



AN ENLIGHTENED APPROACH TO
Electronic Discovery

*By Brian Fagel **

Litigators pride themselves on being jacks of all trades, able to learn unfamiliar subjects and areas of the law with quickness and ease. For general practice litigators, every new case could involve a different type of business or industry, or a different set of legal issues. Litigating that new case requires an efficient grasping of the intricacies of unknown business practices, and how those practices interplay with the applicable legal framework. Every new case can be an adventure in learning, which is part of the excitement of being a generalist.

Litigation discovery, on the other hand, is considered part of a litigator's bag of skills – something acquired in the early years of practice, slightly honed over time, but certainly never new or unfamiliar. Discovery is simply the means of uncovering the facts necessary to try the case, and the standard vehicles of interrogatories, requests for production, depositions, and requests to admit have hardly changed through the years. Viewing the discovery process with complacency, however, is a trap for the unwary – particularly in light of the changes ushered in by the advent of electronic discovery and the passage of the 2006 Amendments to the Federal Rules of Civil Procedure (the "2006 Amendments"). Instead of treating discovery in this day and age as business as usual, with a few added wrinkles, litigators should approach the challenges of electronic discovery like that new case: by engaging themselves to absorb, quickly and efficiently, the intricacies of the technology underlying the storage, retention, and production of electronically-stored information ("ESI"). Failure to do so, as anyone who has read a legal publication in the last several years or heard the words "Qualcomm" or "Morgan Stanley" will attest, can be disastrous.

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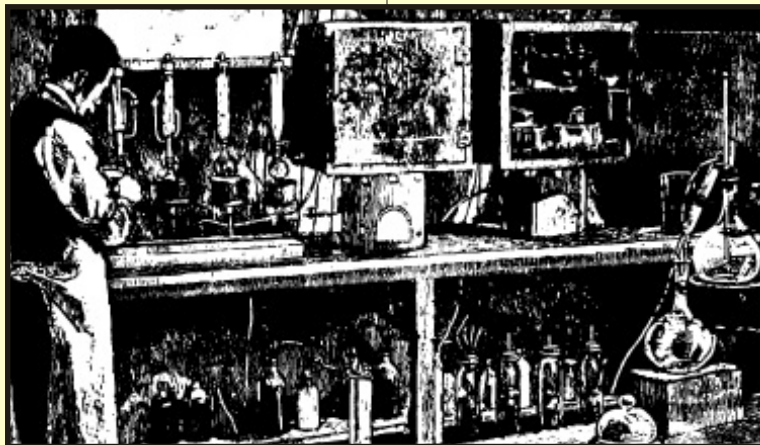
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Litigators do not need to become technologists (just as litigators do not need to become welders or rocket scientists when representing clients engaged in those professions). But developing an understanding of how to approach discovery, when nearly every responsive document is either electronically-generated or is ultimately available in digital form, is crucial in getting *beyond* discovery disputes and into the real work of litigating a case.

The 2006 Amendments codified, for the first time, what every practicing lawyer previously assumed: a request for "documents" encompasses a request for "electronically stored information" ("ESI"). The codification appears in Rule 34(a)(1)(A), which permits the discovery of documents alongside ESI –

and is particularly spelled out in the Committee Notes: "a Rule 34 request for production of 'documents' should be understood to encompass, and the response should include, electronically stored information..." Parties can no longer delay, or evade, their obligation to produce ESI by arguing that the other side "never asked for it." Instead, every document request is now a request for ESI. Thus, the complications and complexities of electronic discovery, which are more often than not the subject of procrastination ("they haven't really asked us for ESI, so let's give them boxes of paper until they complain"), are now one of the first discovery headaches to deal with.

The 2006 Amendments do, however, provide some guidance in how to address the DOCUMENT=ESI codification, by imposing structure on how to formulate requests for ESI and responses to requests for ESI. This is Rule 34(b)(2)(E):



Producing the Documents or Electronically Stored Information.

Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

- (iii) A party need not produce the same electronically stored information in more than one form.

This rule is far more significant, for both the requesting party and the producing party, than it seems – for this is where the old "request everything" and "document dump" strategies

will fail. In following Rule 34(b)(2)(E), litigators need to be thoughtful and deliberate in determining precisely what they want when they craft their discovery requests and discovery responses – and, even more importantly, when they sit down face-to-face with their adversaries at the Rule 26(f) conference. Requesting everything in native, electronic format, without considering why, can lead to a self-induced document dump: the receipt of gigabytes of data that will cost hundreds of thousands of dollars in discovery vendor fees to interpret and render usable.

Likewise, for the producing party, resorting to the default of reducing everything to paper form prior to production – while conservative and controlled, because only tangible, easy-to-review paper documents are being produced – can lead to sanctions for ignoring the letter and spirit of Rule 34(b)(2)(E).

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An examination of the discovery of email illustrates the complexity of issues raised by Rule 34(b)(2)(E). Email is easily the most commonly requested form of ESI, as email is the most-used form of written communication (particularly in the business world). And email is not just the written missives that are exchanged every hour of every day. Email is also the vehicle for transmitting every other possible type of documentary evidence, in the form of attachments. Because of the volume of email that flows through businesses every day, the production of email in discovery can be overwhelming for both sides. Email often holds the key to proving or defending one's case. But when you make a request for your opponent's email, what exactly are you asking for – and what are you likely to receive in response?

The rules direct parties to specify the "form" of production. In other words, "how do you want your emails?" Failure to specify the form of production in your document requests, and at the Rule 26(f) conference, may remove the decision from your hands – and give your opponent an unnecessary advantage. Without receiving any guidance from you, your opponent can make its own determination of how to produce its ESI. With respect to emails, your opponent may decide that printed emails are "reasonably usable," and you may have waived your right to receive the electronic files. Even though one can read the 2006 Amendments, and the electronic discovery industry that they have helped to engender, as suggesting that the default should always be to request documents in their native, electronic format, the correct approach is likely something more nuanced.

This is where the real deep thinking needs to take place, before you are in the throes of full-blown discovery. What do you need to prove, and what evidence is required to prove it? Particularly since the 2006 Amendments shift the key electronic discovery decisions to the beginning of a case – during the Rule 26(f) conference – early case assessment has become more crucial than ever. Not only should you attempt to thoroughly understand the proof issues of your case at the front end, you should also sit down,

as early as possible, with your client's IT experts. They can explain the nature of the computer systems that maintain the ESI, which will arm you with the information you need to negotiate with your opponent.

Email metadata can hold all sorts of interesting and useful information: the date and time the email was sent, modified, and received; whether anyone was blind copied on the email; whether anyone accessed the email after it was filed; and, if the email has attachments, when and by whom the attachments were created or modified, and what modifications were made. In some cases – for example, an employment case involving the alleged misappropriation of trade secrets, or a corporate fraud case – it may be important to know precisely when and how email was accessed, modified, and transmitted. In such cases, email should be requested in its native, electronic format to allow interpretation of the metadata.

Regardless of the value of the metadata, every request for native, electronic data – even though compliant with Rule 34(b)(2)(E)(ii), which allows the requesting party to specify the form of production – will be met with resistance. The likely objections? The risk of producing privileged documents is too great. The costs of pre-production review are too high. Countless nonresponsive documents are going to be produced. These are all valid objections. Many of them can be overcome, but it will take some effort and expense. The risk of producing privileged documents is real, but can be countered with a clawback agreement. As for the costs of pre-production review, it is likely these costs will be incurred whether the emails are produced electronically or in paper form; someone is going to have to look through the emails being produced. One solution, which gives the requesting party the native email files while giving the producing party less heartburn, is for the producing party (after setting aside a pristine duplicate, or "image," of the original native email files in case disputes arise) to perform its privilege and responsiveness review on the native emails. The non-privileged, responsive emails can be culled, with their metadata intact, from the original native email files.

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The review can be performed electronically, which makes it easier to conduct. The producing party thus delivers native, electronic data, but only the data it has had an opportunity to review. Electronic discovery vendors now provide countless tools to expedite, and even automate, the culling of native email files. Even if a request for email in its native, electronic format is successfully resisted (likely with court intervention), the original request will preserve the strategic goal here: to make a case for the value of the metadata. If a deposition answer, or a discovery response, suggests that the metadata holds evidence unavailable elsewhere, the metadata request can be revisited, and nothing will have been waived. In a majority of circumstances, however, email metadata will provide nothing helpful to prove your case, and it simply is not worth the fight to request.

The printed email (or an image created thereof), which shows the "to," "from," "cc," "date," "subject," and "attachment" fields, along with the actual content of the email communication, is usually enough. Discovery vendors now make it simple for the producing party to transform printed or imaged emails into a searchable database, or to extract emails directly into such a database (bypassing the creation of paper copies) without requiring production of the original electronic files. The database will include all of the significant fields, and searches and sorting can be performed with ease. Overall, when crafting a strategy for requesting email, a thoughtful, targeted approach is much more likely to be productive – and to be defensible if met with resistance and eventually brought to the attention of the court. Will there be anything useful in the metadata? Who are the likely custodians of the emails you are seeking? What is the shortest time period you can specify that will still contain the relevant emails? Can you identify specific search terms that will ease the burden on the producing party?

Knowing the answers to these questions, through early case assessment, will not only greatly enhance the strength of your case, it will significantly reduce reviewing costs. It will also allow you to focus on building your arguments, instead of sifting through endless amounts of documents. Email is just one form of electronic document. There are numerous other examples of electronic documents that highlight the complexity that has overtaken litigation discovery: spreadsheets that contain formulas only visible in electronic form; databases that cannot be queried without access to the original electronic file; documents containing "track changes" that cannot be viewed on paper. No hard-and-fast rules exist, particularly in light of the constantly-changing legal landscape.

The 2006 Amendments have barely been interpreted by the courts, and certainly not in any consistent fashion. The best approach is an early, deliberate, and thoughtful one, undertaken with an understanding of the possibilities of electronic discovery, but without losing sight of the endgame: uncovering, and rendering usable, the evidence that will win the case. A highly informative book that canvasses the entire range of e-discovery issues and the extant case law has just been published. *See* Shira A. Scheindlin and Daniel J. Capra, *Electronic Discovery and Digital Evidence* (The Sedona Conference West 2009). It is a valuable resource and should not be overlooked when planning e-discovery strategy.

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