



The
BUSINESS RECORDS MANAGEMENT
BULLETIN



A Service of **BUSINESS RECORDS MANAGEMENT**

4th Quarter 2008

DISCOVERY AND THE AMENDED FEDERAL RULES OF CIVIL PROCEDURE

On December 1, 2006 a heavyweight group of edicts came down upon the federal court system in the form of amendments specifically about discovery of Electronically Stored Information (ESI). Over a year later, here are a few results that have surfaced.

Between 10 and 14 states have brought their own civil procedural rules in line with the federal amendments. Because Rule 16 calls for pre-trial conferences between opposing parties to determine a plan for discovery, lawyers have been forced to discuss e-discovery issues early on and in a more transparent way. Attorneys who have realized that electronic discovery can be huge in scale and overwhelming in time and money are narrowing their demands for discovery. The one universal result identified by experts is that companies and organizations are all painfully aware that they should get their house in order and be ready to deal with electronic discovery if and when it comes their way.

But are they ready? In 2007 a survey was conducted by Kroll Ontrack (a legal technology consultancy) in which 200 attorneys serving as in-house counsel for U.S. companies were queried as to whether they have policies and procedures in place to meet the FRCP requirements. Asked what would be their biggest challenge in the next five years, 21 percent said that huge amounts of ESI will be their biggest problem. Asked if they are current and up to speed on the case law and regulations for ESI, 25 percent said yes. Asked if their company has a plan for dealing with ESI in lawsuits or audits, 43 percent said “yes.”

The Rule 16 meetings have forced companies to learn more about ESI within and throughout their information realms. This has helped legal counsel understand



where the information is and whether it is readily accessible or not. It has also opened their eyes to the amazing amount of information that is created by individuals at their desks but which may not be under the control of a corporate records management program—information on memory sticks or PDAs. This is necessary legwork that relates also to Rule 26(a) under which both sides must identify the sources of relevant ESI.

Where is your ESI and is it accessible?

This brings up the need for legal counsel and the IT department to develop, maintain and have ready a profile of ESI sources. Kahn Consulting, Inc. describes the profile as including:

- Types of ESI likely to be requested for litigation and the locations of systems containing it;
- contact information for the owners and managers of ESI;
- preferred system for producing ESI of a particular type; and
- systems with ESI that will NOT be routinely preserved, and why.

Such a profile, as part of an overall preparedness plan, is necessary because it assists organizations with fulfilling certain new rule requirements. The responding organization must specify those systems with ESI that are “reasonably accessible” as contrasted with those that are not reasonably accessible and thus may not be subject to production because of the burden and cost.

But the responding organization must also identify those sources that may hold responsive information that is not being searched or produced because it is not “reasonably accessible.” The opposing party may also “inspect or sample” ESI as required by the court.

Which brings us to Rule 26(b)(2).

This deals with initial disclosure of information that is not discoverable due to undue burden or cost. The responding party must identify sources that may have relevant data but which were excluded because of the burden or cost of accessing the information. This might include information on backup tapes or on obsolete systems.

If this is a situation you are facing, have your IT team primed and prepared to explain how much time will be involved and what the cost will be. In some instances, defendant companies have hired third-party external IT experts to present evidence as to the burden of time and money such retrieval will incur.

Attorney Stephen Prignano of Edwards, Angeli, Palmer and Dodge, has this warning. “Companies should not assume that if data is not deemed reasonably accessible, they don’t need to produce it and therefore don’t need to preserve it.” Unhappily, that classification can be changed later. If the court then asks you to produce this data and you have not preserved it, you are out of luck.

The “safe harbor” rule rocked some boats.

Rule 37(f), the Safe Harbor rule, states that “absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” This controversial rule was the cause of consternation for companies and governmental agencies that have routine retention-and-destruction schedules which might be construed as leading to destruction of evidence, according to Ken Withers of The Sedona Conference. Withers states that courts have focused on the

extent of harm from loss of information. “If the evidence has only marginal value, or is repetitive or duplicative or not reliable, then there is no real prejudice.” Courts have also considered whether the good faith destruction caused extreme prejudice to the other side.

However, Rule 37(f), recently renumbered as 37(c), still forces the defending party to show reasonable operation of its electronic management system, and few have received such protection under this new rule. Norwalk, Connecticut Community College was not allowed protection because it failed to suspend its deletion policy upon notice of litigation. In a case in Oklahoma, the court warned the parties to be “very cautious in relying upon any ‘safe harbor’ doctrine as described in new Rule 37(f).”

E-mail is open to discovery.

E-mail is a form of ESI and is discoverable, according to Rule 34(a). Therefore, an organization must have the ability to enforce a litigation hold on all e-mail to prevent deletion by users or by an automated system. Contoural (www.contoural.com) spells out the benefits of an archiving system for e-mail in its ‘CIO’s Guide to the New Federal Rules of Civil Procedure.’”

An archiving system for e-mail should ideally reduce or eliminate the need to search backup tapes for e-mails when needed and deleted according to a retention schedule. The system should eliminate the many duplicates that float throughout a company’s e-mail system so that legal counsel is not forced to review duplicate documents.

Archiving systems produce a business record that does not rely on human diligence or lack thereof for action, and archiving tools can categorize contents as well as enforce the right retention schedule. Automated e-mail archiving is a requisite for compliance in many business situations.

How about discovery in a LOTE?

That’s a Language Other Than English and it is a fact of life in many litigations involving multinational companies. A lawsuit may be filed in the USA where FRCP applies, but electronic documents may be far away in other countries. Correy Stephenson, staff writer for www.lawyersusaonline.com, points out that the rest of the world has different court systems and rules on electronic discovery. European rules on privacy are much stricter than those in the USA.

Another interesting article on this topic is titled “Solving Problems in Multilingual Litigation” by George Rudoy and Michelle Mahoney in Law Technology News, January 9, 2008.

Although some states have followed the FRCP amendments with versions of their own, and others have adopted the main points, about half the states have not even tackled the issue. Your storage contractor can be a source of information on where your state stands on these major changes to federal courts.

First Online Master's Degree in Archives and Records Administration

San Jose School of Library and Information Science Now Accepting Applications for the Fall 2009 Cohort

Patricia C Franks, Ph.D., CRM
MARA Program Coordinator
pfranks@slis.sjsu.edu.

The first group of students to pursue a Master of Archives and Records Administration (MARA) degree through the San Jose School of Library and Information Science started their studies in August 2008. With the convenience and flexibility of a fully online format, students can live anywhere while enhancing their career options in a rapidly expanding field that will play an important role in the digital information age. MARA graduates will be among the few information professionals specifically trained to manage the irreplaceable, yet highly vulnerable digital materials now produced by corporate, government, and nonprofit institutions.

Students in the new MARA degree program learn how to help organizations preserve and provide access to their growing volume of digital assets. They focus on understanding the critical role electronic records play in preserving institutional memory and ensuring corporate accountability. They also prepare for successful completion of the certification exams administered by the Academy of Certified Archivists and the Institute of Certified Records Managers.

MARA graduates will be prepared to work in a variety of settings, including corporations, government agencies, libraries, museums, historical societies, archives, and other non-profit organizations.

Student Profiles

The first cohort of MARA students is a reflection of the wide range of individuals served by the program and their variety of career paths. For example, Connie Rodriguez currently works as a National Records Management Program Manager at Ernst & Young, an international accounting firm. Rodriguez and

her colleagues are exploring new ways to consult with key stakeholders regarding management of her company's physical and electronic records. The MARA program is helping Rodriguez learn about emerging trends and best practices that impact her work.

MARA student Patricia Manning works as a Records Specialist at Baker Hughes, an oil field services company. She is helping her company develop a records retention schedule and create a records and information management system. She is the solo Records Specialist for her company, and she appreciates the professional networking that the MARA cohort provides.

MARA Curriculum and the Cohort Model

The MARA program is delivered in a cohort model, where a small group of students share the learning journey together. Cohort members start the program at the same time and stay together for the program's duration. Enrollment is limited to 25 students in each cohort.

Students take two courses a semester and graduate in just under three years. They take 14 required courses (42 semester units), including research methods, a 3-unit internship, a course focused on preparation for professional certification exams, and a culminating experience in the form of an electronic portfolio. All incoming students are also required to complete a brief emerging technology course, which prepares them for the online learning environment.

Sophisticated Online Learning Environment

By learning to use sophisticated technology as part of their coursework, MARA students are better prepared to successfully navigate a rapidly changing information landscape and apply technology in their professional lives. Students interact with peers and instructors through web conferencing, social networking platforms, and immersive environments. Students also learn to store and organize their own digital assets by uploading them to the School's learning management system, and by completing their electronic portfolio as their culminating experience.

The San Jose School of Library and Information Science is a recognized leader in making effective use of leading edge technologies for distance learning. US News and World Report named it the #1 e-learning service provider in its discipline. In addition, the School received the 2007 Faculty Innovation Award from the Association of Library and Information Science Education in recognition of the School's leadership in applying emerging technologies in a web-based learning environment.

More Information

Applications are now being accepted for the next MARA cohort, which will begin their studies in August 2009. The application deadline is March 30. To learn more about the MARA program or apply, visit <http://slisweb.sjsu.edu/mara/index.htm> or contact Dr. Patricia Franks, MARA Program Coordinator at pfranks@slis.sjsu.edu.

Patricia C. Franks, Ph.D., CRM, has a doctorate in Organization and Management with an e-business emphasis. Dr. Franks is a member of ARMA International's Standards Development Committee, and she has served on various committees and task forces for both ARMA and AIIM. She is an adjunct instructor and MARA program coordinator for San Jose State University and an independent consultant in records and information management and business process analysis.

BRM in Erie Completes NAID Audit Process for 2009

Business Records Management in Erie, PA was audited on October 27, 2008 for the NAID Certification Program, and met all criteria and documentation for a favorable audit.

The AAA-Certification from NAID (National Association for Information Destruction) is the highest standard in the industry. It is awarded to companies that adhere to stringent and comprehensive document destruction methods, while meeting security requirements that are designed to protect the privacy and confidentiality of all shredded information.

BRM was the first and remains the only AAA-Certified shredding company in the Erie area.

The auditor was most impressed with BRM's preparation for the audit. Jack Riva, Director of Operations, and Kevin Carter, Erie Operations Manager, indexed all required information prior to the audit, allowing the task to be completed in minimal time.

Congratulations to BRM's Erie Office!

Upcoming Shred Events

Business Records Management has scheduled two Shred Events with the Johnstown Chiefs of the East Coast Hockey League.

Going Green Nights will occur prior to home games on Saturday January 3 at 7:05 PM against the Cincinnati Cyclones and Friday February 20 at 7:05 PM against the South Carolina Stingrays. Anyone bringing personal information to the Cambria County War Memorial Arena on game day will be able to securely discard it, and will receive a discounted ticket to that particular night's game.

For more information on these events, contact BRM.

The November 1 FACTA Deadline Has Passed...How Compliant are You?

The Fair and Accurate Credit Transactions Act (FACTA) is one of the top laws governing businesses on information security and disposal. FACTA mandates proper disposal of documents containing consumer information.

November 1, 2008 was the deadline for businesses that handle consumer information to develop and implement an Identity Theft Prevention Program to protect their clients. Failure to meet these requirements can result in steep fines, negative publicity, loss of business and legal action.

For more information, please contact Business Records Management.

Employee Profiles



Adam Spinner has been an Accountant with Business Records Management since May 2006. His favorite part about BRM is interacting with customers from our various locations. He also likes working on Pittsburgh's North Side,

because the location is so close to the athletic stadiums. Adam's daily duties include generating and integrating invoices, posting them online, handling special projects and billing, answering customer invoice questions, processing credit card transactions, posting daily cash receipts and other day-to-day accounting needs.

Adam is a 2005 graduate of Penn State University, with a degree in Accounting and minor in Economics. In his free time, he likes going to Pirates, Penguins and Steelers games, as well as traveling to Altoona and State College to watch the Pirates' minor league teams. Adam enjoys playing in various Pittsburgh recreational sports leagues with friends, and on fall weekends, he heads to State College to tailgate and watch the Penn State football games. Aside from sports, Adam also enjoys going to his hometown in Cambria County, hunting with his family and spending time with his girlfriend, Cindy.



Tina Van Briggie has been with BRM for eight years, and works in the Data Entry Department. She is currently the Data Entry Coordinator, and her daily duties include barcoding, scanning and indexing charts into the computer system.

She is also responsible for verifying the accuracy of her department's work. Her favorite part of BRM is working with so many wonderful people.

Tina graduated from Pennsylvania Culinary Institute with an Associate's Degree as a Certified Pastry Chef. In her free time, she enjoys going out to dinner with her boyfriend Scott and seeing comedy and fantasy movies. She has two wiener dogs, named after Lord of the Rings characters Smeagol and Gimli.

Congratulations eNewsletter 4th Quarter Winners!

Congratulations to **Donna Magga** of Paul C. Rizzo Associates, Inc. and **Frank Patrick, Jr.** of Aluminum Company of America. They each won a \$50 gift card to a local restaurant. On behalf of everyone at BRM, thanks again and congratulations!

