

# The New Reality ...

Amendments to the  
Federal Rules of Civil Procedure

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## The Problem ...

- **Data is More Difficult to Dispose**
  - Shredded paper = essentially irretrievable
  - "Delete" = misnomer for digital data

## The Problem ...

- **Volume of Data is Increasing**
  - 99% of new information is stored digitally (most on hard disks)
  - An estimated 60 billion e-mail messages are sent each day
- **Most Data is Only Digital**
  - Less than one-third of documents are ever printed
  - 60% of business-critical info is stored within corporate email systems

## The Terms...

- **EDD or Electronic Data Discovery**
- **EED or Electronic Evidence Discovery**
- **ESI or Electronically Stored Information**
- **DAT or Document Analysis Technology**
- **eDiscovery or E-Discovery**
- **Cyber Evidence**

## Spoliation

**“the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”**

**Mosaid Technologies, Inc. v. Samsung Elec.Corp. (D. NJ 2004)**

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## Spoliation

- **Wachtel v. Health Net, Inc. (NJ District 2006)**, some facts taken as established, exhibits stricken from evidence, some witnesses barred, reimbursement of plaintiff’s fees and costs, discovery master paid by defendants, fine for discovery violations.

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## Spoliation

- **Coleman v. Morgan Stanley, (Florida Cir. Ct. 2005)**, judgment against Morgan Stanley for failure to produce 2,000 backup tapes [**\$604 million** compensatory and **\$850 million** punitive damages]

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## Spoliation

- **Zubulake v. UBS Warburg (SDNY 2003)**, adverse inference instruction (e-mails not produced would have negatively impacted case), defense counsel partly to blame for not locating and producing e-mails, **\$29 million** damages

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## The Amendments ...

- **Federal Rules [FRCP]**
  - Electronically Stored Information
  - Effective December 1, 2006
  - Discovery Timeline Shortened
  - Containment of Discovery
  - Judicial Supervision

## The Rules...

- **Rule 26(a):**
  - Provisions Governing Discovery; Duty of Disclosure
  - Party Must Provide Description by Category and Location of All
    - Documents,
    - ESI,
    - Tangible Things
  - In Their Control
  - Which They May Use to Support Their Case

## The Rules...

- **Rule 16:**
  - Pretrial Conferences; Scheduling
  - Order May Include ESI
  - Agreements on Privilege or Protection

## The Rules...

- **Rule 26(b)(2)**
  - Discovery Scope and Limits
    - Party Need Not Provide ESI From Sources That Party Identifies as "Not Reasonably Accessible" Because of Undue Burden and Cost (Good Cause Exception)
- **Rule 26(b)(5)**
  - Claims of Privilege or Protection
    - If Inadvertently Produce Privileged or Protected Material, Can Notify and Have it Returned or Destroyed (Clawback)

## The Rules...

- **Rule 26(f)**

- **Conference of Parties; Planning Discovery**

- Relevant AND Accessible Discovery of ESI
- Form In Which it Should be Produced
- Issues Regarding Privilege or Protection
- Preservation of Evidence

- **Rule 33**

- **Interrogatories to Parties**

- Applies to ESI;
- Can Specify Electronically Stored Information

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## The Rules...

- **Rule 37(f)**

- **Failure to Make ESI Disclosures or Cooperate; Sanctions**

“Safe Harbor” – Court May Not Impose Sanctions For Failure to Produce ESI as Result of “Routine,” “Good-Faith” Destruction of Information as Routine Operation of System

- **Preservation of Evidence**

- **Rule 45**

- **Subpoenas**

- Can Include ESI;
- Can Specify Form in Which to be Produced

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## The Rules...

- **Rule 34**

- **Production of Documents, ESI, Things & Entry**

- Makes ESI Equivalent to Paper
- May Specify Form In Which To Be Produced, Else Must Be Produced in Form “Ordinarily Maintained” or “Reasonably Usable”

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## The Troubles...

- **Retention vs. Preservation**

- **Counsel Does Not Know What Data or Where**

- **Metadata Required for ESI**

- **Other Forms of E-data May Be Discoverable; IM, Web-based E-mail, Images, Voice Mail, Thumb Drives, PDAs, Cell Phones**

- **Eliminating Duplicates**

- **Wiping Technologies vs. Forensic Capabilities**

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## Retention Policies

- **Based on Business Practices**
- **Must be Written and Conveyed**
- **Must be Monitored and Enforced**
- **Destruction Occurs as Routine, Good Faith Operation of Business Systems**
- **If Retention Policy Not Written, Courts Look to Actual Practice to Determine “Routine, Good Faith Operation”**
- **Need Routine to Be Protected Under Rule 37(f)**
- **Cannot Develop or Change Retention Policy Once Litigation Commences or Reasonably Anticipated**

## Sedona Guidelines

- **Organizations should have reasonable records management procedures**
- **Procedures can be tailored to the organization, but --**
- **Procedures should address full information life-cycle**
- **Procedures should address litigation hold**

## Sedona Guidelines

- **The Sedona Conference is a non-profit group of legal experts that offer suggestions for improving the legal system**
- **The Sedona guidelines for electronic discovery are their suggestions for improving the system**
- **They are non-binding, but persuasive authority**

## Sedona Guidelines

- **You don't have to preserve**
  - **all digital data**
  - **shadow, residual or deleted data**
  - **metadata**

## But ... In the Commentary...

Organizations should consider retaining **sufficient metadata about records to ensure the trustworthiness of the records** for organizational, fiscal, legal and historical purposes. If an organization **migrates electronic versions** with associated metadata to other versions without that metadata, the organization should consider if and how it would preserve electronic versions including metadata if it has actual notice (by court order or otherwise) that the metadata is material and needs to be preserved.

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