

# eDISCOVERY:

## Is It a Blessing or a Burden?

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## **EDiscovery: Is It A Blessing Or A Burden?**

When the Science and Technology Committee of the ABA proposed the new Federal Rules covering Electronically Stored Information (ESI) in 2005, it was attempting to put some structure on a growing phenomenon—computers have transformed the paper world into the electronic world, from the intra-communication, to the inter-communication in enterprises. The legal profession (attorneys, judges, tangential businesses, agencies) has been slow to adopt tools to deal with the transmission of information electronically, and have difficulty understanding the nuances of this amoebic-like system of communication.

Software technology companies have attempted to address the document management needs of both enterprise and the legal profession to respond to requests for ESI, by quickly (and without much thought and analysis of the end-user's capabilities) developing products that are cumbersome, complex, and in most cases very expensive. The members of the legal profession generally are slow adopters of technology and with the advent of eDiscovery and court initiatives, whereby they are being forced to comply with production of ESI, the profession is grasping at any product(s) that purport to act as a panacea. To make it clear, there is no panacea and as one authority on electronic discovery stated: "eDiscovery is a process, not a product...the objective is to make it tolerable."

Software companies need to respond to the demand by not just saying that their products are "easy, scalable, comprehensive", but make them really usable by the very people who need them...the paralegals, attorneys, and expert witness firms, most of whom are not technologically astute. So many firms are scrambling to obtain IT consultants or establish IT departments that increase operational costs (thereby reducing the bottom line) or require an increase in fees, which are already deemed too high by the clients retaining these firms.

Many attorneys are side-stepping federal courts to avoid the requirement of production of ESI; but they should be aware that the states are following the federal courts<sup>1</sup> and will mandate in some manner the transmission of ESI in litigation. Can the law firms who do not litigate avoid the process? No! Mergers and acquisitions specialists, estate planning, and intellectual property lawyers all have to work with electronic media in carrying out their clients' requests for services. How that media is collected, preserved and organized is a constant burden on the legal profession.

### WHAT FRCP RULES APPLY

While there are other Federal Rules, which may be applicable depending on the issues before the Court, the primary rules (published December 1, 2006) relating to discovery of ESI are:

- Rule 16—establishes the processes for the parties and the Court to address issues of disclosure and discovery of ESI early in the case.
- Rule 26—requires parties to meet and confer on electronic evidence at the discovery planning conference and considers inadvertent waiver of privilege, preservation of evidence, and form of production.
- Rule 33—calls for a search of ESI in business records interrogatories.
- Rule 34—adds a new category of discoverable information called “electronically stored information”; gives options for forms of production.
- Rule 35—provides for the parties' proposed discovery plan for ESI.
- Rule 37—“Safe Harbor” provision which exempts parties where the cost is too high or burden too great to recover ESI, if such information is lost in routine operation of a company's computer system.
- Rule 45—outlines conditions for non-party production of ESI

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<sup>1</sup> The California Judicial Council in March 2008 issued a notice that it is proposing new statutes and rules which address the production of electronically stored information. The proposed rules are similar to the Federal rules.

### **Why Should All Attorneys pay attention to the collection, storage, and retrieval of ESI?**

As was seen in the Broadcom<sup>2</sup> case, the Morgan Stanley<sup>3</sup> case, and other similar cases, the penalties for non-compliance can range from fines (Zubulake<sup>4</sup>) to adverse jury instructions (e.g. Morgan Stanley, where the jury instruction set forth language that the jury may presume from MS' failure to provide certain ESI that it was hiding "something"). In the Morgan Stanley case, as a result of the jury instruction, the jury held against MS to the tune of \$1.5 billion. It is clear from the Broadcom case that criminal sanctions and/or disbarment of the attorneys can also result. Whether the attorneys are the litigation attorneys or in house counsel who must collect the ESI for the outside counsel, it is clear that attorneys need to have an understanding of what ESI consists of. It is not merely computer created documents such as emails, word processing, but also "blogs", chat sessions, VOIP, and any other method of communication transmitted electronically. Also, these methods are systems and imbedded within the systems may be code which provides certain formats, security, or barriers to obtaining the ESI. However, one thing is clear from the rules (34(b)): the requesting party may designate the format for production. If they do not do so, the responding party can state the format it intends to provide and produce the ESI either as it is usually maintained or in a reasonably usable format. The wiser attorney will request a particular format (e.g. Native, PDF, or plain-text). The responding party may not be burdened with producing in more than one format.

There is a "Safe Harbor" provision to protect the responding party from abusive discovery of ESI. The burden of proof is on the responding party, however, to show that there is extraordinary expense or unusually heavy burden to produce the ESI as requested.

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<sup>2</sup> Qualcomm Inc. v. Broadcom Corp. (05-CV-1968-B) whereby Qualcomm was ordered to pay all of Broadcom's litigation fees which amounted to approximately \$10 million due to the attorneys failing to produce evidence until four months after the trial. The attorneys were the subject of disciplinary proceedings.

<sup>3</sup> Coleman Holdings v. Morgan Stanley & Co., 2005 Extra LEXIS 94(Fla.Cir.Ct., Mar. 23, 2005) whereby the federal court gave a prejudicial instruction regarding Morgan Stanley's attorneys failing to provide emails in a timely manner and had falsely argued that the production would be burdensome was substantive proof of Defendant's willfulness and wrongdoing. The Appellate Court, however, did overturn the damages awarded by the jury in this case (both compensatory and punitive). 4<sup>th</sup> Dist Ct. of Appeal, Morgan Stanley & Co. Inc, appellant, v. Coleman (Parent) Holdings Inc., Appellee, no. 4D05-2606, March 21, 2007.

<sup>4</sup> Zubulake v. UBS Warburg, 2006 U.S. Dist. Lexis 13574 (July 20, 2004).

One of the major issues for small to medium size firms in ESI production is the cost factor.

With a large document production, either on the delivery or recipient end, there are the following processes to be employed (without electronic tools):

- Preservation or retention of documents (It is recommended that every company have a retention/destruction of ESI policy)
- Gathering or assembling/collection of information
- Processing/separation of documents into those that are responsive, relevant to the facts of the matter, and those potentially relevant vs. those which not relevant
- OCR (Optical Character Reading) of contents to facilitate storing, organizing, searching and retrieving case and client matter documents, and summarizing and exporting upon request
- Analysis of those relevant documents
- Production (if responding party)

While the costs have not been ascertained distinctly, it is clear that without electronic tools (software packages) to manage and organize in a simple and expeditious manner, personnel in the legal office must do so in a cumbersome and time consuming manner. The cost is borne by both the law office and the client and attorneys cannot bill all of the time used in this process. Therefore, it is incumbent upon the legal profession and the software suppliers to create and obtain cost effective and user-friendly software solutions.

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