



## Changes to the Federal Rules of Civil Procedure – Evolution or Revolution? (part 2 of 3)

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When the newly revised trial rules go into effect on December 1, 2006, legal professionals are going to have to learn a new language. Both lawyers and paralegals are going to have to learn to talk tech and speak geek. These challenges will be difficult for all of us, but facing challenges head-on is what profession is all about. The comments below provide a brief background on the amendments going in to effect.

### **T.R. 16: Pretrial Conferences; Scheduling; Management:**

The amendments to T.R. 16 specifically require parties to discuss (within the 120 days of the filing of the complaint) “provisions for disclosure or discovery of electronically stored information.” Electronically stored information is going to be the new catch phrase, and is more commonly referred to as “ESI.” This amendment represents one of the most dynamic shifts in practice that will be felt under the revised rules. This amendment requires that each of the parties know either generally or precisely what ESI they are seeking and what ESI is in the possession of their respective clients. The parties will also need to know how their clients archive or store information, what information is stored, for what duration is certain information stored, where certain information is located, how information can be searched and/or indexed, and how ESI can/should be produced. More generally the parties are going to need to discuss practical limitations and sensibly obligations regarding preservation and production of ESI.

These amendments also require the parties to discuss “claims of privilege or of protection as trial-preparation material after production.” This concept is often referred to as “claw back”, “take back”, or “inadvertent disclosure” agreements. The courts clearly realized that the increase in the volume of ESI being requested and produced would inevitably lead to either, (1) more inadvertent disclosures of privileged information, or (2) a dramatic increase in litigation costs associated with pre-production attorney review of information (attorney review is the costliest step in e-discovery). This amendment encourages the parties to reach an agreement regarding the consequences and handling of ESI or documents that are inadvertently produced during discovery. There are three general approaches to inadvertent production. Some courts are taking a stringent approach that any voluntary disclosure of privileged material waives privilege. At the other end of the spectrum, other courts are adopting the more lenient approach that attorney negligence does not waive privilege (although gross negligence may do so). Yet other courts

take a middle-of-the-road approach, which balances factors including the reasonableness of the precautions taken in protecting privileged information from being disclosed, and the time taken to rectify the disclosure. See, *Hopson v. Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005).

Currently, the legitimacy of claw back agreements have been challenged across the country and most jurisdictions, including Indiana, are taking a wait-and-see approach. Unfortunately, clarification may be several years away. After the problem was identified, the rules committee proposed an amendment to Evidence Rule 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver), that essentially sets out a middle-of-the-road approach as discussed above. The proposed amendments are currently scheduled for hearings for public comment in Phoenix, AZ, and New York, NY, to take place in early 2007. Following the public comment period, the proposed Evidence Rule 502 will require approval by the Advisory Committee on Evidence Rules, the Standing Committee, the Judicial Conference, and the United States Supreme Court. In addition, proposed Evidence Rule 502 will require an affirmative act of Congress before going into effect.

### **T.R. 26: General Provisions Governing Discovery; Duty of Disclosure:**

The amendments to T.R. 26 are closely intertwined with sections of T.R. 16 requiring early discussion of ESI. T.R. 26 expressly mandates that the parties discuss “any issues relating to preserving discoverable information.” This amendment requires parties to have an understanding of their clients archive system, disaster recovery system, and document retention policy (“DRP”). This obligation also encourages law firms and corporations to have plans for preserving discoverable information, i.e. litigation hold policies. Most businesses already have, or should have, a litigation hold policy that can be implemented in a short period of time to preserve discoverable information. This obligation is especially important in the digital era when ESI is moved, archived and/or deleted pursuant to pre-set or even default system’s settings. Unlike traditional paper documents that take an affirmative act by a person when they are destroyed, ESI can be (and often is) destroyed without anyone doing anything.

These amendments also require early discussion of “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.” There are two general schools of thought with regard to the impact of this amendment. There are the cynics who believe that the current level of tenacity that has become common place in litigation, will get even worse. It is not hard to imagine a difficult party mandating that certain ESI be produced in a form that is especially challenging to the producing party. It is also easy to imagine a producing party taking extra measures to make ESI as close to paper documents as possible by stripping text search capabilities or meta-data.

However, the optimists believe that the new challenges of the digital era will leave the parties with no choice, but to cooperate and have an open exchange of information in pursuit of resolving the underlying litigation. The optimists believe that these new challenges will usher in an era of cooperation and civility that is necessary in a system where the people controlling the process have a limited understanding of the complexities of information management systems. It is very similar to a community coming together after a natural disaster. Former adversaries join around common interests and put petty differences aside in the name of the greater good.

Which line of thinking will prevail? We will have to wait and see. Regardless, I think that both sides would agree that the new amendments create challenges and opportunities that will have a serious impact on the legal profession overall.

### **T.R. 33: Interrogatories to Parties:**

The amendments to T.R. 33 simply incorporate ESI in to the option to produce business records. In other words, if an answer to an interrogatory can be found by searching the ESI of a party, then a producing party can allow the option to access its electronic information systems to search for certain information or allow a party to simply produce certain ESI in response to particular interrogatories. A party who invokes T.R. 33(d) may be required to provide direct access to its electronic information system. Such access would inevitably carry with it increased security and confidentiality concerns.

### **Conclusion:**

Discovery has traditionally been characterized by collating collections of static paper documents. Identifying such collections with bates numbers, and creating some sort of organizational framework to utilize such documents in the litigation process. The age of digital discovery is making static paper documents obsolete. The idea of static paper documents is being replaced by dynamic databases that would dwarf even the largest paper files imaginable. The traditional discovery model is quickly being replaced by creative and adaptable systems to manage ESI. These changes to the established methods of discovery collection, production, and organization will effect us all.

There is a quote from an unknown author that once said “change is a part of every life. Resisting is often as futile as it is frustrating.” No truer statement was ever made.

*The December Precedent will feature a discussion regarding the amendments to the remaining trial rules 34, 37, sand 45.*