Content downloaded/printed from HeinOnline

Fri Sep 13 18:39:40 2019

Citations:

Bluebook 20th ed.
Jerry Green; Susan K. Carns, E-Discovery - The New Federal Rules, 77 Okla. B.J. 3093 (2006).

APA 6th ed.
Green, J.; Carns, S. K. (2006). E-discovery the new federal rules. Oklahoma Bar Journal, 77(30), 3093-3102.
ALWD
Green, J.; Carns, S. K. (2006). E-discovery the new federal rules. Okla. B.J., 77(30), 3093-3102.

Chicago 7th ed.
Jerry Green; Susan K. Carns, "E-Discovery - The New Federal Rules," Oklahoma Bar Journal 77, no. 30 (November 4, 2006): 3093-3102

McGill Guide 9th ed.
Jerry Green & Susan K Carns, "E-Discovery - The New Federal Rules" (2006) 77:30 Oklahoma B J 3093.

MLA 8th ed.
Green, Jerry, and Susan K. Carns. "E-Discovery - The New Federal Rules." Oklahoma Bar Journal, vol. 77, no. 30, November 4, 2006, p. 3093-3102. HeinOnline.

OSCOLA 4th ed.
Jerry Green and Susan K Carns, 'E-Discovery - The New Federal Rules' (2006) 77 Okla BJ 3093

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

Use QR Code reader to send PDF to your smartphone or tablet device

E-Discovery

The New Federal Rules

By Jerry Green and Susan K. Carns

It had been true "once upon a time" that satisfying a request for production was often as straightforward as opening a file cabinet and pulling out the requested document(s). Today, a request for production may well stir caution, confusion and not just a little fear in the heart of the attorney who appreciates the new complicating realities created by advances in computer technology.

As computer technology has progressed, the language of the present rules has been gradually rendered an ineffective guide for the discovery of electronically stored information. In an effort to cure the complications that have arisen, on Dec. 1, 2006, the Federal Rules of Civil Procedure will be adopting amendments pertaining to discovery of electronically stored information. This article will discuss these amendments intended to provide direction and clarity to a specific area of law that has been developing faster than the rules that govern it: the discovery of electronically stored information, or "e-discovery." This article seeks to provide practitioners with a concise and thorough overview of the amendments pertaining to e-discovery.

A BRIEF HISTORY OF THE AMENDMENTS

In the fall of 1999, the Civil Rules Advisory Committee began meeting to discuss, formulate and propose amendments to the Federal Rules of Civil Procedure. In August 2004, the Advisory Committee published a set of amended rules for public comment. Taking the public comments into consideration, the Judicial Conference revised the proposed amendments once again and approved a final version of the rules in August 2005. The Supreme Court approved this final version of the rules in April 2006. The amendments to the Federal Rules of Civil Procedure are now set to become effective on Dec. 1, 2006.

EARLY ATTENTION TO E-DISCOVERY ISSUES

Rules 16(b), 26(a), 26(f) and Form 35

The amendments to Rules 16(b), 26(b), 26(f) and Form 35 collectively embody the new requirements for early discussions and disclosures among the parties about the form of production, preserving information for the litigation, and the assertion of privilege and work-product protection claims of electronically stored information, or "ESI." Without the benefit of the new rules, all of these issues have been a source of frustration and confusion (and in some cases sanctions) for practitioners on both sides of the table.

In order to effectively implement these new rules, attorneys must give early attention to the

issues related to e-discovery. It should come as no surprise that in order to effectively address e-discovery issues, the attorney will have to become well-educated with respect to the aspects of the client's storage of electronic information. It is advisable to include the client's information technologist(s) in the earliest stages of discovery.

> "... if the parties involved are thinking early on about the nature of the discovery and whether it is electronically stored information."

While good faith professionalism is always a requisite between attorneys, the effective resolution of e-discovery issues seems to be especially dependent upon early cooperation by all parties involved in a case. Without such cooperation, parties will be much more likely to lose access to electronically stored information that otherwise would or could have been made available. Whether you are the attorney for the requesting or producing party, such mistakes have potentially huge implications for a client's case, and impose a very real risk of sanctions upon the attorney whose actions or inactions result in the inability to produce relevant and requested information.

***Rule 16(b)*: Pretrial Conferences; Scheduling; Management:**

(b) Scheduling and Planning

There are two amendments to Rule 16(b). The first amendment to Rule 16(b) is a textual change, adding the possibility of including the decisions regarding the discovery of ESI in the scheduling order. This is an essential change because much discovery is of ESI and therefore requires unique considerations early on. The following is an example of such considerations: agreed-to orders concerning the protocol to be followed in producing ESI may include provisions for 1) keying which documents were produced from electronic files and which were scanned from hard-copy files, 2) keeping multi-page documents as a unit, and 3) providing source information which identifies, where possible, the custodian of a particular document or set of documents.[1] The ability to identify relevant information as "electronically stored information" early on in the litigation process is imperative as the timely scheduling of production will be better informed (and more efficient) if the parties involved are thinking early on about the nature of the discovery and whether it is electronically stored information.

The second amendment to Rule 16(b) is a provision for parties to include in the scheduling order an agreement between parties for asserting claims of attorney-client privilege or protection of trial preparation materials after production. This provision allows parties to craft and enter into an agreement that would serve to trump the default "claw back" provision provided for in the amendments to Rule 26(b)(5). In short, the "claw back" provision serves as a default "buffer" for an attorney who realizes only after production that she has not adequately redacted the privileged or trial-preparation materials. The Rule 26(b)(5), "claw back provision," allows that attorney to request that the information be returned immediately. Under the "claw back provision," the information will either be returned or immediately sequestered, while the court rules on the matter. The Rule 16(b) amendment permits parties to create their *own* agreement with respect to such accidental production — effectively trumping the 26(b)(5) default "claw back" provision.

***Rule 26(a)*: General Provisions Governing Discovery; Duty of Disclosure: (a) Required Disclosures; Methods to Discover Additional Matter**

The Rule 26(a) amendment adds "electronically stored information" to that which must be included in the initial disclosures in discovery.[2] This textual change is *not* to be understood as mere semantics. The addition of ESI is an explicit requirement for an attorney to take into consideration the potentially relevant information that his or her client may have stored in an electronic format and disclose any as such. It is important therefore, that attorneys always keep in mind the dynamic "nature" of computer systems: constantly saving and deleting information and altering conceivably relevant information as a matter of course. The attorney must be informed about the particular dynamics involved in a client's computer system in order to adequately discharge this particular duty to disclose. It is also important that an attorney be sufficiently well-informed so as to not produce detailed information regarding the setup of the client's computer file and inadvertently providing their discovery plan.[3]

It probably can not be said strongly enough that attorneys must discuss the many aspects of a client's electronically stored information (and its potential relevance to litigation) with the client early on in the litigation process. Otherwise, for example, an attorney might well be aware of a type of information that is "kept" by a client, but wrongly assume that it is retained for a longer period of time. In such a case, that attorney could "disclose" that certain information may be utilized – only to discover later (after the request for production by the opposing counsel) that such information was automatically overwritten after a period of time by the client's computer system. The subsequently requested information does not actually exist anymore and the attorney has made an assertion that will be difficult to explain — especially if it means violation of a scheduling order now in place.

As stated above, adequate disclosure of what may be used to support the client's claims or defenses, pursuant to Rule 26(a), requires an attorney to have an understanding of the client's computer system technology. Without such an "understanding" the attorney has greatly increased the possibility of exposing the client to potentially serious sanctions.[4] Before the requisite disclosure is made, the attorney must meet with his client (even better, the client's information technologist, if one exists) in order to better understand what information is actually in the possession of the client.

Finally, one particular technological issue that may need to be discussed or considered in discharging the duty to disclose is the possibility that the metadata (information embedded in the document or in the computer system that reveals information such as which user last altered a "document" and when it was altered) may well be relevant. The informed attorney will be much more likely to properly disclose and preserve such information. Preservation of metadata can be especially difficult. For example, merely opening a document can overwrite the "who-last-viewed-this-document" information. And so it is evident, early awareness of potential relevancy is essential.

Rule 26(f): General Provisions Governing Discovery; Duty of Disclosure: (f) Conference of Parties; Planning for Discovery

The first Rule 26(f) amendment imposes a duty to meet and confer regarding the preservation of discoverable electronically stored information. It is also important to note, if one does not discharge his responsibilities in discussing preservation, and spoliation occurs, there is going to be a stronger argument for sanctions. And, given how little many attorneys understand about how ESI is handled, there is much room for error. Here, the advocate must specifically seek to learn how each of his client's computer systems, involved and utilized, records events.

Without a proper understanding of the way her client's computer system records "events" (and perhaps an information technologist at her side), the attorney is far more likely to either commit to preserving and producing information that is not actually accessible, or reasonably accessible, or conversely, to mistakenly assert that information is not or cannot be made reasonably accessible when it can.

The Rule 26(f) "meet and confer" conference to discuss the preservation of ESI requires that the attorney be prepared to provide an informed answer to opposing counsel regarding what information can or cannot be reasonably preserved and produced. If the client employs an information technologist, it would be highly advisable for the attorney to insist on that person being a part of these earliest stages

of litigation. It may also be necessary to attempt to locate a formerly employed IT person if that former employee was better informed about the particulars in place regarding a relevant subject matter or time period.

The second amendment to Rule 26(f) is the duty to discuss and include in the proposed discovery plan the decisions regarding the form in which ESI is to be produced. A few examples include printing that which was stored electronically onto paper (easy to bates stamp, not easily altered, not easily searched, no metadata available), on a compact disk in the "native format" (often this is the form utilized in the ordinary course of business, easily searched, metadata may be available, easily altered, not easy to bates stamp), or in an Adobe format (cannot be altered, difficult to run searches or to be "manipulated" for analysis purposes.) Depending upon what is considered relevant, as well as the burden to the producing party to produce in certain forms, the particular form of production can be very important to the parties. When it is relevant to your client's needs, pursuing a specific form of production early on will serve your client well. If not agreed to otherwise or indicated specifically in the discovery plan, the default rule requires that the producing party produce the ESI in the form utilized in the ordinary course of business.

The last amendment to Rule 26(f) is the requirement that the proposed discovery plan address "any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order."[5] This possible agreed-to order may be included in the scheduling order pursuant to the amended Rule 16(b), which allows the scheduling order to include agreements reached by the parties for asserting claims of privilege or of protection as trial preparation materials after production. In other words, if parties come to a private agreement, that agreement may be given effect in lieu of the "claw back" provision provided for in the new amendments to Rule 26(b)(5)(B).

Form 35: Report of Parties' Planning Meeting

Following from the amendments to the Rule 26(f) conference, the discovery plan Form 35 now includes the parties' proposals as to how the disclosure or discovery of ESI should be handled. The "Discovery Plan" must account for the handling or preservation of the electronically stored information, the form of production, as well as provide a brief description of any agreed-to order regarding claims of privilege or of protection as trial-preparation material asserted after production.

DISCOVERY OF ESI THAT IS *NOT* REASONABLY ACCESSIBLE

The Rule 26(b)(2) amendment establishes the two-tier procedure for production of electronically stored information. These amendments now allow the party from whom discovery is sought to not provide discovery of electronically stored information from sources that the producing party identifies as not reasonably accessible "because of undue burden or cost."[6] Following from this provision is the two-tier procedure that is intended to give litigants an equitable opportunity to present evidence that the discovery request for electronically stored information need [or need not] be produced.

In the first tier of discovery, a request for production is made. If the party from whom discovery is sought identifies the information as "reasonably accessible," then the request will be satisfied. The discovery process in such a case, then, manifests only through the first tier of the procedure. One way to think of it is that at the first tier, "reasonably accessible" is most simply understood as that which is produced.

The second tier manifests where a producing party asserts that the electronically stored information is "*not* reasonably accessible." The producing party does have the burden of showing "whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found."[7] A common example of these kinds of "not reasonably accessible" materials is information stored on back-up tapes.[8] The identification of such materials should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and cost of providing the discovery and the likelihood of finding responsive information on the identified sources.[9]

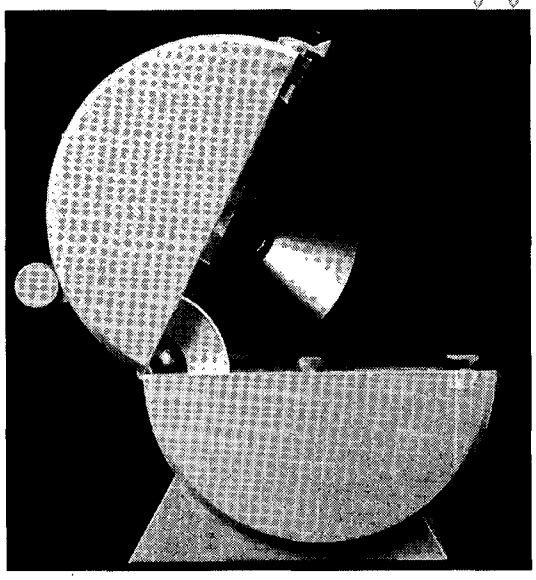
Where a responding party asserts that requested ESI is "not reasonably accessible," it is *not discoverable*[10] unless the requesting party shows good cause.[11] The responding party may then challenge the showing of good cause. The

committee notes to amended Rule 26(b)(2) provide seven factors[12] from which each party may draw to argue its case to the court to determine the "reasonably accessible" question.

The seven factors that may be considered by the court in support of a "*not* reasonably accessible" assertion are the following; 1) specificity of discovery request, 2) quantity of information available from other more easily accessed sources, 3) failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources, 4) likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources, 5) predictions as to the importance and usefulness of the further information, 6) importance of the issues at stake in litigation, and finally 7) parties' resources. Notably; upon weighing these factors, a court may determine that the electronically stored information is "not reasonably accessible" and yet may still require production if the requesting party shows "good cause."[13] In this event, the responding party may argue for cost-shifting.[14]

What is left unclear by the rules is what kind of preservation obligation(s), if any, remain for data that is "not reasonably accessible." That said, courts generally appear to rely on a reasonableness standard when evaluating the extent of a duty to preserve electronic evidence.[15] As such, short of being aware of pending litigation, a company generally does not owe a duty to preserve information on back-up tapes for some unknown future litigant.

"What is left unclear by the rules is what kind of preservation obligation(s), if any, remain for data that is 'not reasonably accessible.'"



PROCEDURE FOR ASSERTING CLAIMS OF PRIVILEGE AND WORK PRODUCT PROTECTION AFTER PRODUCTION

Rule 26(b)(5)(B): Claims of Privilege or Protection of Trial Preparation Materials:

The amendments to Rule 26(b)(5)(B) are referred to as the so-called "Claw back Provision." This provision operates as a default,[16] and is intended to be responsive to the specific difficulty related to the immensely more difficult task of adequately redacting the volumes of information that parties must review in response to a discovery request for electronically stored information.[17] There is now a presumption that with e-discovery, adequate redaction of such volume is virtually impossible, and the Rule 26(b)(5)(B) provision allows a producing party to request that specified information be returned or sequestered until a privilege claim is resolved.[18]

The party asserting a claim of privilege or protection after production must give a sufficiently detailed notice, in writing, to the receiving party.[19] Satisfying this requirement will *automatically* impose a sequestration of the specified information that is not returned.

Implementing this rule raises a lot of questions with respect to how parties can be sure they are in full compliance. Once again, the difficulty arises from the nature of electronically stored/produced information. For example, one can imagine the rather ordinary occurrence where electronically produced evidence is disseminated within a firm for purposes of review by e-mailing it as an attachment to firm employees (which could be read from a cell phone), or to an expert witness, or

even printing and distributing it in a hard copy format. Any or all of this could be done quickly and would make it fairly difficult for the receiving party to subsequently "promptly return, sequester or destroy the specified information and any copies it has."[20] A good faith "reasonable" effort will be required of the party who must now return/sequester, so dissemination of an opposing counsel's response to production should be monitored closely given the broad parameters of the "claw-back provision."

Finally, this amendment requires particular consideration since (though this rule is responsive to the particular issues related to electronically stored information) it applies to all production, not just electronically stored information.

LIMITED "SAFE HARBOR" FOR A CERTAIN TYPE OF LOSS OF ESI

Rule 37(f): Failure to Make Disclosures or Cooperate in Discovery; Sanctions

A computer generates so much information that out of necessity it must be programmed to routinely overwrite certain data that could be relevant at some future date. This provision creates a limited "safe harbor" protecting against sanctions for a party's inability to produce electronically stored information when that information has been lost due to the routine operation of an information system[21] as long as that operation is in good faith.[22] The "good faith" standard is very subjective, and judges have broad discretion to consider each litigant's actions and also the characteristics of the electronic information system at issue. Good faith "may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation."[23] A finding of good faith may indeed result in a party avoiding sanctions; however, the amended rule still allows sanctions, even if there has been a finding of good faith.

INTERROGATORIES AND REQUESTS FOR PRODUCTION INVOLVING ESI

Rules 33(d), 34(a) and *(b)*

The amendments to these Rules are all textual, including "electronically stored information" as subject matter of the respective rule. This textual change replaces ambiguity with precision in the language of the rules. Also, these changes serve to alert practitioners and courts to electronic discovery issues.

Rule 33(d): Option to produce business records

Rule 33(d) allows a party upon whom an interrogatory has been served to direct the requesting party to business records for examination, audit or inspection where the answer to the interrogatory may be derived or ascertained from the business records. The amendment to this rule simply adds "electronically stored information" to the form of "business records" that may be legitimately referred to by the responding party. Where a party invokes this rule, it may be required to provide direct access to its electronically stored information system, if it is necessary to provide the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.[24]

Rules 34(a) and (b): Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes: (a) Scope and (b) Procedure

Rule 34(a) now includes "electronically stored information" as part of that which may be legitimately pursued by a requesting party. Notably, the rule provides that the respondent may need to "translate" the information provided into a "reasonably usable form."[25] The courts will answer the question regarding exactly how much a respondent must do [to adequately "translate" the information provided] in order to have satisfied its burden to produce the materials in a reasonably usable form for the requesting party.

Rule 34(b) guides the procedure under which responding parties must respond to the request for production. One amendment to this rule allows the requesting party to specify the form in which electronically stored information is to be produced. This request may be objected to and in such a case; the electronically stored information is to be produced in the form in which the ESI is ordinarily maintained or form that is reasonably usable.

Whether or not a party has adequately satisfied a request for production is a fact-intensive inquiry, but some courts have required a producing party to label, organize or index docu-

ments being produced, if the court believes that doing so is necessary to make the documents usable by the requesting party.[26]

SUBPOENAS TO PRODUCE ESI

Rule 45: Subpoena: (a) Form; Issuance

Rule 45(a) now includes the requisite language demonstrating that a subpoena may specifically request electronically stored information. Pursuant to Rule 34(b), the subpoena may specify the form in which electronically stored information is to be produced. And, subject to Rule 26(b), a party is not required to produce electronically stored information from sources that the producing party identifies as not reasonably accessible. Finally, when responding to a subpoena to produce electronically stored information, it is important to always keep in mind the new "claw-back provision" from Rule 26(b)(5) that allows a producing party to request the return of privileged or trial-preparation material that is inadvertently produced.

> "Attorneys must study the proposed new rules and amendments to the Federal Rules of Civil Procedure pertaining to e-discovery..."

CONCLUSION

With much at stake at the outset, practitioners will be wise to pay early and close attention to e-discovery issues. A true appreciation of those issues requires being well-informed as to what type of computer system and data retention processes the client uses. Without such, one cannot have even a remote idea of what forms of production are genuinely feasible. Without knowledge of what can be produced and in what form, the advocate puts her client at risk for sanctions.

The need for early cooperation between parties is also critical for implementing an effective scheduling order, discovery plan and document retention plan. Cooperation must be the goal, because without it, motion practice[27] will take over the litigation, and *that* will unequivocally raise the parties' expenses and the court's ire. In order to cooperate effectively, an attorney who is not well-versed in computer technology must consider including the information technologist(s) employed by the client or even hiring a computer specialist just for purposes of evaluating the client's computer system capabilities.

The new e-discovery procedures, such as the two-tier process for determining what is or is not "reasonably accessible" electronically stored information, and the so-called "claw back" and "safe harbor" provisions, have been approved and set in place as responsive to the particular benefits and pitfalls of the growing role of electronically stored information in the courts. The impact made by these rules will serve as aids for the educated, but as traps for the unwary.

Attorneys must study the proposed new rules and amendments to the Federal Rules of Civil Procedure pertaining to e-discovery and the correlative committee notes. Also, study of the rules is advisable for individuals, small businesses and large corporations alike in their document retention policies. While there are no hard and fast rules governing exactly what has to be saved or for precisely how long, an appreciation for the factors courts will take into consideration to determine respective duties can shape the policies implemented with respect to the retention and organization of electronically stored documents — potentially freeing clients not just from unwanted sanctions but unwanted court time as well.

1. *See Bergersen v. Shelter Mutual Ins. Co.*, No. 2006 WL 334675, (D.Kan. 2006) *citing Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.*, Case No. 05-2164-MLB (D.Kan. 2006) at Doc. 198.

2. *See generally Kleiner v. Burns*, 2000 WL 1909470 (D.Kan.), 48 Fed. R. Serv. 3d 644 (Citing the 1993 amendments to the current rule 26,

requiring "computerized data and other electronically-recorded information" be included in the initial disclosure so as to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests.)

3. *See Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 436, 439 (D. Kan. 1987) (holding that plaintiff's interrogatories, in effect, asked defendants to explain their discovery plan and was therefore protected as work-product.)

4. *See Coleman (Parent) Holdings,Inc. v. Morgan Stanley & Co.*, Not Reported in So.2d, 2005 WL 679071 (Fla. Cir. Ct. 2005) and Coleman v. Morgan Stanley & Co., Inc., 2005 WL 674885 (Fla. Cir. Ct.) (Where sanction of adverse inference jury instructions was allowed against Morgan Stanley, due in part to the late production of back-up tapes that conceivably were not produced due to lack of *early* awareness and communication between the attorneys and the client's information technologists.)

5. Amended Fed. R. Civ. P. 26(f)

6. Amended Fed. R. Civ. P. 26(b)(2)

7. Committee Note to Amended Fed. R. Civ. P. 26(b)(2)

8. *But See United States v. Koch Industries, Inc.*, 197 F.D.R. 463 (N.D. OK 1998) (holding that party's poor management of back up tapes [resulting in loss of material identified as relevant] constituted negligent preservation warranting sanction.)

9. Committee Note to Amended Fed. R. Civ. P. 26(b)(2)

10. Amended Fed. R. Civ. P. 26(b)(2)(B)

11. This is a break from at least one Tenth Circuit court's application of the current rules to e-discovery production issues. *See Super Film of America, Inc. v. UCB Films, Inc.*, 219 F.R.D. 649, 657 (D.Kan. 2004) (holding that responding party's "unduly burdensome" contention was mere conclusory statement and without more responding party must comply with production request).

12.*See Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D. N.Y. 2003); Civ. 1243 of SAIC., 2003 WL 21087136 (S.D. N.Y. May 13, 2003); 217 F.R.D. 309 (S.D. N.Y. 2003); 220 F.R.D. 212 (S.D. N.Y. 2003); 2004 WL 1620866 (S.D. N.Y. July 20, 2004). (The court articulated a test of seven factors which are identical to those set forth in the Committee Notes to Rule 26(b)(2)).

13. *See Farmers Insurance Company, Inc. v. Peterson*, 2003 OK 99, 81 P.3d 659, (holding that requiring insurer to examine all paper and electronic files for three-year period would be unduly burdensome.)

14. *See* Committee Notes to Amended F.R.C.P. 26(b)(2); *and See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S.Ct. 2380 (reversing District Court ruling that responding party pay the $16,000 to a third party "transfer agent" able to perform the requisite tasks to obtain the information requested by plaintiff where neither respondent nor petitioner were able to perform the requisite tasks, and in spite of the fact that responding party's net worth exceeded $500 million; ruling instead that because the expense of hiring the transfer agent would be no greater for respondents, who sought the information, than for petitioners, requesting party should bear the cost of production in its entirety.) *and See Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (D.Utah, 1985) (denying defendant's motion to shift the costs of discovery weighing factors such as (1) amount of money involved; (2) relative expense and burden in obtaining the data by requesting party would be substantially greater than that of responding party; (3) amount of money required to obtain the data as set forth by respondent would be a substantial burden to requesting party; (4) whether there would be any benefit to the responding party by producing the requested data.)

15. George L. Paul and Bruce H. Nearon, "The Discovery Revolution: E-Discovery Amendments to the Federal Rules of Civil Procedure," 40 (2006).

16. There is also an ability to custom tailor an agreement under Amended Fed. R. Civ. P. 16(b).

17. Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, Agenda E-18 (Summary) Rules, September 2005, *iii. Procedure For Asserting Claims of Privilege and Work Product Protection After Production: Rule 26(b)(5)*, at 52.; *See also, In re Universal Service Fund Telephone Billing Practices Litigation*, 232 F.R.D. 669 (D. Kan. 2005) (holding that producing party was not deemed to have waived privilege in spite of fact that privilege log produced by producing party only listed e-mail "strand" of twenty-nine emails as a single document, "considering that electronic discovery is a rapidly evolving area in which litigants and judges have little or conflicting guidance.")

18. Amended Fed. R. Civ. P. 26(b)(5)(B)

19. *Id.*

20. *Id.*

21. This principle is discussed and represented by analogy in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129 (2005) wherein the court states, "It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy [such as destroying documents by shredding] under normal circumstances."

22. *See Proctor & Gamble Company v. Haugen*, 179 F.R.D. 622, 631 (D. Utah 1998) (sanctioning party $2,000 per individual who had been identified by same party as having relevant information yet party still deleted corporate e-mail communications from these individuals.); *See also, Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, (Co. Ct. App. 1998) (bad faith non-routine spoliation where employees involved in the destruction of computer hardware admitted having knowledge, at the time it was destroyed, that it was crucial evidence.)

23. *See* Committee Note to Amended Fed. R. Civ. P. 37(f)

24. *See* Committee Note to Amended F.R.C.P. Rule 33(d)

25. *See Bills v. Kennecott Corp.*, 108 F.R.D. 459, (D. Utah 1985) *citing National Union Electric Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1257 (E.D.Pa.1980), (requiring the responding party to develop programs to extract the requested information and to assist the requesting party in reading and interpreting information stored on computer tape).

26. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to The Task?*, 41 Boston Coll.L.Rev. 327, 352-56 (2000); *Bergersen v. Shelter Mutual Insurance Company*, No. 2006 WL 334675, (D. Kan. 2006) (Where responding party provided three Compact Disks that were not labeled, organized or indexed; containing a total of 7,253 documents.)

27. *See United States v. Boeing Company*, No. 2005 WL 2105972 (D.Kan. 2005) (Motion for preservation order denied amid allegations of spoliation and where there were factual disputes regarding preservation. court was not persuaded that Preservation Order was appropriate or that it would serve "any useful purpose" in light of the parties' existing legal obligations to preserve relevant information.)

ABOUT THE AUTHORS

Gerald "Jerry" Green is a partner with the firm of Pierce Couch Hendrickson Baysinger & Green LLP, where he has practiced since 1977. His practice is primarily devoted to litigation in both state and federal courts. He lives in Norman, is married to Randi Green, and has two daughters, Kimberly and Hailey. He has engaged in discovery of the paper kind for most of his career and enters the electronic discovery age with some trepidation.

Susan K. Carns is a legal intern with the firm of Pierce Couch Hendrickson Baysinger & Green LLP. She is a student at the OCU School of Law and has accepted a position as associate attorney at Pierce Couch upon her graduation in December 2006 and entry to the bar. Ms. Carns lives in Oklahoma City and is the proud mother of Anna, Lillian and James.

Sponsored by **The University of Oklahoma College of Law,**
in cooperation with the College of Continuing Education

Winning the Federal Case Before Trial

December 15, 2006 ✤ Cox Convention Center ✤ Oklahoma City, OK

MCLE Credit: OK - 7.0 including 1.0 hour of ethics; TX - 6.0 including 1.0 hour of ethics

7:30 a.m. Registration

8:45 a.m. **Welcome and Introduction**
Dean Andrew Coats, The University of Oklahoma College of Law
Assistant Dean David Poarch, The University of Oklahoma College of Law
Professor Paul George, Texas Wesleyan University School of Law

9:00 a.m. **The Forum Contest**
Bill Wells, Lee & Wells, P.C.
Panel: The Honorable Joe Heaton (U.S. District Judge), Lydia Barrett (Denney & Barrett) and Bill Wells

9:45 a.m. **Pleadings and Claim/Party Joinder**
Professor Meg Penrose, The University of Oklahoma College of Law
Panel: The Honorable Joe Heaton, Bill Wells and Meg Penrose

10:30 a.m. Break

10:45 a.m. **Discovery**
Leonard Court, Crowe & Dunlevy, P.C.
Panel: The Honorable Tom Brett (Crowe & Dunlevy, P.C.), Professor Steven Gensler (The University of Oklahoma College of Law) and Leonard Court

11:45 a.m. Lunch (provided)

12:30 p.m. Lunch Program
What's Coming Next? A Look Into the Rules Amendment Pipeline
Professor Steven Gensler, The University of Oklahoma College of Law

1:00 p.m. **Pre-Trial Motions & Summary Judgment**
Jay Walters, Fellers Snider
Panel: The Honorable Jerome Holmes (U.S. Court of Appeals), Brooke Murphy (Crowe & Dunlevy, P.C.) and Jay Walters

2:00 p.m. **ADR**
Joe Bocock, McAfee & Taft
Eduardo "Jim" Cuaderes, Littler Mendelson, P.C.

3:00 p.m. Break

3:15 p.m. **Ethics**
John Hermes, McAfee & Taft
Panel: Myrna Latham (McAfee & Taft), Rex Travis (Rex Travis Law Office) and John Hermes

4:15 p.m. Adjourn

563-3011-701

Winning the Federal Case Before Trial

By Mail: The University of Oklahoma
College of Continuing Education
1700 Asp Avenue, Room B-1
Norman, OK 73072-6400

By Fax: 405-325-7164
(Credit card or purchase order only)

By Phone: 405-325-1316
800-522-0772 ext., 1316
(Credit card or purchase order only)

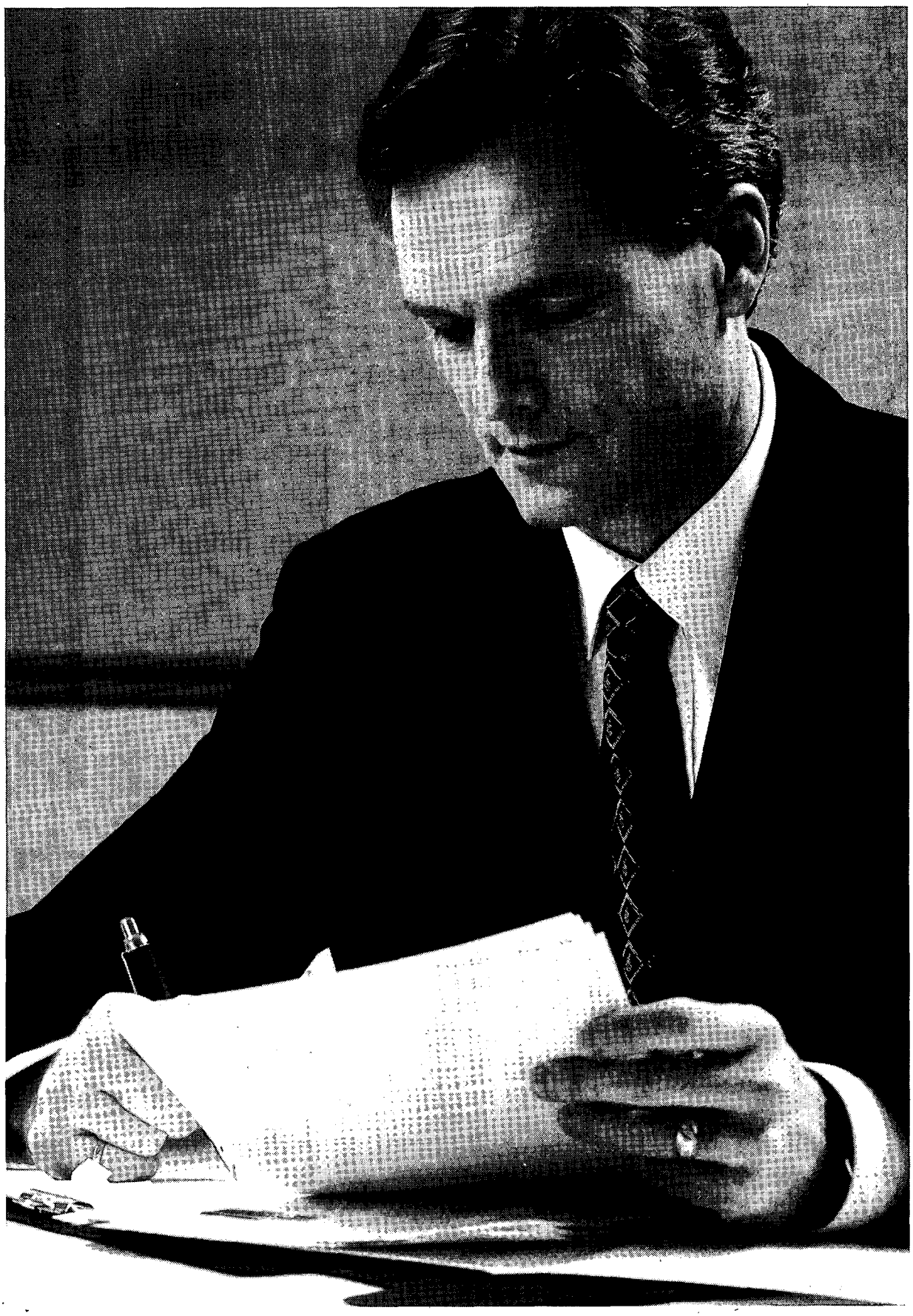
Online: www.cle.outreach.ou.edu/programs.html

The College of Continuing Education is committed to making its activities as accessible as possible. The College and the University provide a range of special services for persons with disabilities. If you anticipate a need for some of these services, please call 405-325-2891.

Cancellation Policy: A full refund will be granted for cancellations received before December 1, 2006. After that date, an administrative fee of 35% will be charged. No refund will be issued for cancellations received on or after the seminar date. Substitute participants may attend.

$160 before December 1, 2006
$185 after December 1 or at the door Contingent on seating availability

Name:_____
Firm/Organization:_____
Address:_____
City:_____ State:____ Zip:_____
Phone:(____)_____ OBA #:_____
E-mail:_____

Amount Enclosed: $_____
❑ Check (Make payable to OU)
❑ P.O. #_____ P.O. Organization_____
❑ Visa ❑ Mastercard
❑ Discover ❑ American Express
Credit Card #_____ Exp. Date_____
Cardholder Signature_____

***For more information, please call* 405-325-2891, *e-mail* sdubbs@ou.edu**
***or visit* www.cle.outreach.ou.edu**