

FHH Telecom Law
January 2007

**New Court Rules Address Preservation,
Disclosure of Electronic Files In Litigation**

By Patrick A. Murck
murck@fhhlaw.com
703-812-0476

After seven years and one major revision, the latest amendments to the Federal Rules for Civil Procedure became effective on the first of December. So what, you ask? As it turns out, the new rules could affect you if you ever wind up involved in litigation in a federal court.

Included in the revisions are new rules for dealing with electronically stored information during discovery, so-called “e-discovery.” Of particular concern here is the fact that the new e-discovery rules set out a roadmap for how electronically stored information can be used during the “discovery” portion of litigation.

As any of you who have had the misfortune to find yourselves in litigation probably know, one of the most burdensome aspects of that process involves “discovery”. Discovery is the pre-trial phase of the proceeding during which each side has the right to ask the other side to cough up all information, documents, witnesses, etc. that might be relevant to the issues to be litigated. Contrary to the mythical trial process depicted on *Perry Mason* and innumerable other TV series, the real-world trial process is designed to prevent any sudden surprises popping up during the trial. Discovery is the main device through which that goal is accomplished. The idea is that each side of the litigation should know what cards the other side is holding before the trial starts, so that the issues can be narrowed and the trial process streamlined as much as possible.

As a result, when litigation is commenced, one of the first major chores is answering the other side’s discovery requests, which normally include requests for all relevant documents of any kind that a party (including the party’s employees, agents, etc., etc.) may have anywhere in their files.

Historically the search for responsive documents involved a tedious review of all paper files. But with the advent of electronic data storage, courts have had to grapple with a variety of new issues. For example, we all know (from the Enron episode, and before that, the Ollie North/Fawn Hall episode) that shredding documents can get you into trouble. But what about erasing electronic files (for example, pesky emails) – isn’t that pretty much the same type of conduct?

The newly revised federal rules reflect an effort to begin to address such questions. While this is an area which is still in the process of evolving, here are some considerations which businesses should bear in mind, even if they are not currently

involved in any litigation.

Businesses should have a general policy relating to electronic document retention and storage. A key provision of the new e-discovery rules is the limited “safe harbor” provision in Rule 37(f) that shields a litigant from sanctions for overwriting electronically stored information. The rule acknowledges that it is impossible to store every bit of electronic data that a firm creates in its day-to-day operations, and that electronically stored information is inevitably overwritten in a routine manner. An example of discoverable, but routinely overwritten, electronic information is “metadata.” (Metadata is the information that a computer stores about a document such as the last person who used it, the date it was last modified, etc.) This information, which can be highly relevant to litigation, is often times automatically overwritten every time the document is accessed, and this usually cannot be prevented.

Another example of routinely overwritten electronic data is that which is stored on backup tapes. In general, businesses do *not* have a duty to preserve backup tapes for all electronic information related to their business dealings, unless they are aware of potential litigation. Therefore, if it is the general practice of a business to overwrite their backup tapes, or drives, on a weekly basis, there is no duty to preserve the overwritten information until it becomes clear that they may be involved in a lawsuit – and consequently, a litigant will not have sanctions imposed for failing to provide properly requested electronically stored information if this information was lost because of the good faith, routine operation of the litigants IT system.

But be aware, good faith is subjective, and would likely require the litigant to suspend the routine overwriting of information once he/she reasonably becomes aware that the information could possibly be relevant to potential litigation. For instance, if a company routinely overwrites backup tapes once a week, but a contract dispute arises, the overwriting practice should be suspended so that new relevant information pertaining to that dispute is erased. Additionally, it is important to keep up-to-date contact information for former IT managers, as they may be required to give evidence of what the routine business practice was for overwriting, or storing electronic data at some previous time, that happens to be relevant to discovery in an ongoing lawsuit.

In a perfect world, none of us would ever get involved in litigation and, thus, none of us would ever have to deal with discovery questions. But since we don't live in a perfect world, there is at least a reasonable chance that, at some point, we will all have to start sorting through our various files in order to answer discovery requests. As the Boy Scouts say, be prepared.