

There is a New Rule in Town

The production of information during the litigation process is often the most frustrating and time consuming part of litigation. Your company can be dragged into litigation and be required to reveal information, which was never designed to be shared with the outside world. Discovery of information has always been part of the litigation process, but as a result of a change in the Federal Rules of Civil Procedure,² discovery is going to be much more expensive and more frustrating than it has been in the past. It is going to require more time of management and more time of counsel.³

Historically, when your business was the target of discovery, the main focus was paper documents. While searching for documents responsive to discovery was often time consuming in terms of personnel time and revenue production, the field of discovery was limited to "readily accessible material." The extent of that search has now undergone a massive change.⁴ Discovery is now no longer targeted to "readily accessible material." The new rules provide that discovery is allowed as to emails, voice mails, PDAs, hard drives, back up devices and other electronic medium in which electronic data is stored.

What does this mean to you? The change in the rules⁵ was primarily designed to make certain that electronic or computer stored data is now produced during the discovery process. In order to understand the significance of the rules change, it is necessary to understand some of the core concepts behind the changes.

When a document is created utilizing a word processing program, the history of that document is also maintained. The history of the document discloses, all authors, number of drafts, changes between drafts, comments made and then deleted from the document. For discovery purposes, the document's history is now discoverable. In Electronic Document Discovery this history is known as "metadata". The production of a document with its metadata in tact could potentially be both embarrassing and increase your company's exposure in any potential lawsuit.

However, discovery can also be responded to by providing a Tiff⁶ or PDF⁷ versions of a file. Since both TIFF and PDF represent "pictures" of documents, they contain little or no metadata⁸. The method of production has to be agreed to by counsel for both sides.

Separate from litigation considerations, you might well consider having your staff routinely convert documents to TIFF or PDF formats, prior to sending them out to their intended recipient as e-mail attachments or electronic faxing.

Every business should have a written Electronic Document Retention Policy. A Document Retention Policy should be designed to be litigation neutral and a practical answer to your company's computer space problem. Your company does not want to utilize valuable computer storage space for electronic data, which is not needed. The Document Retention Policy is a written policy of what your company is doing to save or remove unneeded electronic data from your company's computer systems. As long as the destruction of stored electronic data is consistent with your company's Electronic

Document Retention Policy, your company should not run into legal exposure for following your Document Retention Policy.

Your company's IT department knows how your computer system works and knows how to implement a workable Document Retention Policy. We would be happy to consult with your IT department to explain the significance of the new Federal Rules of Civil Procedure as it effects the destruction of electronic data.

Under the new rules, counsel for a potential litigant can send out, even before filing a lawsuit, a Litigation Preservation Letter that requires, among other things, electronic data relevant to the claim must be preserved and your company cannot continue business as usual with respect to your Document Retention Policy.

As soon as you receive a Litigation Preservation Letter, it is your responsibility to take affirmative action to comply with the Litigation Preservation Letter. You must discontinue your Document Retention Policy and protect potentially relevant electronic data from being destroyed⁹. You should let all involved personnel know about the receipt of the Litigation Preservation Letter and that they have an affirmative obligation to make certain that they do not over write potentially relevant electronic data on all drives, stored e-mail accounts and other places where electronic data is stored, whether property of the your company or retained on the employees' personal computer equipment, including PDA's.

It is beyond the purview of this article to explain all of the consequences of the new rules, but they are going to make for what will be in some respects for you "a new game in town." It is going to be necessary that your company know what is necessary to comply with the new Federal Rules of Civil Procedure regarding electronic evidence.

J This is the first in an intended series of articles on this subject.

2 While this article speaks to federal litigation, many aspects of it are equally applicable to state court litigation and that parallelism will only increase with the passage of time.

3 For better or worse, the most expensive component of discovery has been the review by counsel of what is being produced and to make tactical decisions with respect to that universe of what was and was not discoverable.

4 The changes in the FRCP were effective December 1, 2006 and mainly impacted Rules 16, 22, 26, 34 and 37.

5 The FRCP are the "Bible" of procedures which must be followed in preparing and then presenting for trial federal court cases. Nevada State Court rules are modeled after the Federal Rules. Although Nevada has not amended its rules to parallel the new change in the Federal Rules, it is only a matter of time until the interpretation of the Federal Rules "creep" over to invade the state court rules of procedure.

6 A system of archiving a document where the document is converted into a "picture" and data not contained in the document is stripped away. "TIFF" is an acronym for "Tagged Image File Format"

7 "PDF" is an acronym for "Portable Document File". It also entails a system of archiving a document where the document is converted into a picture and data not contained in the document is stripped away.

8 Tiff documents do contain some "entry level" bits of meta data, but of an essentially "harmless" variety.

9 Somewhere in the pantheon of calling your IT department, wife, and accountant, you should seriously consider calling your counsel.