THE NEW DISCOVERY: AN INTRODUCTION TO ELECTRONICALLY-STORED INFORMATION (ESI) IN CIVIL LITIGATION

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Introduction to the U.S. Judicial System

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ABSTRACT

The following report reviews pleading and discovery issues in civil litigation. Emphasis is given to the examination of rules pertaining to ESI in civil litigation. Particular attention is paid to the Federal Rules of Civil Procedure (FRCP) as many states follow, if not copy, these rules in their own rules of civil procedure. Since the rapid proliferation of ESI impacts costs and methods used in civil litigation discovery, special attention is given to reform studies such as The Electronic Discovery Reference Method (EDRM) and the Pilot Project Rules published by the Institute for the Advancement of the American Legal System (IAALS).

The New Discovery: An Introduction to Electronically Stored Information (ESI) In Civil Litigation

INTRODUCTION

LEADING UP TO 2012

The 2006 amendments to the FRCP concerning electronic discovery were intended “to assist courts and litigants in balancing the need for electronically stored information with the burdens that accompany obtaining it.” (Fliegel & Entwisle, 2009) "The amended rules explicitly recognize electronically stored information and describe procedures to make it available in discovery.” (Definitions) Since those amendments took effect courts, legal professionals, businesses, and organizations such as the American Bar Association (ABA), the Electronic Discovery Reference Model (EDRM), and the IAALS have proposed multiple suggestions for the efficient and economical implementation of rules and procedures for handling ESI.

The method of implementation for handling ESI has been perhaps a little unexpected but still effective. What we might have thought would happen is that the Supreme Court would adopt the amendments to the FRCP – which it did pursuant to the Rules Enabling Act – and then there would be Congressional hearings, *ad hoc* governmental and quasi-governmental committees – which there were – and scholarly papers and pronouncements – which there were, as well – ending in a cohesive set of proposals – which there weren’t entirely. There were and are many suggestions. But what appears to be working in practice?

In December of 2011, the Constitution Subcommittee of the House Judiciary Committee held hearings (the first since the rules were last revised) (Costs and Burdens) regarding e-discovery policy entitled, “The Costs and Burdens of Civil Discovery.” The cost of litigation

had increased dramatically. One reason for this increase was sanctions for discovery violations. (Costs and Burdens, Evolvement of e-Discovery) Among those providing testimony was Rebecca Love Lourlis, Executive Director of the Institute for the Advancement of the American Legal System, University of Denver. "Ms. Kourlis stated that current e-discovery policies have not adequately addressed the problems of cost and delay, leading to fewer trials, and settlements based on the costs of litigation, rather than the merits of cases. She concluded that the FRCP goal of a 'just, speedy and inexpensive system' is not being met by current e-discovery policies, and urged for rule changes to avoid unnecessary expenditures of time and money in litigation." (Costs and Burdens, Hearings Testimony) The IAALS has specificly addressed e-Discovery issues from a FRCP perspective which will be examined later in this paper.

2011 might be called the year of the democratization of e-discovery. For it was in that year that we saw "more opinions at the state court level and heard recommendations from EDD (Electronic Data Discovery) special masters." (Lynn III, 2012) Case law is leading the charge in how to handle e-Discovery questions, from what and how and when to preserve to apportionment of costs. Judges, perhaps, are exactly who should be leading the charge in formating the rules and procedures for this new electronic age, for they see exactly what the parties – and the judicial system -- are up against.

WHAT IS THE NEW DISCOVERY?

First, what is discovery? The Glossary at the United States Courts website provides a most succinct definition. Discovery consists of the "Procedures used to obtain disclosure of evidence before trial." (Glossary) The new discovery is more than procedures, though. It is, in a word, e-Discovery.

E-Discovery is “(t)he collection, preparation, review and production of electronic documents in litigation discovery. This includes e-mail, attachments, and other data stored on a computer, network, backup or other storage media. E-Discovery includes metadata." (Definitions)

WHY IS ESI IMPORTANT?

Metadata is one reason ESI is so important. Part of the obligation of the amended rules is to make metadata available in discovery, too. Metadata is "(s)tructured information about an electronic file that is embedded in the file, but not normally visible when viewing a printed or on screen rendition of the document, that describes the characteristics, origins, usage and validity of other electronic files.” (Definitions) A simple example should illuminate the importance of metadata.

In a hypothetical suit involving workplace discrimination, emails were secirculated among a foreman and several male employees discussing Jane, a female employee. The company had a reputation for being a “good ole’ boy” atmosphere and male employees often made off-color jokes openly about women in general and about Jane in particular. The emails were also common knowledge. After the foreman made an unwelcome advancement toward Jane, she complained to the supervisor who scoffed and said, “Jane, don’t get your panties in a wad.” Shortly after her encounter with the supervisor, Jane was fired for an unrelated incident that occurred prior to her complaint to the supervisor.

Jane hired an attorney and the case eventually wound up in federal court. Jane told her lawyer what the supervisor had said and that it was a phrase the foreman used many times in his emails to her. The supervisor claimed he had not heard anything about the situation between Jane and the foreman until she complained to him personally about it. By then, according to the

supervisor, her termination was already under way. Jane's attorney requested all relevant emails between the foreman and Jane including the parties who were copied and blind copied. When the company produced only printed emails, Jane's attorney refined his request for the emails in their original state, that is the electronic version. Eventually, Jane's attorney filed a motion to compel the company to produce a CD of all relevant emails.

After examining the electronic version of the emails, Jane's lawyer discovered the supervisor had been blind copied on all of the them. The dates of the emails were prior to Jane's termination and to the incident held to be the reason for her termination. The supervisor knew or should have known about the incident before Jane went to him to complain. This information would have been impossible to discover from printed copies of the emails.

FRCP

The Federal Rules of Civil Procedure (FRCP) govern litigation in the federal courts. (Rules) "They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." (FRCP1)

Professor William H.J. Hubbard, Assistant Professor of Law at the University of Chicago Law School testified before the Constitution Subcommittee that "discovery costs for processing, review, and production, as well as costs for preservation, have a "long tail" in which a small but substantial number of complex, costly cases account for a large share of total costs." (Costs and Burdens, Hearings Testimony) The question becomes: How are the Federal Rules of Civil Procedure going to "secure the just, speedy, and inexpensive determination of every action and proceeding(?)" (FRCP1)

To answer this question -- or, if not answer them to at least gain a better handle on how the Rules may accomplish what is its self-proclaimed task -- we will look at some specific rules. Principal provisions of some of the rules as they affect e-Discovery are summarized below.

RULE 26(A) – INITIAL DISCLOSURES

"Parties in litigation must provide a copy (or description by category and location) of ESI that will support that party's claims and/or defenses." (Definitions)

These are known as initial disclosures. Parties provide these before receiving a request from the other side. What must be provided is spelled out in the rule.

RULE 26(F) – MEET AND CONFER

"Parties must meet and confer at the outset of the case to discuss their plans and proposals regarding the conduct of the litigation, including any issues relating to preservation, disclosure or discovery of ESI, including the form in which ESI should be produced and claims of privilege, or protection as trial-preparation material." (Definitions)

Before e-Discovery, these were often informal meetings, a phone call even, simply to touch base and satisfy the statute. With the advent of ESI, though, more complex cases will likewise have more complex Rule 26(f) conferences, possibly being ordered by the court to attend in person.

RULE 26(B) – INADVERTENT DISCLOSURES

If discovery information is subject to a claim of privilege, or protection as privileged 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 is required to promptly return, sequester, or destroy the specified information and any copies it has and is not permitted to use or disclose the information until the claim is resolved." (Definitions)

This is a problem for many legal professionals. Even though lawyers are on notice with this rule that they must “promptly return, sequester, or destroy” the protected information, they were still exposed to it. Later, we will see how law firms may be able to reduce or completely avoid the inadvertent production of otherwise protected information using predictive coding.

RULE 26(B) – NOT REASONABLY ACCESSIBLE INFORMATION

"A party need not provide discovery of ESI from sources that the party identifies as 'not reasonably accessible because of undue burden or cost.’ The party asked to produce ESI bears the burden of demonstrating the information is not reasonably accessible because of undue burden or cost. Even if that showing is made, the court may nonetheless order discovery from that party if the requesting party shows good cause.” (Definitions)

RULE 33(D) – ESI AND INTERROGATORIES

This rule allows parties to generate interrogatories to the other side. Usually these are questions to be answered. But Rule 33 allows a party to produce the business records that upon examination will answer the interrogatories. The amended rule allows for ESI: "If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party’s business records (including electronically stored information)..." (FRCP33)

RULE 34 -- ESI AND DOCUMENT PRODUCTION

Rule 34 relates to the production of documents in a similar manner as Rule 33 related to the answers to interrogatories. An aspect relating to our scenario with Jane worth noting are that a "requesting party or its representative (may) inspect, copy, test, or sample items in the responding party’s possession, custody, or control...." (FRCP34) Remember the email example above and recall that the supervisor was not on solid ground refusing to produce the emails in

their original form. Rule 34 requires that they either be produced or the requesting party must be allowed access to test them.

Time has been spent on the FRCP, even though this report is also concerned with state courts and how they handle ESI and e-Discovery. The reason for this is that most states follow the FRCP; their own rules of civil procedure may even be exactly the same in wording and nomenclature. Colorado is one of those states that follows the FRCP almost verbatim.

LITIGATION

From a discovery standpoint, ESI is important – vital, even -- in litigation. Litigation is a "case, controversy, or lawsuit. Participants (plaintiffs and defendants) in lawsuits are called litigants." (Glossary) Litigation involving ESI will often have a company involved. Nevertheless, in 2012, “we have reached the point where electronically stored information (ESI) is relevant in nearly every litigated matter, from products liability to intellectual property cases.” (BlackLetter) When a company is involved, as it often is, the preservation and spoliation of ESI becomes an issue. (These concepts of the preservation and spoliation will be examined in more detail under the heading Disputes Involving E-Discovery.)

Companies, employers, and businesses subject to a suit need to have policies and procedures for enacting the litigation hold. “Litigation hold (also known as "preservation orders" or "hold orders") is a stipulation requiring a company to preserve all data that may relate to a legal action involving the company. This requirement ensures that the data in question will be available for the discovery process prior to litigation.” (litigation hold) In fact, "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." (Emphasis added.) (Zubulake, at 216)

“Should have known” is significant. Judge Scheindlin in *Zubulake* found that “Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.” (at 218) What may trigger this, for example, is a letter from a lawyer informing the company that she represents a former employee of the company who is filing an EEOC charge for age discrimination. This letter will usually inform the company in explicit language that the recipient has the obligation to preserve all information that connected with the claimant or the matter. This preservation notice includes, of course, ESI. This “written” litigation hold is not more than a good practice. Not issuing one could be grossly negligent. In a case after *Zubulake*, Judge Scheindlin held that "the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information." (Pension Comm, at 465) More recently, though, the Second District rejected the idea of not issuing a litigation hold being gross negligence *per se*. Citing *Orbit One Communs. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010), the Court found that "the better approach is to consider [the failure to adopt good preservation practices] as one factor" in the determination of whether discovery sanctions should issue.” (Chin, at 162)

Litigation involving ESI does not have to be an employer/employee issue only in federal cases, although removal to federal court is common for such cases when they involve a federal question or diversity of citizenship. In general, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." (28 USCS § 1441)

There are cases involving ESI that will remain in state court, and state courts have acted to cover the contingency of ESI in state litigation. Some examples of states implementing standards for addressing e-Discovery in litigation are:

> California: On June 29, 2009, California passed the Electronic Discovery Act to address e-discovery in state court litigation, which was then supplemented by a judicial counsel rule requiring e-discovery issues to be addressed early in the case.
>
> Florida: The Florida Supreme Court is seeking comments on a proposed rule amendment to govern the discovery of ESI.
>
> Pennsylvania: The Supreme Court has amended the state civil procedure rules to officially include e-discovery, with the changes becoming effective on August 1, 2012.
>
> Utah: Utah has also revised its Rule 26 to address electronically stored information. (Jessica, 2012)

Litigation is initiated by a filed complaint. But as we will see in the next section about the Institute for the Advancement of the American Legal System, the complaint is not always the harbinger of coming litigation; it may be the commencement of the action, but it is not necessarily the beginning of the case.

IAALS

The Institute for the Advancement of the American Legal System "is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs." (PPR) It began operations on the campus of the University of Denver in 2006.

Their mission was to "advance a more accessible, efficient, and accountable civil justice system." (IAALS) Those involved understood that their undertaking was enormous. Today, IAALS is a "thriving entity with a full-time, highly qualified staff, complemented by a group of exceptional consultants." (IAALS)

The Institute has published a number of initiatives. The one of primary focus for this study will be "A Roadmap for Reform: Pilot Project Rules." The Pilot Project Rules (PPR) is part of the *Rule One* Initiative. *Rule One* refers to the first rule of the FRCP mentioned in the first paragraph under the heading **FRCP**. The PPR consist of twelve rules formulated in conjunction with the American College of Trial Lawyers (ACTL) Task Force on Discovery and Civil Justice rules intended to focus on problems facing the FRCP. Researches on the subject, along with a survey of the ACTL members, reveal the system "fails to meet the guarantee of Rule 1 of the Federal Rules of Civil Procedure of a 'just, speedy and inexpensive determination of every action.'" (PPR)

The Pilot Project Rules do not preempt the FRCP or similar state rules. Instead, the "court's existing rules will govern except to the extent that there is an inconsistency, in which case the PPR will take precedence." (PPR) The Comment on PPR 1 states:

> The Federal Rules of Civil Procedure and many state rules already contain factors that—where applied—address proportionality in discovery. However, these factors are rarely if ever applied because of the longstanding notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise. It is the purpose of these PPRs that the default be changed—all facts are not necessarily subject to discovery. Because these rules reverse the default,

the proportionality factors that are provided in existing rules and restated in the PPR can be applied more effectively to achieve the goals stated in PPR 1.1.

This should indicate to even a casual reader that the task before the PPR is daunting. The IAALS and ACTL are at the helm of the reform movement, but they are not alone in making recommendations on civil justice initiatives. The IAALS website (www.ials.du.edu) lists similar efforts implemented in state and federal courts in California, Colorado, Delaware, Florida, Iowa, Massachusetts, Minnesota, New Hampshire, New York, Northern District of California, Ohio, Oregon, Pennsylvania, the Southern District of New York, the Seventh Circuit, Texas, Utah, the Western District of Pennsylvania, the Western District of Pennsylvania, the Western District of Washington, and Wyoming.

Rule Two of the PPR concerns the form and content of pleadings. An action commences with the filing of a complaint. Rule 8 of the FRCP prescribes the form and content of the complaint – or claim for relief – entitled General Rules of Pleading. Rule 8 states:

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief. (Rule8)

In Colorado, for example, the General Rules of Pleading, also Rule 8, reads nearly the same as the FRCP Rule 8. Not all states have this simple a rule for pleading form and content,

though. In Pennsylvania, a fact-pleading jurisdiction, Rule 1019 of their Rules of Civil Procedure are more specific:

> Contents of Pleadings. General and Specific Averments.
>
> (a) The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.
>
> (b) Averments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge, and other conditions of mind may be averred generally.
>
> (c) In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of such performance or occurrence shall be made specifically and with particularity.
>
> (d) In pleading an official document or official act, it is sufficient to identify it by reference and aver that the document was issued or the act done in compliance with law.
>
> (e) In pleading a judgment, order or decision of a domestic or foreign court, judicial or administrative tribunal, or board, commission or officer, it is sufficient to aver the judgment, order or decision without setting forth matter showing jurisdiction to render it.
>
> (f) Averments of time, place and items of special damage shall be specifically stated.
>
> (g) Any part of a pleading may be incorporated by reference in another part of the same pleading or in another pleading in the same action. A party may incorporate by reference any matter of record in any State or Federal court of record whose

records are within the county in which the action is pending, or any matter which is recorded or transcribed verbatim in the office of the prothonotary, clerk of any court of record, recorder of deeds or register of wills of such county.

(h) When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written. (Kole, at 30)

Colorado is participating, however, in the IAALS pilot project to a degree by "adopting certain rules regarding the control of the discovery process reduces the expense of civil litigation in certain business actions...and has modified rules of Civil Procedure concerning the pleading, discovery and trial management of certain cases." (Colorado Civil Access Pilot Project) The project operates through December 2013, for specific cases in select counties and districts.

So the form and content for pleadings under the Pilot Project Rule 2, as directed by the Supreme Court of Colorado, reads:

Pilot Project Rule 2—Pleadings—Form and Content

2.1. The intent of PPR 2 is to utilize the pleadings to identify and narrow the disputed issues at the earliest stages of litigation and thereby focus the discovery.

2.2. The party that bears the burden of proof with respect to any claim or affirmative defense should plead all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages.

2.3. Any statement of fact that is not denied with specificity in any responsive pleading is deemed admitted. General denials of any statement of fact are not permitted and a denial that is based on the lack of knowledge or information shall be so pleaded. (Colorado Civil Access Pilot Project)

DISCOVERY UNDER THE PILOT PROJECT

PRECOMPLAINT DISCOVERY

Rule Three of the PPR provides the mechanism of beginning discovery even before filing the complaint. A proposed plaintiff files a motion with notice to a proposed defendant and the court may hold a hearing to determine if the proposed plaintiff can obtain precomplaint discovery, such that:

a. the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by the discovery;

b. the moving party has probable cause to believe that the information sought by the discovery will enable preparation of a legally sufficient complaint;

c. the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought;

d. the proposed discovery is narrowly tailored to minimize expense and inconvenience; and

e. the moving party's need for the discovery outweighs the burden and expense to other persons and entities. (PPR)

Although the FRCP do not currently allow for precomplaint discovery, some states do. Ohio and Pennsylvania do, and as we saw Pennsylvania is a fact-pleading jurisdiction, so it would make sense that if the plaintiff is required to provide sufficient information in a complaint to be statute compliant, there would be a mechanism for gathering the facts necessary to plead properly.

Single Judge

Rule Four asserts that the judge assigned to the case, "absent unavoidable or extraordinary circumstances," (PPR) will be the same judge through the trial and post-trial. Currently, there is no guarantee that the same judge will remain on the case in state or federal jurisdictions.

Initial Disclosures

Rule Five addresses initial disclosures with a particularity that Rule 26(a) of the FRCP does not. Remember that 26(a) simply says a party must provide certain discoverable information without awaiting a discovery request. The Pilot Project Rules are more explicit, requiring that, in Rule 5.1:

> No later than (x) days after service of a pleading making a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support that party's claims.

Rule 26(a) requires a party to make initial disclosures "at or within 14 days after the parties' Rule 26(f) conference (the Meet and Confer Conference)…" (FRCP 26) See Appendix A for the Colorado Civil Access Pilot Project Timetable. This shows when events occur relative to the Pilot Project Rules.

DISPUTES INVOLVING E-DISCOVERY

Preservation

"Technological advances in electronic discovery now allow practitioners to drill down to the relevant ESI and narrow the preservation obligation early in the discovery process. Thus, the best practices and standards for the preservation and collection of ESI have evolved significantly since the series of Zubulake opinions from District Judge Shira Scheindlin of the Southern

District of New York beginning in 2003, prior to the amendments to the FRCP in 2006." (BlackLetter) Current FRCP requires that parties "must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due.…" (FRCP26) In that conference parties are to "discuss any issues about preserving discoverable information; and develop a proposed discovery plan." (FRCP26) Rule Seven of the Pilot Project Rules says parties are to "promptly, after litigation is commenced…" (emphasis added) meet and confer about the preservation of ESI. (PPR)

ESI and e-Discovery have spawned the growth of an industry intent on solving the cost and complexity problems facing courts and legal professionals. The Electronic Discovery Reference Model is an online resource organization with memberships open to anyone, but especially to corporate counsel, corporate IT managers, law firms, consultants, and service providers, and software providers. In fact, "everyone involved in e-discovery can benefit from joining EDRM. As an EDRM participant, you can share best practices for managing the e-discovery processes from the initial management of electronically stored information all the way to the ultimate presentation of that information. You can offer insights to others and help improve the e-discovery processes as well as the entire industry." (EDRM) E-Discovery is still a wide-open field in terms of solutions and the industry that will control those solutions. EDRM is working to systematize and standardize the ESI field in much the same way that XBRL (Extensible Business Reporting Language) is becoming the standard method of business information exchange and reporting. "The goal of the EDRM XML schema is to provide a standard file format that enables an efficient, effective method for transferring data sets from one party to another and from one system to another in pursuit of electronic discovery (e-discovery) related activities." The specifics are beyond the scope of this paper and its writer. Suffice it to

say, that just as the Security and Exchange Commission has been requiring large public firms to submit their financial reports using XBRL since 2008 (Bobcock, 2008) amendments to the FRCP may mandate the use of a form of XML schema to standardize ESI.

Some courts have been specific about preservation. The inclusion of precomplaint disclosures in the Pilot Project Rules would definitely put a potential defendant on notice that a litigation hold needs to be placed on relevant information. Like *Zubulake*, *Pippins v. KPMG LLP* draws the line for preservation to the realm of anticipation. “The duty to preserve has been described as follows: [A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.” (Pippins)

The discussion of preservation begs the question: What if the information is not preserved?

SPOLIATION

According to Black’s Law Dictionary, spoliation is the "intentional destruction, mutilation, alteration, or concealment of evidence, usually a document.” (Black's) To return to *Zubulake*, spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." The spoliation of evidence germane ‘to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.’ However, ‘the determination of an appropriate sanction for spoliation, if any, is confined to the sound

discretion of the trial judge, and is assessed on a case-by-case basis.' The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's own inherent powers." (Zubulake, at 216)

Above, under the heading **FRCP**, we looked at "Rule 26(b) – Not Reasonably Accessible Information" that states in full:

> 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)(C). The court may specify conditions for the discovery.

Cost, however, is of tremendous importance. Remember, by Rule 1 of the FRCP the rules should "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." (FRCP1) Traditionally, under the FRCP and the rules of procedure of most states, "the producing party bears the cost of readying documents for production. This rule works well most of the time for traditional discovery because the costs and burdens of collecting the requested information are relatively low in the grand scheme of all discovery costs. Electronic discovery, however, can raise the cost of readying information for production dramatically because the potential universe of responsive information can be much greater. Potentially responsive ESI must be searched for, collected, and reviewed for relevance and privilege, often at volumes that may be hundreds or thousands of times greater than for paper

documents. Backup and legacy data may need to be restored to a useable form before review can even take place. As discussed above, such restoration often requires outside vendors, all of which comes at a cost. A recent study reported the cost of e-discovery expenditures ranging from $17,000 to $27 million per case, with a median value of $1.8 million." (Hazards)

PREDICTIVE CODING

One approach to lower costs is to cut down on the amount of ESI examined for relevant evidence. How do we do this when we are talking about ESI? What about hundreds of thousands or even millions of ESI documents, emails, social media sites, etc.?

In a gender discrimination suit in the Southern District of New York, Judge Andrew J. Peck became perhaps the first judge to order the use of computer-assisted coding to find relevant information in masses of ESI. The case, *Da Silva Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC) (S.D.N.Y. Feb. 24, 2012), involved three million documents.

Predictive coding is a changing field. One method involves manually reviewing a few thousand documents to determine what search terms are relevant. The software program "learns" from these coded terms and can then search on its own. Culling millions of documents to a manageable number so lawyers can more easily review them is the goal of predictive coding.

CONCLUSION

E-Discovery is fast becoming one of the most fascinating and troublesome areas of litigation. Technology and media will only expand moving forward. Large organizations will continue to generate more and more information in electronic form creating increasing costs to comply with discovery obligations in the event of a suit. These expensive burdens can be triggered by an adversary needing to meet the low evidentiary threshold notice pleading requires. (Fliegel & Entwisle, 2009)

The old discovery was simple in comparison to the New Discovery. Time was when documents were on paper in files, easily (usually) accessible and easily discoverable. Documents today mean something else entirely. A document may not be on paper and may never have been on paper. A "document" may be a web page, an email, or a complex spreadsheet using XBRL. Discovering a spreadsheet in today's environment requires having it in electronic format so the formulas can be examined. Paper spreadsheets would not expose the underlying information known as metadata.

This paper only scratches the surface of the ESI and e-Discovery frontier. Every area is advancing and changing constantly. Private businesses like EDRM and organizations like IAALS are making tremendous impacts on the way the legal community and business approach information. The legal system as a whole seems to move more slowly, though. But hard and fast rules don't seem to be the best method for handling the questions facing the legal community about discovery issues.

We have touched on some rulings by judges faced with discovery decisions of which their predecessors never dreamed. Like Judge Peck in S.D. New York, they have advanced the cause by making what a few years ago would have been too radical to be upheld by higher courts. Today they are becoming precedent. These judges and probably not a think tank, legislative committee or study group are the real avant-garde of the New Discovery.

Appendix A 8/30/2011

This document was authored by Second Judicial District Court Judge Ann Frick

DOCUMENTS

EXISTING	PILOT
Civil Cover Sheet	Changed Cover Sheet • Judge reviews all Cover Sheets and Complaints at time of filing and determines if case is within Pilot Project

DOCUMENTS

EXISTING	PILOT
Delay Reduction Order	New Pilot Project Order • Explain core principles (e.g. proportionality) • New time table chart • Link to Pilot Rules • Plaintiff serves Initial Disclosures BEFORE Answer and Responsive Pleadings are Filed • Plaintiff must serve copy of Order on Defense & file Return of Service

PROCEDURE

EXISTING

- Motion to Dismiss is Filed
  - No need to file Answer
  - Automatic Stay until case is at issue
    CRCP 16(b), 26(a)(1), 26(d)

PILOT

- Motion to Dismiss is Filed
  - Must also file Answer
  - No Stay of Disclosures, Case Management Conference or Other Rules PPR 4.1

PROCEDURE

EXISTING

- Rule 26(a) Disclosures
  - Narrower scope and less informative, merely identify the subjects of the person's information.
    CRCP 26(a)(3)
  - Sanctions discretionary & weaker, fees & costs. CRCP 26(g)(3)

PILOT

- Initial Disclosures
  - Broader scope, more specific and complete– provide description of each person's information, disclose harmful as well as supportive documents and persons
  - Mandatory stronger sanctions for untimely/incomplete disclosures,
    Excused if "justified" or "harmless"
    PPR 3.7

PROCEDURE

EXISTING

- Preservation of Documents
  - No rule

PILOT

- Preservation of Documents
  - Specifically addressed
  - Important for electronically stored information
  - Counsel must confer & agree to preservation.
  - If no agreement , Court issues a Preservation Order
  - Costs borne by producing party, but Court may shift costs
    PPR 6.1 & 6.2

8/30/2011

PROCEDURE

EXISTING	PILOT
Case Management	**Case Management**
Presumptively no Case Management Conference or Order CRCP 16(b)(1)(d)	Joint report for Case Management Conference PPR 7.1, App. B
	Initial Case Management Conference Mandatory, no later than 49 days after last Answer filed. PPR 7.1
	Case Management Order issued by Judge . PPR 7.2, 7.3, App. B

PROCEDURE

EXISTING	PILOT
Continuances/Extensions	**Continuances/Extensions**
Usually granted, especially if unopposed	Denied upon receipt, even if unopposed, unless extraordinary circumstances exist. PPR 1.4, 3.8
	No continuances of trial date solely based on failure to complete expert disclosures. PPR 7.3
	Original trial date NOT reset absent extraordinary circumstances. PPR 8.5

PROCEDURE

EXISTING	PILOT
Experts	**Experts**
Expert report or summary pursuant to CRCP 26(a)(2)	Complete, detailed, initialed, expert report. PPR 10.1(a), App. C
Expert depositions of all identified experts pursuant to CRCP 26(b)(4)	No expert depositions
Nearly impossible to limit expert trial testimony to prior disclosures	Expert's trial testimony on direct limited to contents of report. PPR 10.1(b)
Produce expert's file, including drafts of report	Produce expert's file, excluding drafts of report. PPR 10.1(c), App. C
No limit to number of expert witnesses	Only one expert per side in any given specialty & on any given issue. PPR 10.2

PROCEDURE

EXISTING	PILOT
Judges	**Judges**
Not necessarily the same Judge throughout case.	Same Judge throughout case. PPR 5.1
Frequently Judge has no contact with counsel until trial.	Increased judicial case management
	Initial case management conference within 49 days of answer PPR 7.1
	Soon after conference, issue comprehensive CMO PPR 7.2, App. B
	Assumes active case management and additional conferences by phone or videoconference PPR 8.1-8.4

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