

# A New Era?

## Getting Ready for the E-Discovery Amendments to the Federal Rules of Civil Procedure

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# Why Is This Presentation Important?

- ◆ New rules effective December 1, 2006. “The biggest change in a generation or two.”<sup>1</sup>
- ◆ More and more documents are stored electronically.
- ◆ Hefty sanctions for failing to preserve/produce electronic evidence. Zubulake and Morgan Stanley.

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1. Richard Acello, *E-Mail to Lawyers: E-Discovery Rules on the Way*, ABA Journal E-Report, October 7, 2005.



## The New Rules Fall Into Five General Categories

1. Identifying electronic discovery issues early in the case
2. Electronically stored information that is not reasonably accessible
3. Post-production privilege and work-product protection
4. Discovery tools: interrogatories, requests for production, and subpoenas
5. Sanctions (and a safe harbor)



# **Identifying Electronic Discovery Issues Early in the Case**



# Rule 16. Pretrial Conferences; Scheduling; Management

## (b) Scheduling and Planning.

\* \* \* \* \*

The scheduling order also may include

- (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
- (5) provisions for disclosure or discovery of electronically stored information;
- (6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;
- (75) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (86) any other matters appropriate in the circumstances of the case.

\* \* \* \* \*



## Rule 26. General Provisions Governing Discovery; Duty of Disclosure

### **(a) Required Disclosures; Methods to Discover Additional Matter.**

**(1) *Initial Disclosures.*** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

**(A)** the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information.

**(B)** a copy of, or a description by category and location of, all documents, electronically stored information, ~~data compilations~~, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;



## Rule 26. General Provisions Governing Discovery; Duty of Disclosure

**(f) Conference of Parties; Planning for Discovery.** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 15(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:



## Rule 26(f) (continued)

- (1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
- (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
- (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- (4) any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order.



## Rule 35. Report of Parties' Planning Meeting

**(3) Discovery Plan.** The parties jointly propose to the court the following discovery plan: [use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects:

\_\_\_\_\_ (brief description of subjects on which discovery will be needed) \_\_\_\_\_

Discovery or discovery of electronically stored information should be handled as follows: \_\_\_\_\_ (brief description of parties' proposals) \_\_\_\_\_

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: \_\_\_\_\_ (brief description of provisions of proposed order)

All discovery commenced in time to be completed by \_\_\_\_\_ (date) \_\_\_\_\_. [Discovery on \_\_\_\_\_ (issue for early discovery) \_\_\_\_\_ to be completed by \_\_\_\_\_ (date) \_\_\_\_\_.]



**Electronically Stored Information that  
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LITTLE WHITE PIECE OF PAPER.



## Rule 26. General Provisions Governing Discovery; Duty of Disclosure

**(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

\* \* \* \* \*

(2) Limitations.

\* \* \* \* \*

(B) 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.

\* \* \* \* \*



## Who Pays for the Production of Electronic Documents?

- ◆ Traditional Analysis: Presumption under the civil rules that the responding party bears the burden of complying with discovery requirements. Courts have discretion to “grant orders protecting [respondents] from ‘undue burden or expense’ ...including orders conditioning discovery on the requesting party’s payment of the costs of discovery.”<sup>2</sup> Factors in determining “undue burden or expense” are: the needs of the case; the amount in controversy; the parties’ resources; the importance of the issues at stake in the litigation (public policy implications); and the importance of the proposed discovery in resolving the issues in dispute.<sup>3</sup>

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<sup>2</sup> Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)

<sup>3</sup> See Fed. R. Civ. P. 26(b)(2)(iii).



# Who Pays for the Production of Electronic Evidence? (continued)

- ◆ Zubulake Seven-factor cost allocation test:
  1. The extent to which the request is specifically tailored to discover relevant information
  2. The availability of such information from other sources
  3. The total cost of production, compared to the amount in controversy
  4. The total cost of production, compared to the resources available to each party
  5. The relative ability of each party to control costs and its incentive to do so
  6. The importance of the issues at stake in the litigation
  7. The relative benefits to the parties of obtaining the information
- 1<sup>st</sup> two factors are most important, next three slightly less important, sixth will rarely apply, and seventh is least important
- Cost-shifting analysis is only triggered when electronic discovery imposes an “undue burden or expense.” This turns primarily on whether the data is kept in an accessible or inaccessible format.



# **Post-Production Privilege and Work Product Protection**



## Rule 26. General Provisions Governing Discovery; Duty of Disclosure

**(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

\* \* \* \* \*

(5) Claims of Privilege or Protection of Trial Preparation Materials.

\* \* \* \* \*

**(B) Information Produced.** If information is produced in discovery that is subject to a claim of privilege or of protection as 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 must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.



**Discovery Tools:  
Interrogatories, Requests for Production,  
and Subpoenas**



## Rule 26. Interrogatories to Parties

**(d) Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

\* \* \* \* \*



## Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

**(a) Scope.** Any party may serve on any other party a request (1) to produce ~~and~~ permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test, or sample any designated documents or electronically stored information ~~— (including writings, drawings, graphs, charts, photographs, sound recordings, images ~~phonorecords~~, and other data or data compilations stored in any medium from which information can be obtained, ~~— translated, if necessary, by the respondent through detection devices into reasonably usable form )~~, or to inspect, ~~and~~ copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).~~



## Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

\* \* \* \* \*

Unless the parties otherwise agree, or the court otherwise orders:

(i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.



# Rule 45. Subpoena

## (d) Duties in Responding to Subpoena.

- (1) **(A)** A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.
- (B)** If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.
- (C)** A person responding to a subpoena need not produce the same electronically stored information in more than one form.
- (D)** A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought 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.
- (2) **(A)** When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.
- (B)** If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.
- (e) Contempt.** Failure by of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

\* \* \* \* \*



# **Sanctions (and a Safe Harbor)**



# The Duty to Preserve Data

- ◆ It is well-settled that parties have a duty to preserve all evidence relevant to the claims or defenses of any party once litigation has commenced.<sup>4</sup> This includes electronic evidence.
- ◆ Applies to parties in “reasonable anticipation of litigation.”<sup>5</sup>
- ◆ Therefore, a party must protect against routine alteration or destruction of relevant documents until the matter has been fully resolved.
- ◆ Must a company faced with pending or threatened litigation save every relevant hard copy and electronic document? Guidance from Zubulake: When litigation is “reasonably anticipated,” a party must suspend routine document retention and destruction policies and institute a “litigation hold.” The hold or “freeze” applies to all “accessible” data and can extend to “inaccessible” data containing the documents of “key players.”<sup>6</sup>

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4. See Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)

5. Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 73 (S.D.N.Y. 1991)

6. Zubulake v. UBS Warburg, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“Zubulake IV”)



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**"Um ... do you mind if we take care  
of the paperwork, your honor?"**



## Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

\* \* \* \*

**(f) Electronically stored information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.



## Proposed Comment to Rule 37(f)

Good faith may require that a party intervene to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information, if that information is subject to a preservation obligation. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, such information is one aspect of what is often called a “litigation hold.” Among the factors that bear on a party’s good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.



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AND ALL THESE YEARS I JUST THOUGHT  
YOU WERE VERY PROFICIENT.



## Spoliation Is:

1. Making evidence unavailable when you have a duty to make it available; or
2. Submitting false or altered evidence



## A Bad Filing System Can Be Spoliation

*See Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D. Mass. 1976) (granting a default judgment because defendant indexed claims alphabetically as opposed to by type of product)



# When Does the Duty to Preserve Evidence Arise?

- Pending or foreseeable litigation
- Federal or state statute
- Contract



## Pending and Foreseeable Litigation

- Applies when you know or should know that evidence will be material to pending or imminent litigation or investigation
- Applies equally to prospective plaintiffs and defendants



## What Laws and Rules Apply for Enforcement?

- Federal and state statutes
- Inherent power of the court
- Rules of civil procedure
- Rules of professional responsibility



## Federal and State Criminal Statutes

- Washington law prohibits tampering, concealing or altering any physical evidence when “having reason to believe that an official proceeding is pending or about to be instituted.” R.C.W. §9A.72.150



# Inherent Power of Court

- May require a greater degree of intent
- Presumably required for pre-filing conduct



## Will Having a Good Document Retention Policy Avoid Any Spoliation?

- May help on intent
- Any document destruction must be modified once litigation is foreseeable
- Some courts have found document destruction policies to be evidence of bad faith



## Document Retention Policy

- *See Rambus Inc. v. Infineon* 318 F.3d 1081, 1108-1109 (E.D. VA 2005) (Prost, J. dissenting) (Rambus implemented a “document retention policy’ in 1998 in part ‘for the purpose of getting rid of documents that might be harmful in litigation’ . . . .”)



# What Are the Remedies for Spoliation?

- Adverse inference or presumption
- Monetary sanctions
- Exclusion of evidence
- Dismissal or default judgment



## Monetary Sanctions

- *United States of America v. Phillip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.C.C. 2004) (\$2.75 million fine against Phillip Morris for destroying email over a period of two years during tobacco case)
- *See also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615-17 (D.N.J. 1997) (\$1 million fine for “haphazard and uncoordinated approach to document retention” after court had ordered documents to be retained)



## Monetary Sanctions

- Attorneys may also be sanctioned. See *Bradley v. Sunbeam Corp.*, 2003 U.S. Dist. LEXIS 14451, at \*59 (N.D. W. Va. Aug. 4, 2003) (finding attorney \$100,000)



## Monetary Sanctions

- “Sunbeam followed its document retention policy rather than honoring discovery requests and . . . . Because of that, products were destroyed or not produced in blind adherence to its policy.”



## Monetary Sanctions

- “Drawing on more than 30 years of legal experience, both as a practicing attorney and a magistrate judge, the undersigned believes it is reasonable to assume that Moffett, as a national trial counsel for Sunbeam, bills approximately 2,000 hours, or more, per year at approximately \$250 per hour, or more, for a gross income of \$500,000, or more, per year. This Court believes that 20% of annual gross income is a reasonable sum to punish a lawyer for serious abuse of the rule of law and to deter other from engaging in similar conduct.”



## Monetary Sanctions

- CEO may be personally liable. See *Danis v. USN Communications, Inc.*, 53 Fed. R. Serv. 3d 828 (N.D. Ill 2000) (sanctioning CEO \$10,000 for failing to implement a suitable document retention policy)



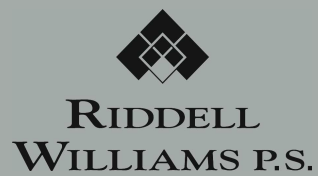
## Spoliation as an Independent Tort

- Not Washington, but other states (e.g. Alaska, Ohio, Indiana, Kansas, Montana and New Mexico) recognize some type of tort where:
  - 1) Negligent or intentional destruction of evidence;
  - 2) Agreement or duty to preserve evidence; and
  - 3) Harm to a civil action proximately caused by the destruction



# Practice Pointers

- ◆ Upon receipt of a request for production of electronic documents, become familiar with client's information technology system
  - ◆ Determine "accessible" vs. "inaccessible" data
  - ◆ Prepare IT personnel to act as 30(b)(6) witnesses
- ◆ Send out "litigation hold" notice
- ◆ Identify "key players" and make sure data is preserved
- ◆ If responding, look at Zubulake and Rule 26(b)(2) and prepare objections
- ◆ If requesting, try to understand opposing party's information technology system to distinguish between "accessible" and "inaccessible" requests (reduce chances of cost-allocation)
  - ◆ Consider an early 30(b)(6) deposition concerning the opponent's information technology system
- ◆ Try to meet early with opposing counsel and reach agreement on issues related to electronic discovery



# Questions?

Please contact me any time with additional questions.

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