

January 2015

## E-Discovery in 2015: Will You Feel The Earth Move Under Your Feet?

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The civil litigation landscape is constantly changing as new laws are passed, new rules are promulgated, and new opinions are issued. As in the natural world, some areas are more prone to change than others, and the bedrock of discovery has significantly shifted in recent years. The rumblings began in earnest in the early part of this century, as judicial opinions began to address the significant challenges posed by the proliferation of electronic information in daily life. Then, in 2006, “the big one” hit, and the Federal Rules of Civil Procedure were amended to substantially address the discovery of electronically stored information (“ESI”). Eight years later, the aftershocks of that tremendous shake up continue and new fault lines have begun to emerge, providing clues—and warnings—as to where the next big shifts are likely to occur. In this article, we will identify some of those areas, including emerging standards of competence in electronic discovery, the pending amendments to the rules of civil procedure, and the continuing evolution of the use of technology in electronic discovery, and beyond.

### Modern Competence

Modern competence requires a heightened level of familiarity with technology. Indeed, it is arguably impossible in this day and age to practice law in any area without some contact with ESI. This reality was recently recognized, at least impliedly, by the American Bar Association, and reflected in an amendment to the comments to Rule 1.1 of the Model Rules of Professional Conduct addressing competence. Specifically, paragraph 8 now counsels that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”<sup>1</sup> Many state jurisdictions have come to the same conclusion and adopted similar (or the same) language in the comments to their rules on competence, including Delaware,<sup>2</sup> Pennsylvania,<sup>3</sup> Kansas,<sup>4</sup> Arkansas,<sup>5</sup> and North Carolina.<sup>6</sup>

In California, the state bar association has taken a more direct approach to the question of competence in electronic discovery. In February 2014, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 11-0004, addressing “ESI and Discovery Requests” for public

<sup>1</sup> Emphasis added.

<sup>2</sup> DELAWARE LAWYERS’ RULES OF PROF’L CONDUCT R. 1.1 cmt. (2013).

<sup>3</sup> PENNSYLVANIA RULES OF PROF’L CONDUCT R. 1.1 cmt. (2013).

<sup>4</sup> KANSAS RULES OF PROF’L CONDUCT R. 1.1 cmt.

<sup>5</sup> ARKANSAS RULES OF PROF’L CONDUCT R. 1.1 cmt.

<sup>6</sup> NORTH CAROLINA RULES OF PROF’L CONDUCT R. 1.1 cmt (2014).

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comment.<sup>7</sup> Specifically, the opinion addresses the question: “What are an attorney’s ethical duties in the handling of discovery of electronically stored information?” The opinion concludes that “[a]ttorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery ...” and that “[o]n a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI.” The opinion also counsels that an attorney lacking the requisite understanding of e-discovery “has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation.”

Although it remains to be seen how these emerging standards may affect the landscape of discovery in the long term, it is clear that the days of excusing one’s mistakes by claiming a lack of technical savvy are over.<sup>8</sup> Accordingly, if you find yourself on the wrong side of this fissure—the line between those with the requisite competence and those without—its time to jump the expanding gap before you fall in, or to find reliable e-discovery counsel or another expert to build a bridge for you if needed.

## Records Management and Information Governance

The ethical duty to remain competent with regard to relevant technologies is particularly important in the context of records management and information governance, where available technologies and their applications in a business context continue to rapidly evolve. In recent years, a number of fault lines have emerged within many organizations as they seek to address the competing needs to (i) understand records management systems, policies, and practices relevant to information at issue in litigation, (ii) maintain compliance with differing (and, at times, divergent) records management requirements in various jurisdictions, and (iii) pursue information governance as a means of leveraging knowledge for business purposes while disposing of unnecessary records that could cause undue risks, burdens, and costs.

One cause of fractures within the landscape of organizational records management is the multiplicity of systems involved in such management. Organizations rarely make use of only one records management system. In fact, many organizations rely on a combination of centrally-managed records and information systems (such as a company e-mail system and networked server locations); record storage media owned by the company, but managed by individual employees (such as laptop computers and company-issued mobile devices); and electronic record repositories that are externally managed on behalf of the company (such as company-sponsored social media accounts and “cloud-based” storage locations). Furthermore, an increasing number of companies are permitting employees to access, use, and, in some cases, store business records on personally-owned mobile devices under the auspices of “Bring Your Own Device” (“BYOD”) policies. Differences in how information is organized and maintained within these various systems can cause fractures and complications in how an organization applies consistent records management practices across these systems. However, understanding the different record systems used by an

<sup>7</sup> Following the initial public comment period, the interim opinion was revised in response to public comments and approved for an additional 90-day public comment period, ending April 9, 2015. The revised opinion is available here: <http://calbar.ca.gov/AboutUs/PublicComment/201501.aspx>.

<sup>8</sup> James v. Nat’l Fin. LLC, No. 8931-VCL, 2014 WL 6845560, at \*12 (Del. Ch. Dec. 5, 2014) (“Professed technological incompetence is not an excuse for discovery misconduct.”).

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organization, as well as the organization's rights to access, copy, monitor, and dispose of information held within these systems, is key to providing competent and effective legal guidance to that client in response to both litigation and the ongoing demands of legal compliance.

Another source of fault lines regarding organizational records management involves the differing legal requirements related to retention of records. Within the United States, different federal and state laws and regulations impose varying legally-mandated retention requirements. In many cases, these differing retention requirements may cause the same records in two different states to be subject to retention requirements of different minimum lengths. In other cases, organizations involved in certain regulated industries may be subject to longer retention requirements for specific records than other types of organizations in the same jurisdiction. Furthermore, retention requirements in foreign jurisdictions often differ significantly from U.S. requirements. Indeed, several foreign jurisdictions impose retention requirements with *maximum* retention periods in order to facilitate data privacy. As a result, record retention requirements under U.S. and foreign laws often differ and, in some cases, directly conflict. Superimposed over all such record retention requirements applicable during routine business operations are record preservation duties that are triggered by actual or reasonably anticipated litigation and that must be met to avoid allegations of, and sanctions for, spoliation. These divergent retention and preservation requirements cause tremors in many organizations and can lead to an environment in which employees are hesitant to dispose of any materials due to fear of falling into the chasms of non-compliance and spoliation.

Finally, all organizations wrestle with the tension between the imperative to maintain records with business and legal compliance value and the desire to reduce costs and potential risks by clearing out unnecessary, duplicative, and superseded information. Often, organizations err on the side of over-preservation in the hopes of avoiding negative consequences related to inappropriate record disposal. However, such a decision inevitably results in the retention of unnecessary records. "A recent survey of corporate CIOs and general counsels conducted at a Compliance, Governance and Oversight Council ("CGOC") summit [in 2012] found that typically only 1 percent of corporate information is on litigation hold, only 5 percent is in a records retention category and a mere 25 percent has any current business value."<sup>9</sup> Accordingly, this survey suggests that nearly seventy percent of data maintained within companies has *no legal, regulatory, or business value*. Retention of such "data debris" can create risks, burdens, and costs associated with its storage, maintenance, and oversight, with regard to potential cyber-risks and the costs of maintaining insurance coverage against such risks, and with regard to future litigation and government inquiries.

While fault lines continue to develop (and, in some cases, widen) as companies and organizations retain ever-greater volumes of information of various types and formats, technologies are beginning to emerge that offer opportunities to bridge these divides. For instance, a number of technology companies now offer enterprise-wide solutions that apply records management rules and default retention periods to electronic records on the basis of their categorization. Some of these tools go ever further by leveraging the ability of software, such as predictive coding tools, often integrated in technology-assisted document review in

<sup>9</sup> L. Luellig & J. Frazier, *A COBIT Approach to Regulatory Compliance and Defensible Disposal*, 5 ISACA J. 31 (2013), <http://www.isacajournal-digital.org/isacajournal/2013vol5#pg33>.

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order to facilitate electronic record categorization for such enterprise-wide records management solutions.

### Technology Assisted Review

Over the past few years, courts have shown an increasing willingness to allow parties to employ advanced technology-assisted review (“TAR”) technologies (and particularly predictive coding) to facilitate document review. In 2014, opinions in several cases have highlighted this emerging judicial acceptance of TAR tools, particularly in disputes involving large volumes of electronic records.<sup>10</sup> However, litigants are finding value in TAR tools in other contexts as well, including early case assessment, quality assurance at the end of a document review, and the examination of received document productions.

While courts have indicated that TAR technologies may be appropriate discovery tools generally, fault lines have emerged regarding how these technologies should be specifically applied. In the latter half of 2013, for example, much ado was made of the court’s opinion in *In re: Biomet M2a Magnum Hip Implant Products Liability Litigation*,<sup>11</sup> in which the court addressed the parties’ disagreement regarding the identification of discoverable documents in Biomet’s seed set, that was used to train the predictive coding algorithm. The court ultimately declined to compel the identification, but noted Biomet’s “unexplained lack of cooperation” and urged Biomet to “re-think its refusal.”<sup>12</sup> In 2014, courts continued to address disagreements between parties as to predictive coding. In *Bridgestone Americas, Inc. v. International Business Machines Corp.*,<sup>13</sup> the court approved Plaintiff’s request to utilize predictive coding to review over two million documents identified by search terms provided by the defendant, despite Defendant’s objection that the request constituted an “unwarranted change in the original case management order” and that it was “unfair to use predictive coding after an initial screening has been done with search terms.”<sup>14</sup> The court acknowledged that it was “to some extent, allowing Plaintiff to switch horses in midstream” and thus reasoned that “openness and transparency in what Plaintiff is doing [would] be of critical importance.”<sup>15</sup> To that end, the court acknowledged and relied upon Plaintiff’s assertion that they would provide the defendant with the seed documents “initially used to set up predictive coding.”<sup>16</sup> In contrast to the court’s decision in *Bridgestone*, the court in *Progressive Casualty Insurance Co. v. Delaney*,<sup>17</sup> declined to approve Plaintiff’s unilateral decision to deviate from the agreed-upon e-discovery protocol and apply predictive coding to those documents already identified by search terms.

<sup>10</sup> See, e.g., *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, 143 T.C. No. 9, 15 (T.C. 2014) (approving Petitioner’s use of predictive coding to identify potentially responsive privileged data contained on two backup tapes despite Respondent’s objection that the technology was “unproven” and reflecting the court’s understanding that “the technology industry now considers predictive coding to be widely accepted for limiting e-discovery to relevant documents and effecting discovery of ESI without an undue burden”); *F.D.I.C. v. Bowden*, No. CV 413-245, 2014 WL 2548137, at \*13 (S.D. Ga. June 6, 2014) (addressing the parties’ disagreement over an appropriate ESI protocol and instructing the parties to “consider the use of predictive coding”).

<sup>11</sup> No. 3:12-MD-2391, 2013 WL 6405156 (N.D. Ind. Aug. 21, 2013).

<sup>12</sup> *Id.* at \*2.

<sup>13</sup> No. 3:13-1196, 2014 WL 4923014 (M.D. Tenn. July 22, 2014).

<sup>14</sup> *Id.* at \*1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> No. 2:11-cv-00678-LRH-PAL, 2014 WL 3563467 (D. Nev. July 18,, 2014) *amending and superseding* 2014 WL 2112927 (D. Nev. May 20, 2014).

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2015 will likely see additional disputes regarding the use of TAR technologies in litigation, and many such disputes are likely to involve more nuanced questions related to the particular utility of certain TAR tools and specific functionalities, settings, and standards incorporated within such tools. In addition, other TAR technologies beyond predictive coding will likely be assessed by courts in the coming months. For instance, courts will likely hear disputes in the future regarding the suitability of alternative TAR tools that rely on pattern and glyph recognition to facilitate discovery involving non-text-based documents, such as images, maps, and photographs. While 2014 certainly reflected the growing judicial awareness and acceptance of TAR technologies, 2015 promises to be a year in which the details regarding the application of these technologies are subject to more granular review in the courts.

### Proposed Amendments to the Federal Rules of Civil Procedure

Even as the aftershocks of the 2006 amendments persist and practitioners and courts continue to struggle with the proper application of those changes,<sup>18</sup> new fault lines are beginning to emerge as proposed amendments to the Federal Rules of Civil Procedure once again wend their way through the approval process.

In 2010, following the May Conference on Civil Litigation at Duke University Law School, there emerged “near-unanimous agreement” that “the disposition of civil actions could be improved by advancing cooperation among parties, proportionality in the use of available procedures, and early judicial case management.”<sup>19</sup> Accordingly, significant work was undertaken by the Advisory Committee on the Federal Rules of Civil Procedure to promulgate proposed amendments in accordance with the conclusions of the conference. Currently, proposed amendments to the federal rules are making their way through the approval process and will become effective in December 2015 if approved at all stages. Proposals related to two rules in particular have generated significant debate and warrant specific attention.

**Rule 26 and Proportionality:** Rule 26 is a foundational rule of discovery that would be significantly affected by adoption of the proposed amendments. In particular, the proposed amendments would serve to better highlight the importance of proportionality by moving the factors currently present in Rule 26(b)(2)(C) (plus one new factor, “the parties relative access to relevant information”) into Rule 26(b)(1), which governs the scope of discovery. “The Committee’s purpose in returning the proportionality factors to Rule 26(b)(1) is to make them an explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes.”<sup>20</sup> Notably, in response to significant public comment, the Committee took pains to make clear that the amendment is neither intended to shift the burden of establishing proportionality to the requesting party nor to provide a new basis for refusing discovery. Rather, the change

<sup>18</sup> *E.g., compare* Anderson Living Trust v. WPX Energy Prod. LLC, 298 F.R.D. 514, 514 (D.N.M. 2014) (concluding that “the term “documents” in rule 34(b)(2)(E)(i) does not include ESI, and, thus, the rule 34(b)(2)(E)(i) requirement that documents be produced either in the usual course of business or labeled to correspond to categories in the request does not apply to ESI.”), *with* Venture Corp. Ltd. v. Barrett, No. 5:13-cv-03384-PSG, 2014 WL 5305575 (N.D. Cal. Oct. 16, 2014) (analyzing the proper application of Rule 34 and applying the requirements of Rule 34(b)(2)(E)(i) to Plaintiff’s document production).

<sup>19</sup> COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE, at Appendix B-2 (September 2014) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> [hereinafter REPORT OF THE JUDICIAL CONFERENCE].

<sup>20</sup> *Id.* at B-8.

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should “prompt a dialogue among the parties and, if necessary, the court, concerning the amount of discovery reasonably needed to resolve the case.”<sup>21</sup> Another important proposed amendment to Rule 26(b)(1) would delete “the reference to broader subject matter discovery, available upon a showing of good cause,”<sup>22</sup> where, “[i]n the Committee’s experience, the subject matter provision is virtually never used, and the proper focus of discovery is on the claims and defenses in the litigation.”<sup>23</sup> Other proposed amendments to Rule 26(b)(1) would delete the laundry list of discoverable matters currently present in the rule and revise language addressing the admissibility of information within the scope of discovery, to curtail tendencies to rely on such language to justify expansive interpretations of scope.

**Rule 37 and Preservation:** Another major proposed amendment would replace current Rule 37(e) entirely. Although the current Rule 37(e) was intended to provide some safe harbor against sanctions for the loss of information “as a result of the routine, good-faith operation of an electronic information system,” it has not been broadly applied. As a result, and because parties are keen to avoid the consequences of being deemed a spoliator, costly and often unwarranted over-preservation has become a major problem. This over-preservation and a troublesome lack of uniformity in the way courts have approached the loss of ESI (which contributed to the problem of over-preservation) led to the conclusion that the “time had come for a more detailed rule.”<sup>24</sup>

Thus, although the proposed new Rule 37—which applies only to electronically stored information—does not provide specific direction regarding when the preservation obligation is triggered or its proper scope, it “authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures.”<sup>25</sup> In other words, it reduces uncertainty which may, in turn, allow parties to make better informed decisions regarding preservation. For example, although courts would retain much of their discretion to impose measures “no greater than necessary” to cure prejudice arising from the loss of ESI “that should have been preserved” in anticipation of litigation, they would be precluded from imposing certain major sanctions, including an adverse inference, absent a finding that the spoliating party “acted with the intent to deprive another party of the information’s use in the litigation.”

Although too numerous to be discussed in detail here, it is important to note that in addition to Rules 26 and 37, other potentially affected rules include 1, 4, 16, 30, 31, 33, 34, 55, and 84.

Where the proposed amendments, if adopted, are likely to significantly affect the discovery landscape once again, and in light of the experience of many who are still adjusting to the changes brought about in 2006, it is wise to consider in advance how the proposed changes may affect day to day practice and to plan accordingly.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at B-9.

<sup>23</sup> *Id.*

<sup>24</sup> Committee on Rules of Practice and Procedure, *Agenda Materials, Washington, D.C., May 29-30, 2014*, at 306 available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks>.

<sup>25</sup> REPORT OF THE JUDICIAL CONFERENCE, Proposed Rule 37(e) Committee Note, at B-58.

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### Conclusion

It is clear from even this brief overview that the landscape of discovery is once again in flux. And, although we may all have our predictions about what changes may (or may not) result, there can be no certainty until the shaking has stopped and there is time to examine the terrain. Nonetheless, where the fault lines are clearly identified, we are all well-advised to be prepared to move to new ground.

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