Federal Evidence Rule Changes and Electronic Evidence

"The first thing we do, let's kill all the lawyers."

William Shakespeare
King Henry VI, IV, ii, 86

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Synopsis / Agenda

- **The Rules and where to find them**
- **Undue burden**
- **Maintaining privilege**
- **Form of production**
- **Non-sanctioned destruction**

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The Rules

- **Federal Rules of Evidence**
  - **http://www.law.cornell.edu/rules/fre/**
- **Federal Rules of Civil Procedure**
  - **http://www.law.cornell.edu/rules/frcp/**
- **Federal Rules of Criminal Procedure**
  - **http://www.law.cornell.edu/rules/frcrmp/**
- **Federal Rules of Bankruptcy Procedure**
  - **http://www.law.cornell.edu/rules/frbp/**

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Undue Burden

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(b) Discovery Scope and Limits.

(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.

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Undue Burden

- The deponent must show this unreasonable cost burden to the Court
- The movant may argue this assertion
- The Court may, considering the limitations of Rule 26(b)(2)(c), still compel discovery
- Also, the Court may specify conditions for the discovery

Undue Burden
(Interpretation)

- This seems to be an effort by the legal community and the Courts to reduce the costs of e-discovery
- This may have the effect of helping smaller parties resist larger adversaries
- Rulings on motions and counters under this rule will depend on the expertise of the Court

Undue Burden
(Recommendations)

- **Deploy and consistently use a job-costing system for e-discoveries (and consider making this part of an overall system)**
- **Negotiate terms and conditions with your archive vendors that include pricing for litigation support services**
- **Train you legal department staff in e-discovery law and technology**

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Privilege

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(b) Discovery Scope and Limits.

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

(A) Information Withheld.

(B) Information Produced.

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Emphasis Added

Privilege

(A) Information Withheld.

When a party withholds information otherwise discoverable under these rules by claiming that it is **privileged** or subject to protection as **trial -preparation** material, the party shall **make the claim expressly** and shall **describe the nature** of the documents, communications, or things not produced or disclosed in a manner that, **without revealing information itself privileged or protected**, will enable other parties to assess the applicability of the privilege or protection.

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Emphasis Added

Privilege

(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.

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Privilege
(Recommendations)

- Check all requests or motions to compel for privileged information
- Check all productions of information
- Check the metadata, too!

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From of Production

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(b) Procedure.

…The request may specify the form or forms in which electronically stored information is to be produced. …

…If objection is made to the requested form or forms for producing electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. …

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From of Production
(Continued)

…The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. …

…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;

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From of Production
(Continued)

(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.

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From of Production
(Interpretation)

- The Rule and the Committee Notes recognize that the "usual form" is probably the form that the Court will order
- Alternate forms require justification
- Multiple forms are generally not required

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From of Production
(Recommendations)

- Do not invest in elaborate "most common denominator" systems
- Resist efforts by opponents to assert that there is such a form
- Again, have good cost accounting of your e-discovery projects

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Non-Sanctioned Destruction

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

(f) Electronically Stored Information.

Emphasis Added

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.

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Non-Sanctioned Destruction
(Interpretation)

- **To use this rule to successfully resist (without sanctions) a motion to compel, the deponent must have *routine, good faith operations.***
  - **Translation: SOP's**
- **Expect to be asked to supply evidence that the procedures exist and are followed**
  - **Translation: Historical records**

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Non-Sanctioned Destruction
(Recommendations)

- **Create, review, approve, and rigorously follow a records destruction SOP**
  - **Or include this in your records retention SOP**
- **Consider all regulatory agencies in the design of your records retention and / or destruction schedules**
  - **In a discovery compelled by DEA, you might actually be operating under the FRCRMP's**

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Thanks! Any Questions?

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