format or a reasonably usable format.
- Have a document retention policy that meets safe harbor provisions.
- Have procedures in place to halt destruction of documents when notified of a dispute.
- Have someone who is adequately knowledgeable about computer systems responding to discovery requests.
- Proactively preserve electronic data to avoid spoliation claims.

What are the possible effects on appraisers?

In smaller cases, business appraisers providing litigation services may benefit from the ability to get electronically stored information in native format, rather than in .pdf format or in printed versions.

In larger cases, litigation experts may benefit from the parties' ability to define up-front the format in which to produce electronically stored information. Appraisers, if they are retained early, may be able to participate in defining these formats. This can be critical, as once a party has fulfilled a request to produce data in hard copy or a proprietary electronic format, the requestor may not subsequently be able to ask for the data in an alternative format (such as ASCII) that would facilitate review and analysis.

In many larger cases, the appraiser may be working with a specialist in data recovery, specifically retained to assist with electronic discovery. This will further facilitate the ability to obtain relevant information in usable formats.

Electronic discovery issues may also factor into the cost and timing of discovery and expert reporting. Because parties must address electronically stored information near the start of a case, either they will hire the appraiser early on, to assist with that process, or they will hire the appraiser later, after the ability to define different formats and data sources has been lost. This delay could potentially limit the available information or force the use of other steps to obtain information and put it in a format the analyst can use.

The cost of e-discovery may limit the available information. Even with the goal of defining the attributes of electronic data up front, plus the desire to balance the cost of obtaining the information with its importance—there may be cases where the parties just cannot afford to produce some or all of the requested information in electronic format.

What else should appraisers be aware of?

Counsel may request specific types of communications from opposing parties and experts. A review of documents and billings may clearly indicate that appraisers have received or sent communications of various types via fax or email.

Opposing counsel may also broaden the requests. Electronic data are stored in many places beyond the office desktop and individual laptops. It is already fairly common to request copies of back-up tapes and hard drives from work computers as well as email records; what may become more common are requests for copies of hard drives from home computers, information from email services, and data stored on cell phones, Blackberries and PDAs. Obviously, a good forensic expert can track all computer activity and, in many cases, restore previously deleted files.

Information located as part of e-discovery may be a key factor in the ultimate case outcome. The

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ability of computer and communications hardware to store large amounts of electronic data increases the possibility that parties may discover unanticipated information, which could have a significant effect on the resolution of a case either during settlement negotiations or at trial.

Retention of electronic data by experts is also getting new attention. Should an expert be judged to have willfully destroyed evidence or otherwise failed to comply with the new rules, the penalties and associations could have a negative affect on the case, putting the expert at risk for malpractice claims.

Currently, it is not clear when routine document management (and destruction) reaches the level of spoliation. Depending on the specific case, parties might not be permitted to destroy anything (even by editing an existing document or draft); or, in light of our predominantly electronic environment, reasonable and/or routine deletions will not result in sanctions.

For example, in *University of Pittsburgh v. Townsend* (abstracted in the June 2007 *BVU*), the defendants argued that all draft expert reports must be disclosed, along with all communications between experts and counsel. As to the first issue, the court ruled that the parties did not have an affirmative duty to disclose draft expert reports in the course of litigation, but once they had received an appropriate subpoena for their production (in this case, for the deposition of the expert), any existing draft reports were discoverable and could not be destroyed. In addition, the court found that communications from counsel containing "the data or other information considered by the witness informing the opinions" must be disclosed pursuant to Rule 26, while any other communications were also "discoverable."

Where do we go from here?

There is a high level of interest in electronic discovery, both from the plaintiff's and defendant's side of the litigation aisle. There is also considerable concern about the overall cost, and who should pay. Expenses include document review, staff time, consultants cost, and disruption costs. Additionally, the management of electronic discovery requires a higher level of expertise compared to the general production of paper documents. The risk of spoliation is also higher if parties do not take steps early in the proceedings to preserve electronically discoverable information.

As more cases decide issues related to e-discovery, the parameters for preservation, production, and disclosure of electronic data will become clearer. With time (and practice) under the new rules, appraisers and their clients will better be able to predict the availability and format of electronic information.

Editor's Note: This article just begins to cover the issues associated with electronic discovery. For more in-depth coverage, join the author along with presenters Ron Seigneur, Shari Lutz, and attorney Ed Aro on July 25, 2007, for BVR's teleconference, "Emerging Issues in Electronic Discovery, Document Retention and Spoliation for BVFLS Practitioners." To register, go to www.bvresources.com and click on the "Teleconferences" link.