Chapter 2: Discovery and the Law

Prior to 2006 the Federal Government began to realize that this newfangled electronic revolution sweeping through society at large was quickly beginning to impact the way the legal system operated. In short, it was time for a rules upgrade. So, with the speed of a herd of turtles the 2006 FRCP discovery amendments were eventually passed and their impact was quickly felt.

While the study of these early amendments is certainly educational we will not discuss them in detail here. Why? Because beginning December 1, 2015 a new set of superseding amendments are set to go into effect which will revolutionize the practice of discovery once again.

This time, the FRCP amendments are specifically targeting not only the problem of large amounts of discovery being requested and produced but also the unique problems and opportunities stemming from the fact that almost all information involved in discovery is now in an electronic format.

What about the states?

State discovery rules have often been drawn directly (or with minor revisions) from the FRCP rules although the general trend seems to be that state rules are considerably less restrictive and more open to interpretation (and thus provide less guidance to practitioners) than those of the FRCP. With the new amendments going into effect in December 2015 there will likely be a widening chasm between these new rules that will control within the federal courts and the state rules that may have resembled the old FRCP rules but now will likely seem rather behind the times.

Unfortunately, the process of changing state rules is arduous at best so many debates are expected to arise in state courts as parties attempt to justify their discovery practices using the FRCP amendments by trying to prove that the state amendments are so sadly out of date as to be almost useless. Thus, it is likely that the state body of common law will, for the foreseeable future, effectively dictate the changing interpretation of older state discovery rules long before the system gets around to actually changing the rule itself. It is important, then, for paralegals to keep a sharp eye on rulings being handed down that may begin to practically affect discovery practices as opposed to just knowing the state rules themselves verbatim.

Here, we choose to concentrate solely on the FRCP amendments set to take effect in December of 2015 and strongly advise you to not only be diligent in knowing your state discovery rules and their past analyses but remain vigilant as to applicable common law holdings affecting the interpretation of those rules.

Why do these amendments even matter?

In short, money. Yes, money, the element that truly makes the (legal) world go ‘round. In the past, sanctions for misbehavior related to discovery have mostly been against clients but the judiciary has increasingly made it clear that lawyers—and their pocketbooks—are
now also potentially eligible for the sanction chopping block. Judges are also beginning to liberally shovel out adverse inference instructions when spoliation occurs. Adverse inference instructions effectively tell juries that they may assume the evidence that is missing would negatively impact the party accused of the spoliation. It’s practically a losing verdict on a platter!

These penalties preceded the new amendments and come December 1, 2015 the stakes with become increasingly higher for litigators who either are unfamiliar with electronic discovery in a technical sense or happen to run afoul of a particularly up-to-speed judge. You see, once these new discovery duties are clearly enumerated it then becomes incumbent on practitioners to follow them. That’s why they’re called duties. They’re mandatory, which means not following them may, effectively, be viewed as malpractice.

Truly grasping the nature of the new amendments requires, of course, extensive study of the actual amendments and the commentary that accompanies them. This is not the place for such particularity but a brief overview of the changes will still be helpful.

**Precision Counts**

First, electronic data is now officially referred to as electronically stored information, or ESI. This may seem like a small, minor and rather pitiful inconsequential change but it is actually quite revolutionary. You see, whereas before in discovery pleadings (discussed in detail later in this course) litigators used to have to insert a laborious, endlessly droning explanation of what “electronic information” or a “document” encompassed it’s now perfectly acceptable—and, indeed, required—to merely insert the term electronically stored information. This umbrella term now covers all things within the electronic information pool regardless of how you do—or do not—specify that information’s nature. The new FRCP rules define ESI so widely that it is hoped future technological advancements will fall more neatly into the confines of these amendments and thus future revisions may be avoided for quite some time.

**Peeping Is Now Permissible**

Amended Rule 34(a) now allows litigators to take small representative samples from large amounts of ESI in an effort to determine whether relevant information exists instead of having to dive directly into a gigantic pile of data and hope that somewhere in the haystack of irrelevant information is a usable needle. This “peeking”, should it result in the discovery of relevant information to the cause at issue, will then trigger the production of the whole haystack. But, if your sneaky peek does not result in the uncovering of relevant data it will then become rather difficult to justify forcing the other party to continue producing arguable irrelevant data.

**Requests for Format of Data More Customizable**

Amended Rule 34(b) allows you to request the format in which you wish ESI to be produced. So, if you want it in native format in order to prevent the spoliation of metadata you can certainly request it be produced as such. Of course, everything is negotiable so some back and forth over format is to be expected but this modification certainly puts some rights in place for those parties who prefer one format over another. But, if no format is specified, the producing party can present the data in the format in which it is ordinarily
found or, in the alternative, a merely “reasonably usable” format. What constitutes “reasonable” or “usable” is still up for debate.

We Decline to Answer...Sort Of

Amended Rule 33(d) is both a resounding trumpet of victory for laborious interrogatory answers and yet a minefield for an inexperienced, hasty or lazy litigator. Interrogatories, discussed in detail later in the course, are questions to which a respondent must answer and must answer under penalty of perjury. Now, instead of answering an interrogatory and then effectively re-answering it under a request for the production of documents a responding party can produce ESI in response to an interrogatory. Of course, this ESI submission must be explained in “sufficient detail to permit the interrogating party to locate and to identify...the records from which the answer may be ascertained” and must also allow the recipient of the information the opportunity to “examine, audit or inspect” the ESI identified in the response. Thus, while 33(d) provides relief on one hand for a producing party it simultaneously puts them in the tenuous position of potentially accidently revealing things they shouldn’t.

To Get or Not To Get...That’s No Longer Really the Question

Amended Rule 26(a)(1)(b) says ESI must be disclosed to the other party at the beginning stages of the case. But, there is always a catch. Here, the catch is that such ESI, even if its existence must be disclosed, doesn’t necessarily mean it has to be produced if it’s not reasonably accessible. ESI is not “reasonably accessible” if it’s so prohibitively expensive or unreachable that it would place an undue burden on the propounding party to produce it. Of course, just because a party may say ESI is “inaccessible” doesn’t mean it is truly such and “reasonable” and “accessible” are terms that will surely be hotly debated for quite some time.

Pardon Me, I May Have Made A Small...Mistake

The only thing worse than having to produce mountains of information is accidently producing something that shouldn’t have been handed over in the first place. Something privileged. Something damaging. Something not good for you or your client.

And while you cannot, in common legal parlance, un-ring the bell, you may, under this new Amended Rule 26(b)(5)(b) politely reach out your metaphorical hands and claw the information back. In other words, once you inform the other side you made a big oops and gave them something you oughtn’t they must promptly “return, sequester, or destroy the specified information” and any copies it may have made and take “reasonable steps” to get back the information if they’ve given it to another party.

It would be, of course, ideal if the amended rule gave you the ability to mentally wipe the minds of opposing counsel regarding the privileged information that may now unfortunately reside there but, alas, the federal judiciary can only do so much to protect a party from their own mistakes.
At Last We Meet

Certain state rules require a “meet and confer” between parties at the beginning of a case to discuss discovery issues. This meeting often takes the form of a letter, email, or telephone call in what is often a half-hearted attempt to find a common ground. But, according to Amended Rule 26(f), this meet and confer is now mandatory within the federal system and specifically spells out not only that ESI must be discussed but also lays out the particularity of the discussion. What does this mean for lawyers? It means finding an ESI expert or forensic computer examiner to be present for that conference if only to translate to an uneducated or inexperienced attorney what exactly is being discussed. Many attorneys will try to swap in the client’s (or their own firm’s) IT personnel as a substitute for a truly qualified forensic analyst which is invariably a terrible mistake as IT departments are just that—IT, and almost always not qualified to discuss the legal implications of data preservation and production.

Your Honor, The Dog Ate It

The other side of the dreaded duo of production errors (the first being inadvertent production of privileged materials) is the destruction of evidence by a party either by a good faith accident or as part of their common business practice. Perhaps even worse than handing over the privileged keys to the castle, figuratively speaking, is having to tell the opposition that not only do you no longer have the keys to the castle you’ve actually burnt down the castle itself.

Amended Rule 37(f) provides guidance in such situations. This amended rule allows a party to explain the destruction of evidence that has been requested by the opposition and thus avoid sanctions by the court for its unavailability. The protections of this amended rule depend heavily on the institution and monitoring of a proper litigation hold and the ability of the party at fault to prove that their document retention and destruction plan is defensible.