

# THE NEED FOR ELECTRONIC DISCOVERY RULES

## THREE PHASES OF E-DISCOVERY RULEMAKING

### RULES FOR GUIDANCE AND PROTECTION

### THE CASE METHOD APPROACH: JUDGES AND LAWYERS AS PROBLEM SOLVERS

The explosion and proliferation of electronic data requires us to rethink our approach to discovery and related privilege issues. In the process, we must determine whether electronic data presents novel problems or issues, whether new rules can and are required to address those issues, and what specific rules will solve what specific problems.

Big document cases used to mean hundreds or perhaps thousands of documents but today it may involve millions of e-mails alone. Throw in backup tapes, archives, drafts of documents, copies, attachments, power points, spread sheets, web pages, voice mails etc. and you may have cases involving several million documents. Does a good faith response to a document request require a cross media search for and production of each copy and version of each document? Must each document be reviewed by a lawyer before it is produced to determine relevance and privilege issues? Is it physically or financially possible to do so?

Compounding the problem are fears of spoliation charges where threatened sanctions for destroying or not preserving documents may be more severe than the cost of preserving and producing everything---or the value of the case. To avoid spoliation charges, some lawyers believe they must stop any document destruction at the first sign of trouble. Many lawyers fear that a good faith search for documents may require them to search for and recover deleted documents from hard drives of all employees that may have relevant documents. The rules may not be clear and the acts will be judged with hindsight.

For many years, lawyers expressly requested electronic documents but did not pursue the issue. More recently, as lawyers began to pursue electronic discovery, reports emerged of settlements forced to avoid the catastrophic cost of compliance with electronic discovery requests and corporations sought guidance and protection in new rules. Various judicial and professional groups at the state and federal level have explored the need for new rules to handle the new electronic media and a pattern has emerged.

### **THREE PHASES OF E-DISCOVERY RULEMAKING**

At phase one, the reaction is to simply assume the same discovery rules will be applied to electronic data in the same manner as with paper since documents are still documents even in electronic form. Once the electronic document is identified, just click the right icon and the document stored in a box is printed out--- somewhat like a photocopy machine. Discovery disputes at this level involve such issues as who pays for the printouts to hard copy or the selection of the format or media for production<sup>1</sup>.

At phase two, we realize that electronic data is not the same as paper documents and perhaps the differences justify new approaches and new rules. The subject matter is bits and bytes in cyberspace rather than documents stored in a box. The right software and hardware is required to read electronic documents and, for legacy data, it may be difficult to find or may not exist. There are significant differences between paper and electronic data: electronic data involves huge, even unmanageable, volumes of documents if printed; many documents are simply duplicates or drafts of no interest; electronic data may be searchable; electronic data is highly portable; electronic data is altered by the continued, normal operations of a computer; electronic data is subject to nefarious alteration and destruction that may not be apparent to the uninitiated but deleted data may be subject to recovery; electronic data discovery requires expert knowledge,

---

<sup>1</sup> See *Sattar v. Motorola Inc.* (7th Cir 1998), 138 F.3rd 1164 [Party produced documents in electronic form ["tapes"] that was inaccessible to opponent who lacked proper equipment and software. No abuse of discretion when tr ct denied request to produce hard copies of 210,000 pages of emails and gave producing party 4 options: download to floppy or hard drive; provide software to opponent; provide on-site access to system; each side bear half cost of hard copy. ]

assistance and management; the employment of neutrals with knowledge of both discovery law and computer science may be required. Recognizing the differences between paper and electronic data and documents, lawyers and the courts seek discovery rules that will address the unique properties of electronic data. There is no shortage of suggestions on subjects that might be addressed.<sup>2</sup>

Most persons approach electronic discovery from the limited perspective of their own practice or experience. In the past it was surmised that when two corporations battle in court there is an undeclared truce on electronic data: don't ask; don't tell. When David battles Goliath, corporate counsel fear that the cost of electronic discovery is a weapon to force settlement. However, all plaintiff's lawyers do not have the same goals and needs. In most cases, the plaintiff may not want and may not be able to handle millions of documents to review but they do want a good faith response to discovery. In other cases, where dumpster diving is practiced out of necessity, every version of every deleted document may be required to ferret out the critical evidence. To the extent rules apply to everyone and every case, participation in the rule making process should include and consider all interests and all types of cases. So, committees are formed, studies are commissioned, proposals are made but a consensus fails to emerge except for the most general rules<sup>3</sup>.

At phase three, it appears that general discovery rules and concepts when combined with knowledge of the technology and applied to the facts and issues in each case are sufficient to address issues involving electronic discovery: reasonable particularity in the request, good faith search and response, good cause for production, balancing of relevancy against burden, cost shifting where appropriate. Every case is different and general concepts allow practical applications to varying facts so long as

---

<sup>2</sup> See memo to committee listing potential subjects  
[http://californiadiscovery.findlaw.com/proposed\\_el\\_disco\\_rules.htm](http://californiadiscovery.findlaw.com/proposed_el_disco_rules.htm)

<sup>3</sup> General rules may be desirable for such purposes as clarifying that electronic data including metadata is, or is not, within the definition of "document" or is otherwise discoverable. Thus far, courts seem to assume that all data or stored information is discoverable.

lawyers and courts do their job<sup>4</sup>. In addition, technology continues to change and rules that are too specific or oriented toward specific technology are outdated by the time they are enacted<sup>5</sup> . .

## **RULES FOR GUIDANCE AND PROTECTION**

The immense volume of electronic documents, their alteration in the normal course of business operations, and the threat of spoliation sanctions raised concerns among corporate counsel. What is the extent of the duty to preserve, the duty to search, and the duty to produce when confronted with discovery requests for every bit or byte that refers or relates to 35 or 350 broad categories? Corporate lawyers are concerned that courts will expect them to search all backup tapes for copies of drafts of documents that no one believed were important enough to retain. They explain how prohibitively expensive that would be. Some opponents and some courts have responded by suggesting that is their problem created by their choice of record maintenance.

Some state jurisdictions have taken the lead in enacting rules to address some of these issues. The rule most frequently<sup>6</sup> cited as a reasonable and practical approach to

---

<sup>4</sup> In the past lawyers have used basic discovery concepts and applied them to technology to resist and obstruct discovery. *Emerick v. Fenick Industries* 539 F.2d 1379. (C.A.Fla. 1976) [judgement entered when Defendant "... was unable to [produce] "ledgers and journals" because [it] did not keep ledgers or journals. ... its business records were kept by computer and were available only on a codified computer print-out."]; *Tulip Computers Intern. B.V. v. Dell Computer Corp.* 2002 WL 818061 (Slip Copy D.Del., April, 2002) [Dell was unable to locate data on its own computer network to provide requested information but after a year of discovery maneuvers and court proceedings and when its opponent's expert was able to talk with Dell's expert, the information was found in Dell's data bases]; *State Farm v. Engelke* (Tex. 1992), 824 S.W.2d 747 [Insurer estimated discovery of bad faith lawsuits would have required expenditure \$2.7 million and 27 person years of labor but cross examination revealed information could be provided by computer generated response. As to information available from public records "State Farm's representative testified ...computer system could be programed to produce the information sought..."]

<sup>5</sup> For example, Texas Rule 196.4 *infra* requires a specific request for electronic data but any lawyer who is excluding electronic data in discovery is neglecting a vital if not indispensable body of knowledge. The rule was enacted in 1998. At the same time a major California discovery treatise stated that failure to pursue electronic documents "... may not only prejudice their case, but may also constitute malpractice." Michael R. Overly, California Continuing Education of the Bar (1998 3d Ed), Civil Discovery Practice 3rd Ed., Vol. 2, §8.24, p. 711. Expect every Texas lawyer to make that specific request in every request. Another rule that focused on e-mail might not be drafted to cover instant messaging or some other practice

<sup>6</sup> See also California Code of Civil Procedure §§2017(e), 2025(h)(3) and 2031(g)(1) 2d ¶., Alaska Rule 30(b)(7) and Illinois Production Rules 201, 214.

production of electronic data<sup>7</sup> is Texas Rule of Civil Procedure 196.4, adopted in 1998, effective in 1999, which addresses specific problems with specific rules:

**196.4 Electronic or Magnetic Data.** To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is 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 must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

Although the rule is widely praised, it is doubtful if it departs from the approach that a reasonable lawyer and educated court would take with regard to the duty to search and produce. Perhaps the most significant contribution is the comfort level it provides to corporations by its emphasis that only “reasonably available” electronic data retrievable “through reasonable efforts” must be produced.<sup>8</sup> If extraordinary efforts are required, mandatory cost shifting applies. This latter provision, if literally followed, would eliminate discretion and prevent a balancing or marginal utility approach to cost shifting which some recent federal courts have adopted<sup>9</sup>.

Proposals also have focused on spoliation<sup>10</sup> issues and have sought guidance and protection to avoid such charges and sanctions<sup>11</sup>. Some proposals would restrict

---

<sup>7</sup> The impact of the rule on discovery in Texas should guide other jurisdictions as to the value of such rules. Hopefully, there is or will be some objective study to inform and guide those concerned with this issue.

<sup>8</sup> Although lawyers will argue about what is “reasonable” in the context of that rule, the language eliminates any suggestion that responding parties must engage in heroic efforts to search and obtain electronic data. But few, if any, lawyers would argue that heroic or unreasonable efforts are required. See also *Alexander v. Federal Bureau of Investigation* (D.C.1998), 188 F.R.D. 111 re denial of discovery from archives and backup tapes that would require heroic efforts when the probability of additional discoverable documents or files was not likely. However, lawyers will disagree as to what is “reasonable” and the Texas rule does not help to resolve that issue.

<sup>9</sup> Re factors to consider in allocating costs of electronic discovery see *Rowe Entertainment v. The William Morris Agency* (S.D.N.Y. 2002), 205 F.R.D. 421 and see *Murphy Oil USA v. Fluor Daniel Inc.* (2/19/02, E.D. La.) 2002 WL 246439; Re marginal utility approach to allocating costs see *McPeck v. Ashcroft* 202 F.R.D. 31 (D.D.C. 2001) [the more likely to yield relevant information the more the producer should pay]

<sup>10</sup> Based on California case law spoliation is described as follows [see Spoliation section of the Sanctions Case Outline at <http://californiadiscovery.findlaw.com/sanctions.htm> for case citations ]:

Unless justified by the responsible party, the intentional or negligent destruction, concealment, alteration or failure to preserve documents, data, information, or other evidence, reasonably known at

spoliation to situations where there is a specific case on file and a specific discovery request or specific court order for production or preservation. Others would require that there be some wilful or knowing or intentional violation of a defined duty or court order. Such proposals must be evaluated in light of the recent publicity surrounding Enron where no case was filed or discovery propounded or court order for preservation obtained before documents were destroyed. Certainly, any rule should not reward those who diligently destroy documents before anyone can learn of their wrongdoing or while the process server is knocking at the door. Other proposals would eliminate any need to suspend document destruction conducted in the normal course of business even when it should be known that vital evidence is being destroyed. Spoliation issues have been handled by the courts for many years on a case by case basis. Rule makers should be hesitant in writing general rules that may be relied upon to protect those who destroy potential evidence or who knowingly allow evidence to be destroyed.

Some have suggested that case management conferences are the answer to any problem arising from discovery of electronic data. Lawyers disagree on the value and cost effectiveness of case management and it appears to vary depending upon the case, the lawyers, the judge and the issues. Certainly, to the extent case management is employed, anticipating and resolving issues of electronic discovery should be a part of the process. In any given case, a special master may be appointed to handle discovery in general or electronic discovery. Whether any rule requiring additional case management in all cases would improve the process would be speculative and doubtful.

---

the time when it is eliminated, to be relevant to the issues or subject matter of reasonably knowable, pending or probable litigation, shall be subject to appropriate sanctions imposed against a party in a pending action if and to the extent such elimination of potential evidence is a reasonably certain cause of the substantial impairment of or significant prejudice to the ability to prove or disprove an element of the cause of action or defense.

Intentional, grossly negligent or other culpable conduct, done for the purpose of destroying or preventing the use of evidence or without reasonable concern for preserving evidence, proximately causing the destruction, unavailability or lack of preservation of relevant evidence in known pending or reasonably imminent litigation, may result in exemplary or punitive sanctions in order to adequately compensate the victim of such conduct or to deter future culpable conduct.

<sup>11</sup> See the proposed model rule offered by Thomas Y. Allman posted at [http://californiadiscovery.findlaw.com/proposed\\_el\\_disco\\_rules.htm](http://californiadiscovery.findlaw.com/proposed_el_disco_rules.htm)

Reportedly<sup>12</sup>, some federal judges have suggested that the interest in promoting communication and the burdens of discovery should outweigh the production of electronic evidence. To return to pre-email days when comments were not preserved for evidence, deleted e-mail should not be recoverable after a period of time expires absent some other showing of wrongdoing. The obvious difficulty is that the approach condones the destruction of the best evidence of a communication by email. Recent cases from antitrust to sexual harassment have shown the devastating impact of email evidence.

### **THE CASE METHOD APPROACH JUDGES AND LAWYERS AS PROBLEM SOLVERS**

New rules based on experience might facilitate discovery of electronic data and existing rules should be improved and refined<sup>13</sup>. However, case law to date demonstrates that judges can and do apply existing tools and concepts to electronic data. Any shortcomings in the applications are not due to inadequate rules or remedies but are attributable to the human element.

While committees meet to discuss proposed rules, judges and lawyers in the trenches are formulating solutions to e-discovery issues. One solution<sup>14</sup> has been to adopt a protocol to protect privileged material by appointing a "neutral" operating under court guidelines<sup>15</sup>. The fee of the neutral might be split or apportioned. The court establishes the parameters, e.g. key words, for discovery and the neutral conducts the electronic search. The neutral presents the search results to the producing party who reviews it for privilege or other objections. Non-objectionable

---

<sup>12</sup> *Digital Discovery & e-Evidence*, Vol.2 No.6, Pike and Fischer, Inc., July 2002

<sup>13</sup> Jurisdictions may want to specify that electronic data and information in any form including metadata is in fact discoverable, may provide protocols for resolving common issues, or may seek to redefine and elaborate on common discovery terms such as "reasonable search" or "reasonable particularity" of requests.

<sup>14</sup> Since most trial court orders are not reported, particularly in state courts, examples of how courts are addressing issues are not readily available. If examples are forwarded to [best@justice.com](mailto:best@justice.com), they can be posted to the web site at [CaliforniaDiscovery.findlaw.com](http://CaliforniaDiscovery.findlaw.com) for access by all.

<sup>15</sup> *Playboy Enterprises v. Welles* (S.D. Cal.1999), 60 F. Supp.2d 1050 [Tr Ct established protocol: mirror image by neutral expert at requesting party's expense; producing party to print and review all documents and submit privilege log ]; *Simon Property Group v. mySimon Inc.* (S.D.Ind.2000), 194 F.R.D. 639 [Court defines parameters of discovery; Discoverable hard drives identified; Moving party selects expert to act as officer of court; mirror image retained by expert; recovered documents provided by expert to producing party for review and objections]

material is immediately produced. Objectionable material is identified and the objections are submitted to the court for adjudication in the normal manner. More recently, several Federal District Courts have applied the following protocol<sup>16</sup>, subject to modification by counsel, for reviewing e-mail and allocating costs:

1. Requester selects expert subject to objection
2. Expert isolates e-mail for review with cooperation of producers technical personnel
3. Mirror image hard drive and copy backup tapes
4. Requester may employ sampling to reduce costs
5. Requester formulates search procedure and selects "key words" subject to objections
6. Requester attorney reviews documents on attorney's eyes only basis
7. Requester selects format for review and selects relevant e-mails
8. Relevant documents provided to producer's counsel in hard copy with bates stamps
9. Requester pays for above
10. Producer reviews for privilege and confidentiality

IF PRODUCER WISHES TO REVIEW DOCUMENTS PRIOR TO ANY PRODUCTION

11. Producer's expense to copy, review and delete privileged documents
12. Provide redacted hard drive or backup tape and privilege log

In *Rowe Entertainment* and *Murphy Oil*<sup>17</sup> the courts adopted the following factors for consideration in allocating costs between the requesting and producing parties:

1. Specificity of request
2. Likelihood of successful search  
[possible use of sampling to demonstrate]
3. Marginal utility
4. Purpose of retention  
[if only due to neglect of for disaster recovery, production in litigation would not be considered a normal cost or obligation; if retained for a business purpose and recovery would be normal expectation, the producing party can be expected to pay for production]
5. Benefits to parties  
[if both parties benefit or if producer benefits, producer should pay]
6. Magnitude of costs  
[if high, shift to party who requests it]
7. Ability to control costs

---

<sup>16</sup> Trial court cases and cases from other jurisdictions have the advantage of not being binding but providing sound guidance based on the facts before the court and the adversarial process.

<sup>17</sup> See *Rowe Entertainment v. The William Morris Agency* (S.D.N.Y. 2002), 205 F.R.D. 421; *Murphy Oil USA v. Fluor Daniel Inc.* (2/19/02, E.D. La.) 2002 WL 246439

[party in control of process and determining how extensive the search will be can pay for what they want]

#### 8. Party resources

Reported federal court cases reflect the evolution of issues being presented to the courts. In the past, courts were called upon to determine whether electronic data was discoverable, whether it could be or should be produced in electronic form, and who would pay for the printout of hard copies. Recent cases deal with cost allocation, protocols to handle potentially privileged material, and protocols for accessing opponents' computers, networks and databases. As the remedies develop, evolve and are refined and perfected in trial courts, they serve as guidelines for others regardless of whether they are adopted as rules.

No decisions have suggested that trial courts do not have the tools or power to address and resolve the issues that are presented. Before any rule is adopted, the rulemakers should analyze the problem being addressed in light of the law in that jurisdiction. If the existing law cannot be applied to properly resolve the issue, a new rule might be needed. If existing law can handle the issue, it is up to the lawyers to properly present the law and the facts and for the judges to properly apply it. If they do not do their jobs, a new rule is unlikely to help.

Existing rules can always be improved or modified and, as lawyers have experience with electronic data, it is hoped that they will not only share their experience but propose rules to the rulemaking authorities. There may be procedures that are tested and proven in the trial courts that should be elevated to rules after they are shown to be effective in facilitating the electronic discovery process<sup>18</sup>.

Lawyers, experts, and judges are not perfect but neither are rule makers. As lawyers and judges become better educated and more sophisticated in dealing with

---

<sup>18</sup> To share the information, lawyers, judges and experts are encouraged to submit proposed rules or trial court orders to [best@justice.com](mailto:best@justice.com) for publication on the website for civil discovery of electronic discovery at <http://CaliforniaDiscovery.findlaw.com>.

electronic data they will apply discovery and spoliation concepts to the facts of specific cases. If a mistake is made it is limited to that case and is subject to review by appellate courts. A mistake in one case, much as it should be avoided, does not have the adverse consequences of a rule enacted in haste or based on inaccurate or anecdotal information that will affect every litigant in that jurisdiction in the future. Perhaps the adversary system will prove superior to the rulemaking approach in the evolution of electronic discovery guidelines.

Richard E. Best