

# **E - DISCOVERY**

## **Fighting over “smoking gun” emails: The nightmare begins**

### **Part I – E-Discovery under the New Federal Rules**

The federal discovery landscape has changed. The United States Supreme Court on April 12, 2006 approved amendments to the Federal Rules of Civil Procedure to govern the discovery of electronically stored information (“ESI”). These amendments took effect on December 1, 2006. To date, the Texas federal district courts have yet to enact local rules governing electronic discovery.

The new e-discovery rules amended Rules 16(b), 26(a), (b)(5), (f), 33, 34(a), 37(f), and 45, as well as form 35. Currently, no changes to the Texas Rules of Civil Procedure have been proposed to address discovery of ESI. Eventually, the Texas Supreme Court will likely adopt rules that address the specific procedural issues raised by ESI. On August 2, 2006, the Conference of Chief Justices approved as “a reference tool” *Guidelines for State Trial Courts Regarding E-Discovery of Electronically-Stored Information*. See [www.ncsconline.org](http://www.ncsconline.org).

Discovery related to ESI and litigation about its existence, destruction, production, form of production, burdensomeness of production, and inadvertent disclosure have spawned a lucrative cottage industry for IT consultants, attorneys and CLE purveyors. Before taking a close look at the amendments, it is important to understand why the amended rules are necessary and why every attorney should care about them.

### **Why We Need the New E-Discovery Rules**

*Even the most routine business dispute requires either two parties who can agree to lay off each other’s email (unthinkable, and verging on malpractice), or a significant budget for electronic discovery services. With electronic discovery consultant fees starting at \$275 an hour, and costs of collecting, reviewing and producing a single e-mail running between \$2.70 and \$4, experts in this market estimate that in 2007, litigants will spend more than \$2.4 billion on electronic discovery services, with no end in sight to this growth. – March 20, 2007, Ann Fort, Fulton County Daily Report*

For more than a decade, most people, corporations, and government entities have been communicating by e-mail, saving documents in electronic form, and generally operating in an electronic work environment. Plaintiffs’ lawyers know that the smoking gun in many cases is likely to be found in their opponent’s email files. Emails are thus critical, even potentially case dispositive.

The proliferation of ESI has created several challenges for attorney and clients in litigation. The first challenge is that there is now much more information to review and potentially produce as part of discovery. The ease of e-mail has markedly increased the volume of written communication. In 2003, for example, the U.S. Postal Service processed 1.98 billion pieces of mail. That same year, more than 182.5 billion e-mail messages were sent. *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, p.4(July2005)([http://www.thesedonaconference.org/content/miscfiles/publications.7\\_05TSP.pdf](http://www.thesedonaconference.org/content/miscfiles/publications.7_05TSP.pdf)).

Given that every e-mail is potentially within the scope of a document request, the universe of information that is potentially discoverable is drastically larger than it used to be.

A second challenge is that ESI may be stored in a myriad of places. Electronic information can be stored not only on central servers and backup tapes, but also on each individual employee's hard drive. Additionally, a client's electronic information can be stored on individual laptops, BlackBerry devices, or other PDAs. And with the ever-increasing invention of new communication devices, the number of potential repositories will surely increase.

A third challenge is that ESI contains "hidden" data, or metadata. Metadata is "data about data," and it may include, for example, information about who made what changes to a document and when the changes were made. This metadata is not seen when a document is printed, and therefore, producing an electronically stored document in paper form may omit some potentially responsive, discoverable information.

Courts have recognized that it is "black letter law that computerized data is discoverable if relevant, *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934, \*2 (S.D. N.Y. 1995), and recent court decisions have placed heavy burdens on corporate defendants and their counsel to undertake thorough, if not exhaustive, efforts to preserve, gather, and produce ESI, at sometimes exorbitant costs. Failure to do so has resulted in harsh results. For example, in the following two cases, both corporate defendants lost due to their failure to adequately produce e-mail evidence, and the resulting assumption that evidence was willfully destroyed or withheld:

- In *Coleman v. Morgan Stanley & Co.*, 2005 WL 679071 (Fl. Cir. Ct.2005); *Coleman v. Morgan Stanley & Co.*, 2005 WL 674885 (Fl. Cir. Ct. 2005), the court allowed an adverse-inference jury instruction for spoliation of evidence, which led to a **\$1.4 billion dollar verdict**, because Morgan Stanley and its counsel did not properly preserve and produce all e-mails from backup tapes and archives.
- In *Zubulake v. UBS Warburg*, 229 FRD 422 (S.D. N.Y. 2005), the court entered an adverse inference and sanctions because e-mails were not properly gathered and timely produced. This led to a **\$29 million dollar verdict**.

Clearly, an attorney needs to become conversant with ESI, the amended federal rules, and the challenges they impose. The conclusion to the advisory notes of the amended federal rules sum up the purpose, goals, and potential impact of the e-discovery changes:

The proposed rule changes reflect and accommodate changes in discovery practice that have been in the making for years, brought about by profound changes in information technology. The proposed amendments work in tandem. Early attention to issues is required. The requesting party is authorized to specify the form in which electronically stored information should be produced and a framework is established to resolve disputes over the forms of producing such information. A party need not review or provide discovery of electronically stored information that is not reasonably accessible unless the court orders such discovery, for good cause. A procedure for asserting claims of privilege or of work-product protection after production is established. Absent exceptional circumstances, a party that is unable to provide discovery of electronically stored information lost as a result of the routine operation of an electronic information system cannot be sanctioned, if that operation was in good faith. Electronically

stored information has the potential to make discovery more efficient, less time consuming, and less costly, if it is properly managed and effectively supervised. The volume, the dynamic character, and the numerous forms of electronically stored information, among other qualities, also have the potential to increase discovery costs and delays, further burdening the litigation process and exacerbating problems the Advisory and Standing Committees have been grappling with for years. The proposed rules provide support for early party management and, where necessary, effective judicial supervision. Keeping discovery manageable, affordable, and fair is a problem that litigants and judges in all courts share... .

## **The New E-Discovery Rules**

The e-discovery amendments to the Federal Rules of Civil Procedure attempt to address some of the stated challenges associated with electronically stored evidence. A summary of the key changes follows.

### **The Definition of ESI**

Amended Rule 34(a) adds a new category of discoverable information – electronically stored information – and includes within the definition of discoverable documents and ESI “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations *stored in any medium* from which information can be obtained... .” Fed. R. Civ. P. 34(a)(emphasis added). The definition that includes ESI is much broader than the prior definition of “document” in Rule 34 and should encompass all electronically stored information. The definition of ESI is intentionally broad – it encompasses data stored in any medium – to cover new technologies that may develop in the future.

### **Inaccessible Data – The Fight Begins**

*Electronic data, such as e-mails, are discoverable. Deleted e-mails are, in most cases, not irretrievably lost.* – U.S. Magistrate Judge Elizabeth Jenkins, *Wells v. XPEDX*, 2007 WL 1200955, \*1 (M.D. Fla. April 23, 2007).

Although amended Rule 34(a) defines ESI very broadly, the new rules attempt to ease the burdens associated with discovery of ESI by differentiating between “accessible” and “inaccessible” data. Under amended Rule 26(b)(2)(B), a party need not provide ESI that the party identifies “as not reasonably accessible because of undue burden or cost.” A key provision of the amendment is that the producing party gets to make the initial determination of whether ESI is “not reasonably accessible.” This may sound like the cat guarding the henhouse. And it is. This self-determination, however, may be challenged through a motion to compel, and the amended rule places the burden on the producing party to show that the requested ESI is not reasonably accessible because of undue burden or cost. Further, even if one party identifies information as not reasonably accessible, its description, category and location must be disclosed. FRCP 26(b)(2)(B). This is akin to a privilege log, meaning the information must be identified, even if it is difficult to retrieve. This procedure likely will be a further burden on the government. The committee notes to Rule 26(b)(2) state that limited discovery may be needed to test the party’s designation that ESI is not reasonably accessible. See *Metro Wastewater Reclamation District v. Alfa Laval*, 2007 WL 1160012 (D. Colo. April 19, 2007)(motion to compel granted allowing production of ESI). Rule 30(b)(6) depositions could be used for this purpose. See *Wells v.*

*XPEDX*, 2007 WL 1200955 (M.D. Fla. April 23, 2007)(motion to compel granted allowing corporate representative deposition for information technology, and production of allegedly deleted emails of 7 employees).

If the producing party successfully makes this showing of undue burden or cost, under the amended rule, the burden shifts to the requesting party to show “good cause” for the discovery. Issues that will surely be litigated are: what is considered “inaccessible data”, and what constitutes “good cause” sufficient to support an order compelling production. Before the enactment of the new rules, the leading case on this topic was *Zubulake v. UBS Warburg*, 217 FRD 309 (S.D. N.Y. 2003), which defined inaccessible data as data on backup tapes or data that is fragmented, damaged or erased, and accessible data as everything else.

The committee notes to amended Rule 26(b)(2) suggest that a court consider the following factors in determining whether inaccessible data should be produced:

- (1) the specificity of the discovery requests;
- (2) the quantity of information available from other and more easily accessed sources;
- (3) the failure to produce relevant information that seems likely to have existed but is no longer available [in any other format] ...;
- (4) the likelihood of finding relevant, responsive information...;
- (5) predictions as to the importance and usefulness of the further information;
- (6) the importance of the issues at stake in the litigation; and
- (7) the parties’ resources.

### **Cost Shifting – The Fight Continues**

The amended rules do not explicitly address cost shifting in connection with ESI. Instead, they adhere to the general rule that the producing party must pay for discovery. Under amended Rule 26(b)(2)(B), however, when a party successfully shows that ESI is not reasonably accessible, the court may still order that the ESI be produced if there is good cause for the production, and the “court may specify conditions for the discovery.” The committee note on Rule 26 suggests that such conditions could include cost shifting. Thus, the new rule implicitly endorses cost shifting for inaccessible data when there is an undue burden or cost associated with obtaining the data.

The notion that the requesting party may have to pay the cost of production of inaccessible ESI is consistent with precedent, including *Zubulake*. According to *Zubulake*, a party requesting data from backup tapes or “offline” inaccessible data should bear some of the burden and cost of its discovery. Consistent with other forms of production, nothing in the new rules prevents or limits the ability of a responding party to seek a protective order under Rule 26(c), where justice requires the Court to protect the responding party from undue burden and expense.

### **Forms of Production – Be Careful to Watch and Object**

Another issue associated with ESI concerns the form in which ESI should be produced. For example, when responding to a request for e-mails, many lawyers assume that it is sufficient to print out the e-mails and produce them in paper form. A paper copy of an electronic document, however, will not reveal the metadata about the document. Paper versions of ESI are also not searchable electronically. A requesting party may therefore wish to obtain ESI in an electronic form, both to capture the metadata and to allow for computer searches of the documents.

Rule 34(b) allows the requesting party to specify the form in which the ESI should be produced. Thus, the requesting party gets to designate whether a paper printout of ESI is sufficient or whether an electronic version should be produced. The producing party may object to the form requested and show why the ESI should be produced in a different form. If no objections are made, or no specific form is requested, the ESI should be produced “as they are kept in the usual course of business,” or “in a form or forms that are reasonably usable.” It is unclear from the amended rule or the committee notes what “reasonably usable” ESI will be; thus, it appears that the court and the parties may be left to sort this out through litigation. Importantly, amended rule 34(b) does not, absent a court order, require a party to produce the same electronically stored information in more than one form.

### **Inadvertent Disclosure of Privileged ESI – A Little Help Please**

ESI creates special problems relating to the attorney-client privilege. The sheer volume of ESI makes the inadvertent production of privileged information more likely. Also, metadata may contain privileged information – such as a city attorney’s edits to a document – that may not be revealed by a review of a paper printout of a document.

Amended Rule 26(b)(5) creates a mechanism for addressing the problem of inadvertent disclosure. Under this rule, if a party inadvertently produces information that is claimed to be privileged, the producing party may notify the receiving party of the inadvertent production and the basis for the claim of privilege. The receiving party must promptly return, sequester, or destroy the information until the claim is resolved, but the receiving party may present the information to the court under seal for a determination of the privilege claim.

Courts in the Fifth Circuit determine on a case-by-case basis whether the inadvertent production of information waives any privilege. *E.g., Allgood v. R.J. Reynolds Tobacco*, 80 F.3d 168, 172 (5th Cir. 1996). Furthermore, an Advisory Committee is currently meeting to determine proposed amendments to Federal Rule of Evidence 502 regarding waivers of the attorney-client and work product privileges. Unlike Texas Rule 193.3(d), amended Rule 26(b)(5) does not affect the substantive law on the waiver of privilege. Rather, it only creates a procedural mechanism for resolving a dispute about whether inadvertent production waives the privilege.

City Attorneys who provide advice on the structuring and implementation of electronic information retention policies should keep in mind that their advice may be subject to discovery and judicial scrutiny. *See Rambus v. Infineon Technologies AG*, 222 FRD 280 (E.D. Va. 2004)(corporate general counsel’s advice in implementing document retention program reviewed by the court).

If the parties are willing to enter into a “clawback” agreement under which the parties agree to return inadvertently produced information, they may avoid the issues of inadvertent production. Rule 16(b)(6) provides for the incorporation of such an agreement into the case management order. A party should be cautious about relying on a clawback confidentiality agreement, however, because the agreement may not provide protection against claims of waiver by third parties. That is, even if a clawback agreement prevents a party to the agreement from using inadvertently produced privileged information, a nonparty may still argue that the inadvertent production constitutes a waiver of the privilege. *See In re Columbia/ HCA Healthcare*, 293 F.3d 289 (6<sup>th</sup> Cir. 2002).

## **Pre-Discovery Meetings – Be Prepared from the Get-go**

*If legal can't go to that meet-and-confer and accurately convey the story around their electronically stored information, they're going to be in a considerable amount of hot water.* — Deborah Johnson, VP of Discovery and Litigation Solutions, Orchestra Corporation

Amended Rule 26(f) requires parties to meet early to discuss their respective electronic discovery plans. This amended rule requires the parties to discuss the form of production, as ESI is now mandated as part of initial disclosures. The government IT department and its counsel will need to know, from the beginning of the case, where email is stored in the organization, how many users have relevant email, how to produce email, how much effort it will take to produce email, and when and how email is deleted. See April 27, 2007 U.S. Congressional investigation to the Honorable Alberto Gonzales for an example of this government dilemma. Under amended Rule 26(a)(1), email must be disclosed “without awaiting a discovery request.” Do not be surprised, in a significant case, if the parties request or bring their respective IT experts to the Rule 26 conference.

## **Preservation of Electronic Evidence – A Potentially Dispositive Battlefield**

*The courts won't accept an excuse for waiting to develop electronic discovery functionality. It's probably too late if you haven't already started thinking about it if you've got cases coming in the door.* — John Ritter, VP of Information Security, Bank of America

Perhaps because of extreme court decisions awarding sanctions and ordering adverse inferences because of spoliation of ESI, the e-discovery rules create a “safe harbor” for production of ESI. Amended Rule 37(f) provides that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to produce electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

Although this amended rule seems to protect many government defendants and their in-house and “out-house” counsel from allegations of spoliation, the committee notes on the rules indicate that to maintain “good faith operation” of the computer system, and thus avoid sanctions for spoliation, the parties and their attorneys must make reasonable attempts to institute a litigation hold and prevent the routine deletion of potentially relevant ESI. In other words, “a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.” FED. R. CIV. P. 37(f), advisory committee’s note. Thus, amended Rule 37(f) means that there will be no sanctions unless: (1) the party violates a court order, or (2) the party failed to take reasonable steps to preserve ESI after it knew or *should have known* that the information was discoverable and the spoliation resulted from the loss of information. Therefore, to be protected by the safe harbor, the government and their counsel must take affirmative steps to stop routine deletion of ESI once a preservation obligation arises. The obligation to preserve ESI is triggered once a party reasonably anticipates litigation. At this point a party must suspend its routine document retention/ destruction policy, and put in place a “litigation hold” to ensure that all relevant documents are preserved. The rhetorical question therefore arises: when does a preservation obligation and reasonable anticipation of litigation exactly arise — When a significant accident occurs? When an open record request is received? When a notice of claim is made? This undoubtedly will have to be resolved by the federal courts.

[It is interesting to note that the Texas Attorney General has ruled that litigation is reasonably anticipated for purposes of open government when a governmental body receives a letter by an opposing attorney containing a specific threat to sue the governmental body; a person files a complaint with the EEOC, *see* ORD No. 336 (1982); or if a person threatens to sue on several occasions and hires an attorney, *see* ORD No. 288 (1981). On the other hand, the Texas Attorney General has determined that litigation is not reasonably anticipated if an individual publicly threatens to bring suit against a governmental body, but does not take objective steps toward filing suit, *see* ORD No. 331 (1982). And the fact that a potential opposing party has hired an attorney who makes a request for information also does not establish that litigation is reasonably anticipated, *see* ORD No. 361 (1983).].

While the costs of complying with e-discovery can be expensive, the consequences of noncompliance can be far worse. Cases across the country seem increasingly willing to take the hard line with parties who mishandle e-discovery:

- **Adverse inference instruction, preclusion of evidence order, and award of attorneys fees imposed for a small number of emails lost pursuant to “long-standing” document policy.** In 2006, the Southern District of California imposed sanctions against a defendant, an investor in Napster, Inc., in a copyright infringement action regarding musical compositions. After learning that the defendant’s employees routinely deleted emails pursuant to its “long-standing” document policy, without regard to whether the deleted emails were relevant to the litigation, the court issued a preclusion of evidence order, an adverse inference instruction, and an award of attorney’s fees. The court determined these sanctions to be the appropriate remedy, despite the fact that the defendant’s conduct did not constitute a pattern of deliberately deceptive litigation practices, and notwithstanding evidence that the number of emails actually lost was small. *In re Napster Copyright Litig.*, 2006 WL 3050864 (N.D. Cal. Oct. 25, 2006).
- **Variety of severe sanctions issued for failing to search e-mails and permanently losing others pursuant to standard practices.** In 2006, a New Jersey federal court imposed significant sanctions upon an ERISA class action defendant for repeated e-discovery abuses, including failing to search e-mails and permanently losing others due to standard e-mail retention practices. While reserving decision as to the propriety of a default judgment until certain class action issues had been resolved, the court, notwithstanding its proclaimed reluctance to sanction parties, issued a variety of sanctions, including: (1) deeming certain facts admitted by the defendant for all purposes; (2) precluding evidence that was not produced by the defendant in discovery; (3) striking various privilege assertions by the defendant; (4) directing the payment of substantial costs and attorneys’ fees related to defendant’s misconduct; (5) imposing fines in an amount to be determined after the court considered defendant’s financial condition; and (6) appointing a discovery monitor at the defendant’s expense to review defendant’s compliance with the court’s discovery orders. *Wachtel v. Health Net Inc.*, 2006 WL 2538935 (D. N.J. Dec. 6, 2006).
- **Inadequate record hold notices resulted in adverse inference instruction and award of attorney’s fees.** In 2007, a district court in the Southern District of New York granted plaintiff’s motion for sanctions in the form of an adverse inference instruction and awarded plaintiff its costs and attorneys’ fees incurred in connection with its sanctions motion, as well as additional discovery costs where the defendant was only able to produce e-mails for 13 out of 57 current and former employees who were identified as “key players” in the suit. While the defendant sent out document hold notices early in the

case, it failed to issue a reminder notice after going through a corporate reorganization that resulted in the creation of separate entities, and, moreover, the initial hold memos that it distributed were ignored. The court explained that, in the Second Circuit, the “culpable state of mind” requirement [for the granting of an adverse inference instruction] is satisfied... *by a showing of ordinary negligence.*” *In re NTL Inc. Sec. Litig.*, 2007 WL 241344, \*19 (S.D. N.Y. Jan. 30, 2007)(emphasis added).

- **Court orders default judgment for failure to produce “smoking gun” e-mails.** In a 2007 suit for specific performance of a contract for the purchase of a radio station, a Southern District of Florida federal court awarded a default judgment and attorneys’ fees and costs to plaintiff based upon defendant’s discovery misconduct. The court found that the defendant, among other abuses, failed to produce “smoking gun” e-mails during discovery. The e-mails, later obtained from a third party, directly contradicted testimony by defendant that it was in compliance with the purchase agreement’s exclusive dealing provision. Despite defendant’s assertion that the e-mails were purged “as part of ongoing business practice...due to the limited amount of storage space,” the court found the entry of a default judgment to be warranted. *Quantum Communications Corp. v. Star Broad*, 2007 WL 445307 (S.D. Fla. Feb. 9, 2007)

## **E-Discovery Resources**

It is important to keep abreast of the most up-to-date decisions on e-discovery issues. A comprehensive source is [www.krollontrack.com/ediscovery](http://www.krollontrack.com/ediscovery), where you can sign up for automatic monthly notices on new cases.

## **Conclusion: Government Emptor!**

*It's not difficult establishing the benefit of proper records management, when a company such as Microsoft Corp. spends an average of 20 million for e-discovery per litigation. – Michael Heade, Microsoft Records Management Analysis Manager, April 25, 2007*

The amendments to the federal rules of procedure will likely make e-discovery harder, more expensive, and lead to increased motion practice and potentially dispositive sanctions. No attorney or government entity can ignore these amended rules or their effect on how ESI is handled and exchanged during a lawsuit. The key to success, in our humble opinion, is not to be afraid of the new rules or of modern technology. Instead, embrace them, learn them, and win with them.

## **Part Two – How the Rules Differ in Texas Courts**

“Everything’s bigger in Texas”, according to the old saying. But this doesn’t hold true with regard to this particular topic. Clearly, the amended Federal Rules are far more comprehensive, and justify more in-depth coverage – not only because they are newer, but because the overwhelming majority of cases relating to e-discovery are Federal cases. With diversity of citizenship, federal questions, and typically uncapped damages, there’s generally more at stake.

But perhaps more significantly, e-discovery seems more appropriate with the cases we typically find in Federal court. For example, issues involving high-technology, including patents, copyrights, and other intellectual property disputes, generally involve questions of Federal law, or

involve parties with diverse citizenship, and electronic communications are understandably the norm in such cases.

But city attorneys typically wind up in Federal court defending civil rights issues, such as §1983 actions, employment cases, whistleblower cases, First Amendment cases and harassment cases. Arguably, e-discovery and spoliation issues are even more important in these cases, because they generally involve the search for a “smoking gun”. Writers often seem to have problems distinguishing the communication style they use for business e-mail from the style they use in personal e-mail, instant messages, multiplayer online games, or anonymous message boards. As drivers with road rage perceive their cars to separate themselves from physical vulnerability and accountability for bad manners, so too do electronic communicators often employ rude, harassing and hastily written communication styles, often embracing subjects outside the bounds of business etiquette and good taste – in other words, precisely the kind of viscerally repugnant communication that plaintiffs would love to find.

Nevertheless, the overwhelming majority of cases seen by city attorneys are filed in State court, so it seems worthwhile to discuss some of the differences, especially as electronic communications develop greater acceptance in some of the more mundane issues we see.

### **The Texas Rules and Procedure**

Unlike the Federal Rules, the Texas Rules make very little effort to differentiate electronic discovery from any other form of discovery. Despite this, the key principles and strategies are very similar. Even where there are differences, one might expect the Texas courts to find the Federal rules to be persuasive on the issues not specifically addressed by the Texas rules, because they are both newer and more comprehensive. If you have a Texas case, you will probably want to become familiar with the new Federal standards. On the other hand, as a local practitioner in a Texas your knowledge of key differences could give you an advantage.

At the outset, it helps to understand that electronic information is included within the definition of “documents and tangible things” under TRCP 192.3(b), if it constitutes or contains matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person’s custody, care or control. It also helps to know that in Texas, unless the rules state otherwise, *either* the parties *or the court* may modify the standards and procedures relating to discovery. There is no court approval needed if the agreement satisfies Rule 11; however, the Court may modify them on good cause shown. Note also that a Rule 190 discovery plan can also limit the amount of discovery.

The initial disclosure standard in TRCP 194 is considerably narrower than its Federal counterpart, and unlike FRCP 26(f), it must be specifically requested by your opponent, and does not specifically entitle production of any electronic materials. In fact, the only production contemplated by the rule are documents reviewed by an expert, the expert’s vitae, insurance agreements, settlement agreements, witness statements, and in a suit for personal injuries, medical records and bills, and nothing in the rule requires these documents to be produced in electronic form, as opposed to any other form. So, if you want to examine metadata in the patient records to see if the doctor changed them after suit was filed, or to look at the electronic report of your opponent’s expert to see if anything was possibly changed at your opponent’s request, you’re going to have to file a separate request for production specifically request the format you want, and be prepared to justify the redundancy.

In Texas, e-discovery is generally handled through requests for production under TRCP 196.4. Under this rule, you have to specifically request the electronic data, and specify the form in which you want it produced [sample discovery instructions for electronic production under the Texas Rules are appended to this paper as Attachment C]. But however you specify the format, it must be reasonably available in the ordinary course of business. If *through reasonable efforts*, the responding party cannot produce the document in the form requested, he or she must object in compliance with the rule. So, for example, you may *want* the MS Word version of the document, with all the markups and revisions and comments, but if the responding party contends that only the PDF version is reasonably available, the responding party must object under “these rules”.

So, what constitutes an objection under “these rules”? Rule 193 provides that an objection to written discovery must be in writing, predicated on a good faith factual and legal basis, and made within the time provided for answering the discovery. Otherwise, the objection is waived, unless also based on privilege (not waived). However, the Court can excuse the waiver on good cause shown. Rule 193.2. Note that nothing is said about reasonableness, reasonable availability, burden or cost. Presumably, a party would need to couple that objection with a request for a protective order under Rule 192.6, claiming that the protective order is necessary to protect the responding party from undue burden or expense. But Rule 192.6(a) instructs that one should not move for a protective order where an objection is appropriate. The rule continues to instruct that “the person must comply with [the] request to the extent that protection is not sought . . . .”

Using the previous hypothetical, what if the MS Word version you want is on a backup tape, but the PDF is on the active server? It appears that the responding party would produce the PDF, but object to production of the Word file under Rule 193. Would he also move for a protective order? Probably not. Aside from the language of Rule 192.6 discouraging the practice, cost shifting is already provided for in Rule 196.4. “If the court orders compliance with the request, the court *must* also order the *requesting* party to pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.” Note that this is a specific departure from the silent FRCP 26(b)(2)(B) standard discussed before, and unapologetically deviates from the normal rule that the respondent pays the expenses of discovery (*See*, TRCP 196.6).

Can you insist on obtaining electronic documents from a non-party? **YES**, but only if you obtain a court order or issue a *subpoena duces tecum*, and otherwise comply with TRCP 205, because electronic data comes within Rule 192.3(b)’s definition of “documents and tangible things”, irrespective of the fact that Rule 205 lacks Rule 196.4’s language, specifically authorizing the requestor to specify the form in which the data is produced. However, note that the typical “Deposition Upon Written Questions” form has an instruction that specifically states that the documents should be produced in the form they are kept in the ordinary course of business, and asks the custodian to swear to that fact. Obviously, this is done for authentication as a business record, since the self-authentication of production rule at TRCP 193.7 only applies to production by parties. Also note that under Rule 200, you have to give the other party notice of the Deposition Upon Written Questions, and allow them to object and propound cross-questions. Reasonable costs of production must be reimbursed under Rule 205.3(f), so the earlier issues involving a responding party’s objections and requests for cost shifting and protective orders are largely immaterial. Nevertheless, the availability of a TRCP 192.6 protective order extends to any “*person* from whom discovery is sought.” If it is important to obtain e-discovery from a non-party, you may want to consider doing so under Rule 205, using a *subpoena duces tecum*, but either avoid the typical practice of coupling it with a deposition upon written questions, or change the questions you ask as necessary to ensure that you get what you want. Then, you can worry about authentication later (*e.g.*, party admissions), once you know you have your smoking gun.

Special rules may apply to production by certain third parties. For example, specific rules apply to production of medical records, both under the TRCP and the Texas Health & Safety Code. Production from banks and other financial institutions is governed by Finance Code §59.006 (*see*, Tex. Civ. Prac. & Rem. Code §30.007).

Discovery sanctions are generally governed by Rule 215. Consistent with the Federal standard, Texas sanctions are intended to both secure compliance with the rules, punish violations, and deter future violations. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). However, sanctions should not generally prevent a decision on the merits of the case. *Id.*, at 850. Death penalty sanctions are predicated upon the assumption that the claims have no merit. *Cire v. Cummings*, 134 S.W.3d 835, 840-41 (Tex. 2004)(Plaintiff's deliberate destruction of audiotapes justified severe sanctions under the assumption that they were unfavorable to her claims). Imposition of severe sanctions can have due process implications, but pattern of abuse can be important. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242-43 (Tex. 1985). The only sanction which may be imposed against a non-party under the Rules is contempt. TRCP 176.8(a), 215.2(a), (c).

### **Spoilation and Prophylactic Measures**

Detailed discussion of spoliation is beyond the scope of this paper, but it is interesting to read Justice Baker's concurrence in *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998) (Texas does not recognize spoliation as an independent tort action), as well as the analysis of the Texas Supreme Court in *Wal-Mart v. Johnson*, 106 S.W.3d 718 (Tex. 2003).

Many Federal cases regard spoliation as a Federal procedural issue, but still turn to State substantive law. *See, e.g., Floeter v. City of Orlando*, 2007 WL 486633 (M.D. Fla, 2007)(holding that the Federal standard governs, but applying Florida law to aid determination of both, whether a personal e-mail was a public record, and whether the City's failure to preserve it constituted spoliation of evidence). In *Ratliff v. City of Gainesville*, 25 F.3d 355 (5th Cir. 2001), the Fifth Circuit considered whether the City of Gainesville, Texas should be sanctioned for failing to retain a certified agenda for one year, as required by Tex. Gov't Code §551.104. The court held that by simply re-using the tapes prior to the time that they reasonably anticipated litigation, Gainesville was not acting in bad faith, and that sanctions or jury instructions were not appropriate. However, in *Clark Constr. Group v. City of Memphis, Tennessee*, 229 FRD 131 (W.D. Tenn. 2005), the district court held the City accountable for the acts of a third-party construction manager who shredded evidence after the City knew of the litigation, and that the City's failure to prevent this was held to be purposeful and grossly negligent, even if not willful. Consequently, the district court ordered a rebuttable adverse inference from the destruction, along with an award of attorney fees. *See, Pressey v. Patterson*, 898 F.2d 1018 (5<sup>th</sup> Cir., 1990)(case involving Houston P.D. - destruction of audiotapes did not justify striking City's answer, but did justify deemed admissions, where City did not knowingly misinform Court, and misinformation occurred after destruction).

A critical threshold inquiry is whether there is a duty to prevent spoliation, and when does the duty arise (or "trigger"). *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). Consistent with other State and Federal precedent, the duty to prevent spoliation can have a statutory basis or a common law basis. *Trevino*, at 954. The common law basis creates the duty to preserve evidence that is relevant to litigation, or potential litigation, or is reasonably calculated to lead to the discovery of admissible evidence. In the absence of a statutory duty, the common law duty generally arises upon reasonable anticipation of litigation, consistent with the cases analyzed in Part I. *Id.* In *Texas Electric Co-op v. Dillard*, 171 S.W.3d 201 (Tex. App. –

Tyler, 2005), the notice trigger was pivotal to the analysis of whether a jury presumption instruction was appropriate, where the defendant admitted destroying a trucker's log book pursuant to an ordinary six-month retention schedule, but after the defendant's attorney had received a notice of representation from the plaintiff's attorney. Under the circumstances, the appellate court did not find an abuse of discretion in allowing the jury issue.

“Before any failure to produce material evidence may be viewed as discovery abuse, the opposing party must establish that the nonproducing party had duty to preserve \* \* \* [and show] that the party who destroyed the evidence had notice both of the potential claim and of the evidence's potential relevance thereto [i.e.,] whether a reasonable person would conclude from the severity of the accident and other circumstances surrounding it that there was a substantial chance for litigation.” *Id.* at 209, *citing Wal-Mart*, at 722.

Texas municipalities have a number of statutory duties to preserve records. Examples include the records retention standards at chapters 201-05 of the Texas Local Government Code, and the Public Information and Open Meetings acts, at chapters 551 and 552 of the Government Code. The most obvious prevention is to follow these statutory duties. Even where a statutory duty is breached, it doesn't necessarily trigger sanctions. See, e.g., *Ratliff v. City of Gainesville*, 25 F.3d 355 (5th Cir., 2001)(no sanction of instruction for failure to preserve certified agenda in absence of bad faith). The limitations associated with these statutory duties can also provide a shield, as was the case in the *Floeter* case discussed above, which turned on the fact that private e-mails were not “records” under Florida open records law. *Floeter v. City of Orlando*, 2007 WL 486633 (M.D. Fla., 2007)

In the context of litigation, many cases indicate that the reasonable anticipation of litigation standard triggers a duty to preserve, while others would not impose the duty until a discovery request a request to preserve is made. In such cases, it may be helpful for attorneys to be prepared with a form “hold letter”, to prevent accidental destruction, or to at least demonstrate a good faith effort to comply [An example is appended as Attachment D].

Specifically with respect to electronic documents, city attorneys should become familiar with the ordinary retention and backup schedules followed by their IT departments and vendors. Can they “freeze” individual e-mail accounts if requested? Can they back up individual accounts to guard against deletion? Are they equipped to respond quickly to prevent deletions or to recover data? If a voluminous request came in, would they have the resources to respond within deadlines? If not, what external vendors would have the ability to help, and would they know or be able to learn the system? Does your city have instant messaging? Do you have a policy that addresses instant messaging? Are instant messages preserved? If your IT is outsourced, can your vendor respond to these issues, and does your contract provide for these contingencies? If your staff has pagers, smart phones, PDAs, Blackberries, who will you contact and what will you do if an employee alleges receiving a harassing text message, phone call or photo? Can you recover it? Can you save it? Can you audit it? Can you prevent deletions? What authentication measures can tie an electronic transmittal to the sender? Will they satisfy evidentiary requirements?

### **What's Next?**

The new horizon involves instant messaging, text messaging, photo messaging, photo blogging (e.g., Flickr), location blogging (e.g., twitter), and other uses of technology that your city is probably unprepared to face. The real difficulty with these new technologies is that they don't necessarily involve “records” that are “retained”, despite being used in the conduct of government

business. See, e.g., Tex. Atty. Gen. Op. OR2004-0200 (2004)(holding that the duty to produce records under the Texas Open Records Act extends to records in existence at the time the request was made, and therefore instant messages which are not retained or backed up would not be subject to disclosure; however, footnote 1 points out that some systems can be set up to record instant message traffic, in which case, disclosure is probably required). How the courts will deal with these less-structured technologies is yet to be determined, but it doesn't take much imagination to see how alleged misuse of these technologies could significantly impact a harassment suit or an employment action.