

Book Review

THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK: FORMS, CHECKLISTS, AND GUIDELINES

*by Sharon D. Nelson, Bruce A. Olson and
John W. Simek
American Bar Association 2006
745 pp.*

Reviewed by William V. Rapp¹

Changes as of December 2006 in the Federal Rules of Civil Procedure as they relate to electronic evidence or e-evidence have brought the legal issues concerning the discovery of electronic materials into prominence along with their maintenance and preservation. As Jim Caitlan and Douglas Cohen have noted in a recent article: “The critical aspect of electronic discovery is not only finding relevant documents, but also clearly identifying and eliminating those that are *not*. In this new era of e-discovery, you must collect only what is necessary or suffer the tremendous burden of wasteful, redundant review.”² In

1. William V. Rapp is a Professor of Strategy and International Business at The New Jersey Institute of Technology’s School of Management and a third year evening law student at Pace Law School.

2. Jim Caitlan & Douglas Cohen, *The Natural Selection of Document Collection*, A.B.A. SEC. LAW PRACTICE MGMT. 1 LAW TECH. TODAY 3 (2007), http://www.abanet.org/lpm/lit/articles/vol1/is3/Natural_Selection_of_Document_Collection.shtml.

turn “the newly amended *Federal Rules of Civil Procedure*, especially Rule 26(a)(1B), requires counsel to clearly understand the client’s IT infrastructure and electronic retention policies.”³

In many ways the new rules are attempts by the law, the courts, and counsel to begin catching up with the technology and organizational realities generated by the tremendous growth of e-mail, the Internet, and electronic databases that together have resulted in exploding and extensive electronic documentation and data storage. As U.S. Magistrate Judge for the District of New Jersey Ronald J. Hedges observed in his monograph on electronic discovery or e-discovery for the Practising Law Institute,⁴ “Computer files, including e-mails are discoverable,” and the potential volume is huge compared to paper documents.⁵ The judge notes “[c]omputerized data have become commonplace in litigation. The sheer volume of such data, when compared to conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create back-up data measure[d] in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text.”

Further this “electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, hand-held devices, automobiles, or household appliances.”⁶ Anyone who saw the movie “Breach” would recognize the importance of even hand-held devices including ipods. The Federal Bureau of Investigation information break in catching the Russian mole that had eluded them for many years came when they were able to secretly download the data from his hand-held.

3. Jim Caitlan is Senior Discovery Consultant and Douglas Cohen is Senior Vice President of Discovery Solutions at TrialGraphix, a national litigation consulting firm specializing in discovery, trial consulting, and presentations.

4. U.S. MAG. J. RONALD J. HEDGES, PSS SYSTEMS, DISCOVERY OF DIGITAL INFORMATION, (2d ed. 2006), http://www.pss-systems.com/resources/hedges_edition2.pdf.

5. *Id.* at 1.

6. *Id.* at 10.

The sheer quantity of available electronic data means an electronic data retention or “discovery plan must address issues relating to such information, including the search for it and its location, retrieval, form of production, inspection, preservation and use at trial.”⁷ Nor can one just plead inability or cost under Federal Rules of Civil Procedure Rule 26(b)(2) as a way to avoid production if the company has just failed to reasonably organize their files. As Judge Hedges succinctly states “[c]onclusionary or factually unsupported assertions by counsel that the discovery of electronic materials should be denied because of burden or expense can be expected to fail.”⁸ This is because a trial court’s cost benefit balancing test will consider whether the company has made a good faith effort as well as the relative importance of the information to the case in question.

Rule 34(b)(1)(B) in particular allows the party to “specify the form or forms in which electronically stored information is to be produced,” while Rule 37(f) gives this specification teeth because “[i]f a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f) the court may . . . require that party or attorney to pay any other party the reasonable expenses, including attorney’s fees, caused by the failure.” In addition to these general rules, parties are often subject to special local rules in different federal courts.

Furthermore, it is not just the Federal Rules of Civil Procedure that e-discovery issues have affected. Retention and production issues are subject to various state court rules as well.

7. *Id.*

8. *Id.* at 78-79 (explaining the e-discovery process has affected the following Federal Rules of Civil Procedure: Rule 5.2 (Privacy Protection For Filings Made with the Court); Rule 11(b) (Representations to the Court); Rule 11(c) (Sanctions); Rule 16(b) (Scheduling; Management); Rule 16(c) (Attendance and Matters for Consideration at Pretrial Conferences); Rule 26(a)(1) (Duty to Disclose - General Provisions Governing Discovery - Required Disclosures - Initial Disclosure); Rule 26(b)(1) (Discovery Scope and Limits - Scope in General); Rule 26 (b)(2) (Limitations on Frequency and Extent); Rule 26 (b)(5)(B) (Claiming Privilege or Protecting Trial Preparation Materials, Information Produced); Rule 26 (c) (Protective Orders); Rule 26(f) (Conference of the Parties; Planning for Discovery); Rule 30 (b)(6) (Depositions by Oral Examination -Notice of Depositions - Other Formal Requirements - Notice of Subpoena Directed to an Organization); Rule 34(a) (Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes, In General); Rule 34 (b) (Procedure); Rule 37 (f) (Failure to Participate in Framing a Discovery Plan)).

Finally the Sarbanes-Oxley Act of 2002 has created criminal liabilities for organizations. Therefore even without the recent changes in the Federal Rules of Civil Procedure the fact that communication and transactions are increasingly being done via the Internet and e-mail combined with the rapid growth in cyber-crime has dramatically altered the electronic evidence gathering landscape and will continue to do so.

Indeed the fact that some evidence such as e-mail is only available in electronic form has played a critical role in several high profile cases such as *Zubulake v. UBS Warburg LLC*, cases I-V, and *Arthur Anderson LLP v. United States*,⁹ as well as in recent congressional hearings and subpoenas issued to the White House over the firing of several U.S. prosecutors. The tremendous explosion in the need for and review of e-evidence when combined with the millions of documents a modern corporation or government can generate has created both large technical and legal challenges for attorneys and the courts. The challenges this situation can present to inside and outside corporate counsel or others involved in the discovery and litigation process can indeed be physically enormous and mentally mind-boggling.

Preparing for the omnipresent possibility of litigation plus keeping track of and monitoring the process when actual litigation or the prospects thereof arises clearly creates the need for more communication between counsel and the firm's Chief Information Officer (CIO) to decide on the appropriate organization and transfer of electronic information or e-information including selecting and contracting with e-discovery technology providers.

This is why most current law office technology support programs provide some sort of e-discovery software and processing. But this technological support varies quite widely from merely organizing the data in a discoverable fashion that will help provide any discovery process that is conducted to be done in a more organized and efficient manner to actually providing forensic services and specialized expertise by industry

9. There are five *Zubulake* decisions and they are seminal to e-discovery in terms of civil action whereas the *Anderson* case was a criminal prosecution. For the former, see 216 F.R.D. 280; 217 F.R.D. 309; 2004 WL 1620866 (S.D.N.Y.); 2005 WL 627638 (S.D.N.Y.). For the latter, see 125 S.Ct. 2129 (2005).

sector. However, where does one begin in sorting out the issues and developing an e-discovery plan?

The American Bar Association Law Practice Management Section addressed this issue in 2006 when it sponsored publication of *The Electronic Evidence and Discovery Handbook* by Sharon D. Nelson, Bruce A. Olson, and John W. Simek. This practical guide anticipated the changes in the Federal Rules of Civil Procedure plus the continued explosion of discoverable e-information. It is thus a laudable attempt to give assistance to counsel on how to manage and deal with complex e-discovery situations. It puts in one place items that will help attorneys looking to discover evidence and also corporate counsel looking to preserve and properly maintain electronic records in compliance with statutory obligations or court orders. It can also assist courts looking for guidance in responding to motions, issuing orders, or delivering judgments related to e-evidence. Further, the accompanying compact disc makes its various templates and materials user-friendly for producing or filing documents in electronic or printed form.

One such aid is a complete glossary of technical terms developed by the Sedona Conference for use in legal documents. Other assistance can be found in the form of checklists on requests for information or filing motions. The *Handbook* gives guidance as well on engaging and vetting e-experts or other e-discovery vendors including sample contracts and service checklists. There are form letters covering the preservation of e-evidence and form memos on e-information retention and preservation policies. There are form letters and motions directly related to e-discovery including interrogatories, requests for production, motions to compel, motions for protective orders, and motions for sanctions.

Completing the process the *Handbook* provides sample orders for the courts in order to support the various motions. Finally, there are concise readable summaries and cites for important recent cases related to e-discovery and e-evidence.

In sum, while this book is not a panacea or a complete handbook to the evolving and expanding e-discovery process, it is still an essential component to get an appropriate program started. It will certainly keep an attorney on track when combined with the sophisticated and well-tailored technology pro-

gram the authors advise lawyers and organizations to develop and for which the book gives acquisition guidance. Thus, it should definitely form a part of the library of any lawyer likely to be involved in e-discovery in the same way that a lawyer would keep a copy of Black's Law Dictionary to periodically check the precise meaning of certain legal terms.