

**Proposed Rules and New Practice Standards
for
Electronic Discovery**

David Nuffer

**Ronald N. Boyce Federal Bar Association Seminar
October 22, 2004 Salt Lake City, Utah**

Table of Contents

Presentation Outline 2-3

Proposed Amendments to Federal Rules of Civil Procedure

Rule 16 Pretrial Conferences; Scheduling; Management..... 4
Rule 26 General Provisions Governing Discovery; Duty of Disclosure 6
Rule 33 Interrogatories to Parties 13
Rule 34 Production of Documents, Electronically Stored Information, and Things and
Entry Upon Land for Inspection and Other Purposes 14
Rule 37 Failure to Make Disclosure or Cooperate in Discovery; Sanctions 18
Rule 45 Subpoena 20
Form 35 30

August 2004 Amendments to ABA Civil Discovery Standards

10..... The Preservation of Documents 32
29..... Electronic Information 32
30..... Using Technology to Facilitate Discovery 36
31..... Discovery Conferences 36
32..... Attorney-Client Privilege and Attorney Work Product 38
33..... Technological Advances 39

Proposed Rules and New Practice Standards for Electronic Discovery

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Presentation Outline

The new definition of “document”

Rule 33(d) “business records, including electronically stored information”

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

Testing and Sampling Rule 34(a)

ABA Standard 31(b) – subsets, keywords, neutral

Planning for Electronic Discovery

Rule 16(b)(5) – “disclosure and discovery of electronically stored information”

Rule 16(b)(6) – “agreement for protection against waiving privilege”

Form 35

Rule 26(f) – “discuss any issues relating to preserving discoverable information”

ABA Standard 29(a) – types and platforms

ABA Standard 31 – discovery conference checklist

Form of Production Rule 34 (b)

Request: “The request may specify the form in which electronically stored information is to be produced.”

Response: “including an objection to the requested form for producing electronically stored information”

Default: “If a request for electronically stored information does not specify the form of production, a responding party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. The party need only produce such information in one form.”

Note existing Rule 34(a) “translated, if necessary, by the respondent through detection devices into reasonably usable form”

ABA Standard 29(b) – specifying format, providing metadata and software

ABA Standard 30 – using technology to facilitate discovery

Two Tiers of Electronic Discovery

Rule 26(b)(1)

“Parties may obtain discovery . . . relevant to the claim or defense of any party”
“for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”

Proposed Rule 26(b)(2)

“need not provide discovery of electronically stored information that the party identifies as not reasonably accessible”
“good cause shown” “terms and conditions”

Privilege waiver

Rule 26(b)(5)(A) how to claim privilege

Rule 26(b)(5)(B) “without intending to waive notify return or destroy

Inadvertent waiver

Claw back - Produce and then review

ABA Standard 32 – Privilege protection

- Neutral
- Non waiver agreement
- Review procedure

Rule 45 incorporates some of these concepts for third parties.

ABA Standard 10 The Preservation of Documents

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

Limitation on sanctions for failing to provide electronically stored information routine operation caused destruction or loss of data

Proposal: Protection if “reasonable steps” taken

Alternative: Protection unless “party intentionally or recklessly failed to preserve”

Note: No safe harbor if a preservation order is in place

ABA Standard 29(b)(iii) Permitting Discovery/Cost Allocation

See also Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003)

http://www.nysd.uscourts.gov/rulings/02cv1243_05803.pdf

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003)

http://www.nysd.uscourts.gov/rulings/02cv01243_072403.pdf