

INSIDE LITIGATION

Innovative Strategies for In-House Counsel

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Jim Michalowicz on ...

Striving for Sensible Standards

Pragmatic reflections on the rulemaking process— achieving reasonable, responsible and defensible processes for e-discovery and e-records.

In a fast-moving technological world, 15 years can seem like an eternity – but it can also feel like yesterday. That is how long I've been involved in the dialogue over e-records management. Others have also joined in the debate: corporations, law firms and the courts are now fully engaged in this conversation.

As the latest proposed amendments to the Federal Rules of Civil Procedure are considered, discussed and debated, we have the opportunity to see positive changes in the way we do business. The need for reasonable, responsible and defensible processes in e-discovery and e-records management provides a vehicle for discussion in light of potential amendments to Civil Procedure Rules 16, 26, 34 and 37.

It was my privilege to testify before the Civil Rules Advisory Committee in October 2000 while serving as DuPont's manager of legal services. Earlier this year, in January 2005, I again testified before the Rules

Committee at one of its public comment hearings on the amendments proposed for adoption in 2006.

At the hearings, I suggested ways to reduce the burden of the entire e-discovery process on all parties. The bench, plaintiffs and defendants can all

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benefit from process changes that amended rules could formally require.

It would seem that no one would argue with such goals as reducing costs for all parties involved in litigation, improving the accuracy of the document responses and reducing the time cycle from a defined request to

the delivery of documents. But as I learned listening to others testify, there are no shared goals for improving the discovery process and some see the benefits of a system that has inherent burdens.

As an information management professional, my focus is to develop an efficient discovery process that delivers an accurate and timely response to a defined discovery request. Discovery is an important phase in the litigation process that supports dispute resolution through decisions based on factual information. My comments to the Committee, which I share here, were intended to ensure that the Rules of Civil Procedure support these overriding goals and objectives.

Breakdowns in the Discovery Process

Many attorneys and their clients would agree that the three root causes of most problems in discovery are the imprecise definition of a request's scope; criticism of steps taken to preserve

material sought in discovery; and uncertainty about the form of the production.

However, no improvements will be made to the document discovery process unless everyone agrees that these breakdowns are defects inherent in the process. These defects should not be viewed as an opportunity for requesting parties to take advantage of the unknown in e-discovery, and they should not be able to shift the burden onto the responding party to determine what electronic information and media types may require preservation and production.

Poorly defined requests, which the requesting party can pose without any measurable risk, only exacerbate discovery inefficiency and inaccuracy. This should not be, as I heard one attorney describe it, "when the fun begins."

Precise definition in scope is critical to the discovery management process. Overly broad, imprecise requests make the process burdensome. Time spent interpreting or translating these requests slows down the process of evidentiary exchange. Given the nature of e-discovery requests this delay can be lengthy at times.

Without a clear definition in the request's scope as to relevancy or format of the evidentiary materials requested, the responding party is vulnerable to accusations of spoliation. While the responding party can attempt to address the request and identify likely custodians of evidentiary materials responsibly, the threat of a spoliation

claim remains.

Thus, an imprecise or broadly worded request or an opposing party's reluctance to make a conscientious effort at defining and identifying its request, forces respondents to preserve everything.

The Proposed Amendments

Currently, there are several proposed amendments to the federal rules that relate to e-discovery and e-records.

The proposed amendments to Rule 16 (which establishes a process for the parties and courts to address early issues pertaining to the disclosure and discovery of electronic information) and Rule 26 (which requires parties to discuss during the discovery-planning conference issues relating to the disclosure and discovery of electronically stored information) would establish a framework for both parties and the court to

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focus early attention to disclosure and discovery of electronic information issues.

The proposed amendments

support the goals and objectives of a discovery management process that seeks a reasonable, efficient and timely exchange of evidentiary materials between the parties. Addressing some of the e-discovery issues early on may reduce the breakdowns that now occur.

Many companies have developed early case assessment (ECA) protocols that address the facts, issues, potential costs and risks in a particular case. ECA is a defined process to collect facts that allow for an informed business decision. The proposed amendments suggest an ECA approach with a framework for addressing e-discovery issues that lead to a decision on the scope, preservation and form of document production. I recommend that the seven steps of discovery previously noted, or some variation, be used as a process map to build this framework.

Rule 34 currently distinguishes between electronically stored information and "documents." To address the form of production of requested materials, the proposed amendments to Rule 34 (b) permit the requesting party to specify how they want electronically stored information produced. The proposed amendments further suggest that if the parties cannot agree to the form of production, the responding party can either produce in the "form in which it is ordinarily maintained" or in an electronically searchable format.

I'm not convinced that the proposed amendments to Rule 34 (b) improve the document

7 STEPS TO MANAGING DISCOVERY

There are seven chronological steps involved when evaluating whether document discovery will be useful in a litigation. These apply to both paper and electronic information.

1. Define the scope of the request
2. Identify who oversees the record and information, and where those reside
3. Preserve potentially responsive materials
4. Collect the responsive materials
5. Convert and index the materials, in order to begin reviewing them
6. Review those materials for responsiveness and privilege
7. Produce materials to the requesting party—*J.M.*

discovery management process. The electronically searchable format, with limitations to protect attorney work product, could help the reasonable, efficient and timely exchange of evidence. The same is not true of the second option. Rather than improving the process, it may hamper the discovery exchange to allow material to be produced in the "form in which it is ordinarily maintained." Since electronic data is stored in

aggregated formats, it would be difficult to transfer the requested materials back to its native format, or the way it is normally maintained.

Another consideration, which impacts the form of production, is the option for the parties to develop an online repository of document discovery materials and share the cost of creation and maintenance. While it may seem like a foreign concept to adversaries in litigation, such cooperative solutions can meet the objectives of reasonable, efficient and timely exchange of evidentiary materials.

E-Records and Information Management

Two key proposed amendments touch on managing records and information. Rule 26(b)(2)(C) deals with the accessibility of electronic information, and Rule 37 addresses a safe-harbor provision to protect a party from sanctions for failing to provide electronically stored information lost during routine operations.

There are typically three stages for records and information in electronic formats – active, archived or back-ups.

"Active" information is usually the primary source for potential evidentiary materials. The active storage facility is often indexed, which lends itself to the preservation and collection steps in document discovery. "Archived" information is a secondary source for evidentiary material, and it may or may not be in an indexed form. Back-up information is not typically indexed, exists for

use in disaster recovery and often duplicates information that resides in the active area.

Minimizing the "fishing expeditions" that can occur with overly broad e-discovery requests is a primary goal of proposed amendments to Rule 26 (b)(2)(C). Confining the scope of a request to the location where responsive materials reside makes sense.

However, there are some potentially troublesome aspects to these amendments. The terminology used in the proposed amendments regarding the information, "accessible and not accessible," does not necessarily correlate to how the information is maintained and managed in the context of records and information. There is a concern that the term "accessible" as defined in the proposed amendments begins to take hold in the records and information management world and encourages bad practices. I don't have an alternate phrase. But I can suggest a very simple approach: Once the responding party has demonstrated that it has a responsible plan to identify, preserve, collect and produce evidentiary materials in response to the defined request, it shouldn't be further required to justify why certain storage areas were not searched or produced.

Finally, the safe-harbor provision in the proposed amendment to Rule 37 is offered to protect a party from sanctions for failing to provide electronically stored information lost because of the routine operation of the party's computer

THE CONSTITUTION AND BILL OF RIGHTS FOR CORPORATIONS

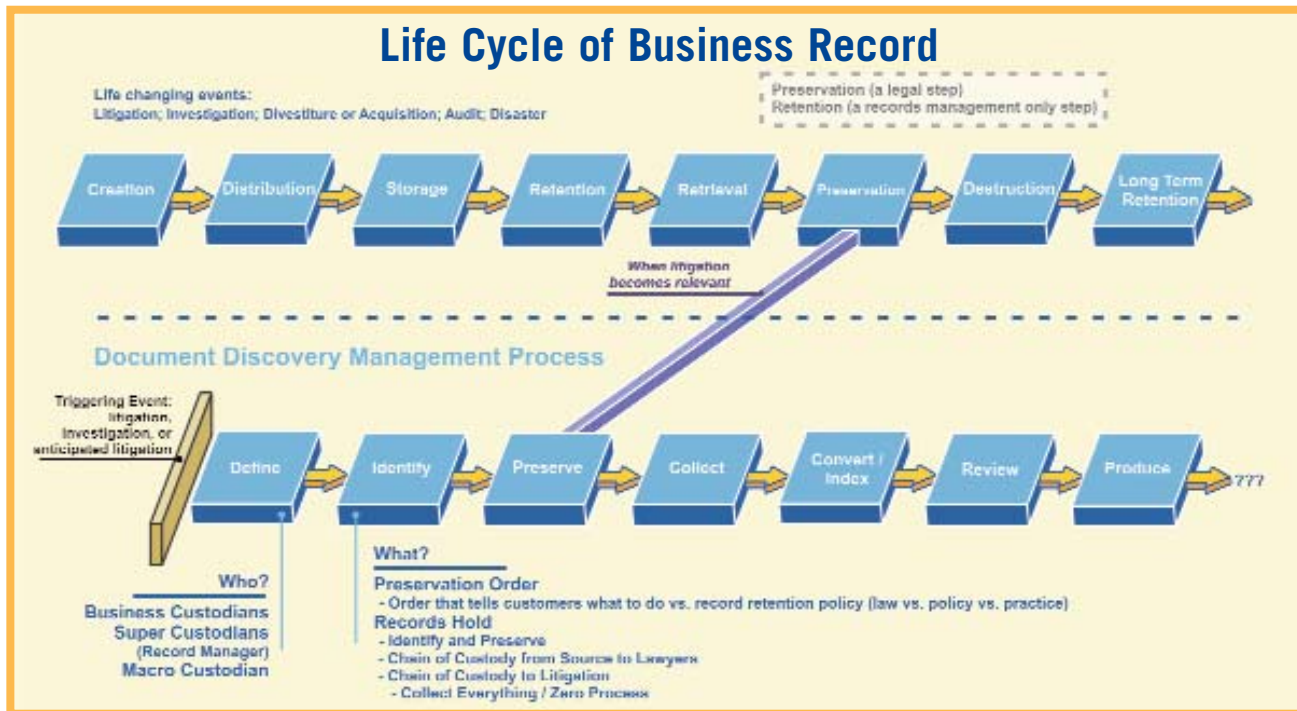
Litigation, regulatory investigations, mergers and acquisitions, audits and physical disasters can all impact the regular life cycle of company records and information. Since almost all types of records and information are now in digital format that has extended the life span of records. Any discovery rules amendments should consider the impact on a record's life cycle.

A corporation's responsibility to manage the life cycle of records and information derives from more than responses to litigation requests for production. Records and information should first be analyzed for their business value as part of a company's knowledge assets, as well as for regulatory compliance. A corollary consideration is the record's characterization as evidentiary material. A company should not be compelled to keep information that does not have business value, does not meet a regulatory compliance requirement, and is not needed as evidentiary material. Proposed amendments to the Federal Rules of Civil Procedure should take into consideration the impact on a company's records and information management process as a whole.

As a contributing editor to the Sedona Guidelines for Digital

Information and Records Management, I believe that a company has a responsibility to develop and implement a records and information management program that addresses the life cycle process. This "constitution" should include retention policies and schedules. Once that is built, I believe that a company should also have a "bill of rights." These rights include the disposition of records and information that are no longer necessary for business purposes, regulatory requirements or as evidentiary materials. Another right is the ability to modify and update its records and information program to meet changing business or regulatory needs or requirements without risking penalty.

There is some concern that certain court rulings on e-discovery issues may have compromised a company's execution of the records and information bill of rights. Too often, responsible disposition of e-records and information is improperly associated with spoliation. Hopefully, the proposed amendments help make a distinction between responsible records and information management actions and spoliation violations that impede the document discovery process.—J.M.



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system. This proposed amendment has merit, since it does make a distinction between responsible electronic records and information disposition and spoliation. This proposed amendment can be effective if companies operate a records and information program which includes a records preservation protocol.

It is my hope that my comments to the Committee, the dialogue we in the records management and legal community continue to have and the amendments themselves will serve to improve processes that ultimately result in sound and sensible rules and requirements.

It really is quite a thrill to participate in the rule-making process, to understand it and experience the sense of being

part of the changes. In the next step, the Standing Committee on the Rules of Practice and Procedure will review the recommendations from the Civil Rules Advisory Committee in June 2005. The Judicial Conference, which is headed by the Chief Justice of the U.S. Supreme Court, will then conduct a review in September. If the amendments stay alive, then the Supreme Court and Congress get their chance to look over the proposals. And if approvals are all made, new rules could go in effect come December 2006.

I will keep you posted.

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