E-DISCOVERY IN FEDERAL COURT:

SIX CHANGES YOU SHOULD MAKE TO YOUR PRACTICE IN THE DISCOVERY PHASE OF THE CASE

By Kary Pratt

1. YOU MUST CHANGE THE WAY YOU REQUEST DOCUMENTS

- FRCP 34(a) explicitly recognizes electronically stored information as a category distinct from "documents and things".

- FRCP 34(b) specifically authorizes the requesting party to specify the form of production and gives the responding party a means to object to the requested format.

    - FRCP 34(b)(iii) states that a party need not produce the same electronically stored information in more than one form. So, be sure from the outset that you can handle the form of the information that you request.

    - You need to evaluate what form you want your opponent's documents in- hard copies, images of data, exported data, native data, hosted data (this is data that resides on a controlled access website.)

        - Review the November 2006 Article in In Brief entitled "*Requesting and Producing Electronic Discovery"* by Craig Ball for advice on choosing an ESI form.

- Figure out the production formats that will best work for you from a cost perspective and what you have the capacity to process.

    - Do you want the information in native format? For example, do you want documents created in word in electronic form in Word? Native format usually includes all of the metadata associated with the document.

        - Metadata is information about a particular data set or document that tells how, when or by whom it was collected created, accessed and modified and how it is formatted. This data is generally not reproduced in full form when a document is printed.

        - You need to consider whether you have the program necessary to view the data in native form before you request it that way. You may be able to easily have the data converted to a format which will make it accessible to you if it is in a proprietary format, or even request that the opposing party convert it to a common

program, such as Excel, if their system has the capacity to do that. But you have got to do your homework to figure this out and make your request accordingly. Talking to an e-discovery vendor may help on this issue.

- If you are unsure you have the applications necessary to read the data in native format, you should request it in a static format, such as TIFF or PDF. However, if you request it that way, you will get a static image of the document without metadata.

- If you need metadata, you must specifically request that electronic data be produced in the form it is maintained. If you don't say that, the rules allow the opposing party can produce it any reasonably useable form and this may mean you will get only copies of screen shots, stripped of metadata.

- If all you want is hard copies, you need to be specific in your request for production because the opposing party can produce in the form the data is reasonably kept unless you make a specific request for production in hard copy form.

  - Be careful when you ask for hard copies rather than native files in electronic form in cases where the volume of discovery is large. The opposing party may complain that the cost of blowing back the electronic data to hard copy form is too expensive and may invoke the cost sharing mechanism of the new rules to force you to pay for that process.

- When the volume of documents requires electronic searchability, just getting the image files may not be enough unless they include a searchable data layer or load file. Native data might be more useful if there is no way to search image files. Native data would include the .doc, .wpd and .rft formats.

- Carefully formulate your requests for production for electronic formats.

  - Forms 5.15-5.23 in *The Electronic Evidence and Discovery Handbook*, Sharon D. Nelson, Bruce A. Olson, John W. Simek, available from the American Bar Association for $129 – 1-800-285-2221 or online at www.ababooks.org. will give you ideas on what kinds of requests you can make and how to frame them for different types of production formats.

- A good strategy is to make targeted requests for data in electronic form in your first request and then expand on that in subsequent requests depending on how useful the information and format was and then follow up with additional requests as appropriate.

- When requesting email, you must be sure to request not only all related metadata, but also all attachment files.

- Don't forget to request instant messaging and voicemail files that are electronically stored if those might be relevant to your case. Many systems preserve voicemail in a data form on the computer, even after the voicemail has been deleted from the phone system.

- What happens if you don't specify a form of production for ESI? Under revised FRCP 34, absent a court order, party agreement, or a request for a specific form of production, a party may produce the electronically stored information in the form in which it is ordinarily maintained **or in a reasonably useable form.**

    - Absent a court order, the information need only be produced in one form, so if you forget to specify a format, you are likely to be stuck with the form produced by the opposing party..

- Be sure to specifically request the opposing party's document retention policies.

- Be careful what you ask for! Once you get it, you are going to have to sort through it. So, ask for it in a form you can manage.

    - The old standby "produce any and all …relating to" may well be problematic if you find your self the recipient of terabytes of information that you need to pay large sums of money to process and analyze only to find out that the data was useless to your case.

    - Your mantra should be: COMPEL BROAD E-RETENTION BUT SEEK NARROW E-PRODUCTION.

2. **YOU MUST PAY CAREFUL ATTENTION TO THE WORDING OF THE REQUESTS FOR PRODUCTION YOU RECEIVE AND OBJECT TO FORM IN A TIMELY FASHION**

- ***If no form for producing ESI is specified*** in the request for production, FRCP 34(b) nonetheless requires you to state the form you intend to use. FRCP 24(b)(ii) provides that if a request does not specify the form, you must produce the information in the "form or forms in which it ordinarily maintained or in "a form or forms that are reasonably useable."

- ***If the form for producing ESI is specified but you object to production in that form***, you must specifically object to the form and must state the form or forms of production you intend to use under FRCP 34(b).

- The new rules do not say when this objection needs to be made, but a good practice is to do it at the time you respond to the request for production, before the date set for actual exchange of production.

3. **YOU MUST IDENTIFY AND OBJECT TO REQUESTS SEEKING ESI FROM SOURCES WHICH ARE NOT REASONABLY ACCESSIBLE**

- ***If the request includes ESI from sources which are not reasonably accessible because of undue burden or cost***, such discovery may be subject to the limitation of FRCP 26(b)(2)(B). However, to invoke that protection, you should object to the production specifically on that ground.

    - The new rules do not say when this objection needs to be made, but a good practice is to do it at the time you respond to the request for production.

    - After you object, the ball is then in your opponent's court and they must make a motion to compel or file for a protective order. If they do that, you must show that the information is not reasonably accessible due to undue burden or cost under FRCP 26(b)(2)(B). If you make that showing, the burden shifts back to the party requesting the production to show good cause.

        - Who pays if such non-readily accessible information is ordered produced? The rules don't address this, but the Advisory Notes do. Under the Advisory Committee Note, the court has authority to set conditions for permitting the discovery, including "payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible." The note also states that "the requesting party's willingness to share in the costs may be weighed in determining whether there is good cause."

            - The Advisory Committee Notes also talk about he possibility of sampling to test the assertion of inaccessibility

4. **YOU MUST CAREFULLY PROTECT FROM THE INADVERTANT DISCLOSURE OF PRIVILEGED INFORMATION**

- Like you did with paper discovery, you must have a system to sort out privileged materials form ESI. If the sheer volume of method of discovery prevents a careful review of the data for privilege, you should consider entering into a claw back or quick peek agreement.

- The new rules encourage parties to agree to non-waiver through the use of "quick peek" or "claw-back agreements" before the Rule 16(b) Scheduling Conference, which can then be incorporated into the case management order.

- Claw-back agreements provide that inadvertently produced privileged data shall be returned upon notification to the receiving party, and that any inadvertent productions shall not amount to a waiver.

- Under a quick peek agreement, a responding party can agree to provide certain requested materials for initial examination by the requesting party without waiving privilege or work product protections. The requesting party then designates documents it wants produced pursuant to a Rule 34 request. The responding party then reviews only the requested documents for formal production and asserts any claims of privilege or work-product protection.

    - You should exercise caution when employing either of these types of agreements because they may not be enforceable as to third parties.

        - See, "*Dangers In The Use Of Quick Peek And Claw Back Agreements Under The New E-Discovery Rules*" by Kathryn Mary Pratt, in For the District of Oregon, Winter 2007 edition.

5. **YOU MUST NOW CONSIDER ESI WHEN PREPARING AND RESPONDING TO SUBPOENAS**

- Revised FRCP 45 conforms the subpoena provisions to the changes in the other rules related to electronic discovery.

- Be careful what you ask for, especially when issuing a subpoena to a large institutional party.

- Be careful to specify the form of production you need from the subpoenaed party.

    - You can always negotiate this issue with the subpoenaed party. Most parties will tell you the way the information is stored so that the request can be tailored to cause the least disruption to their business.

6. YOU MUST CHANGE YOUR DEPOSITION PRACTICE

- Depending on the size of the case and type of data you expect, you may need to take 30(b)(6) depositions of the opposing parties IT personnel to make sure that

you ask for what is available and ask for it in a form that provides the maximum amount of information and in a form which is useable to you.

- You need to discover information from your opponent about offline storage and external data sources. Once you know where the potential evidence is, you may have to ask the court to establish a search protocol if you do not trust the opposing party or that party is obstructive.

    - Check out Form 5.24 in *The Electronic Evidence and Discovery Handbook*, Sharon D. Nelson, Bruce A. Olson, John W. Simek, available from the American Bar Association for $129 – 1-800-285-2221 or online at www.ababooks.org.

- You may need to rewrite requests for production after the 30B(6) deposition, so be sure to do it early enough in the case so that you have time to follow up.

- Ask fact witnesses where they looked for evidence to comply with your requests for production, how they conducted a search, their individual practices with regard to document/email retention, whether they searched their email archives, etc. Be specific.

    - If you think that the search was not adequate, make a request on the record that the additional sources be searched and any additional materials produced.

    - Be sure to specifically ask witnesses about the opposing party's compliance with their firm document retention policies.

- If you do not inquire deeply enough of your opposing party, you will likely either fail to get complete discovery or lose an opportunity to put the adverse party in a position of having to defend its discovery failures.

- Be sure to prepare your own fact witnesses to respond to questions as to how they looked for the requested electronic documents, eg., what searches they performed, whether they searched archived email, performed a google desktop search, etc.

    - If there is data that has been lost or destroyed, you must be prepared to have your witness respond to questions concerning whether the loss or destruction of the data was a necessary feature of the normal routine operation of the systems in order to establish the good faith defense of FRCP 37(f).

        - If there is a simple way to suspend the operation of normal processes, your witness must be prepared to explain why that step

was not taken. If the suspension of the operation of normal processes to avoid overwriting information would have created problems for the system, the witness should be prepared to explain why or identify the person who can explain why. You may need to engage an expert to explain the processes for especially complex, customized systems.