
One Year After the Federal E-Discovery Rule Amendments

M. James Daley and Kenneth Prine

Star Trek Captain Jean-Luc Picard would be proud. Courts, counsel, and clients now “boldly go where no man has gone before” in exploring the new frontier of electronically stored information (ESI). Since the December 2006 amendments to the Federal Rules of Civil Procedure, e-discovery motion practice is on the rise in litigation generally and environmental litigation specifically, as reflected by an increase in reported decisions and anecdotal reports from many federal and state judges. In response, a growing number of federal and state courts have implemented protocols and guidelines for addressing ESI issues. The protocols tread a fine line between observing the “prime directive” of the Federal Rules amendments and corresponding state rules, on the one hand, and the urgent need to supply practical guidance to judges, attorneys, and litigants at the local level, on the other. The growing number of ethics opinions involving review of inadvertently produced metadata and the ultimate admissibility of ESI is also helping to further refine the contours of discovery practice under the amended Rules.

At a recent e-discovery conference, a federal magistrate noted that United States District Court judges and magistrate judges should not be asked to be e-discovery “day care” providers to litigants. And who can blame them? They are supposed to provide guidance and make decisions where the parties truly cannot resolve difficult legal and factual e-discovery issues. They loath providing “parental supervision” where parties fail to communicate and collaborate to resolve these issues without court intervention. This is not a new development in discovery, but Rule 26(f) requirement to specifically meet and confer regarding ESI arguably adds a new layer of time, complexity, and cost to this process. The requirement has “upped the ante” for computer-literate practitioners, and counsel on both sides of the bar have expressed a need for more concrete guidance.

In response, more than thirty federal district courts have adopted local ESI discovery rules, protocols, or guidelines. See K&L Gates Electronic Discovery Law, Updated List: Local Rules of United States District Courts Addressing E-Discovery Issues, www.ediscoverylaw.com/articles/resources/. In a legal

world where multijurisdictional practice is increasingly the norm for environmental litigators, this is an important reference to bookmark.

These protocols attempt to provide practical guidance to parties in conducting e-discovery. They also foreshadow how the court may treat unresolved e-discovery disputes. If misused, however, these protocols have the potential to increase the cost of litigation, especially in low-dollar cases where the amount in controversy may not warrant traditional e-discovery.

One such example is the *Suggested Protocol for Discovery of Electronically Stored Information* (the Maryland Protocol) adopted by the United States District Court for the District of Maryland in early 2007. The Maryland Protocol was prepared by a joint bench-bar committee consisting of Magistrate Judge Paul Grimm, members of the bar, and technical consultants. Although the Maryland Protocol has not been formally adopted by the District of Maryland, it appears on the court’s Web site at www.mdd.uscourts.gov/news/news/ESIProtocol.pdf. The Protocol expressly states that it is “a working model” to be reviewed periodically to determine whether the court should adopt more formal guidelines or rules relating to ESI. It also expressly states that it is not intended to be an “inflexible checklist,” it may not apply in all cases, and it is intended “to provide the parties with a comprehensive framework to address and resolve a wide range of ESI issues.” The Protocol stresses the role of counsel for the parties in ensuring that their clients are fully aware of their discovery obligations, including preservation obligations and preparation for the initial conference.

Seeking to improve the prospects that the Rule 26(f) conference under the amended Rules will be meaningful, the Maryland Protocol suggests that the parties may wish to exchange information before the initial discovery conference of the parties and states that a reasonable request for such information may include

information relating to network design, the types of databases, database dictionaries, the access control list and security access logs and rights of individuals to access the system and specific files and applications, the ESI document retention policy, organizational chart for information systems personnel, or the backup and systems recovery routines, including, but not limited to, tape rotation and destruction/overwrite policy.

Mr. Daley is a partner and cofounder of Redgrave Daley Ragan and Wagner LLP (RDRW) in its Kansas City, Missouri, office, and Mr. Prine is counsel for RDRW in its Minneapolis, Minnesota, office. Mr. Daley and Mr. Prine may be reached at jdaley@rdrw.com and kprine@rdrw.com.

Id. at 5–6. The Protocol includes an extensive listing of the issues to discuss at the initial conference.

To the extent that the protocols eliminate needless discovery disputes, they will advance the civility of the profession and the goals of Rule 1—a just and speedy resolution of disputes.

The e-discovery rules permit a requesting party to specify a form of production and a responding party to reject that form and propose another. Where the parties cannot reach agreement on the form of production, the Maryland Protocol states that ESI should be produced as “static images,” defined as “representation[s] of ESI produced by converting a Native File [also defined] into a standard image format capable of being viewed and printed on standard computer systems.” Tagged Image File Format (TIFF) and Portable Document Format (PDF) are acceptable standard image formats. Under the Protocol, the load files should be produced with static images if they can be created without “undue burden or cost.” *Id.*, at 3, 16. The last clause is the limiting one; a claim of “undue burden or cost” will put the matter before the magistrate judge or district court. But that may be necessary to avoid unnecessary e-discovery costs under the Protocol.

Discovery of Data About Data

Metadata is data about data. Information on a computer system will record when a document was accessed, by whom, and what changes were made to a document. Metadata associated with a computer file does not accompany the creation of a static image of the computer file’s contents unless the person processing the imaging is instructed to extract all or a portion of the metadata and to link it to the image.

The Maryland Protocol acknowledges that metadata is part of ESI but that it may not be relevant. Even if it is relevant,

the cost of extracting metadata may mean that metadata associated with a native computer file either is not reasonably subject to discovery or is subject to cost-shifting under a Rule 26(b)(2)(c) analysis. Accordingly, the Protocol makes clear that individuals involved in discovery discussions need to be aware of the costs of extracting and producing metadata.

The Protocol sets forth guidelines applicable to metadata. First, it explains that metadata need not be routinely produced, except upon agreement of the parties or a showing of good cause by the requesting party. Second, upon agreement of the parties, the district court will consider an order that a party may produce metadata as part of a native format production upon the representation by the receiving party that it will not access or review that metadata. Third, if a party produces ESI without all of its original metadata, the producing party should provide written notification of this fact to the requesting party either at or prior to the time of production.

The Protocol identifies three different types of metadata and suggests additional procedures and general rules for dealing with each during discovery.

System metadata is data that is automatically generated by a computer system. System metadata is less likely than other forms of metadata to involve issues of privilege or work product. The Protocol states that system metadata need not be routinely produced, but production is encouraged “where it will not unnecessarily or unreasonably increase costs or burdens.”

Substantive metadata is data that reflects the substantive changes made to a document by the user. The Protocol explains that substantive metadata need not be routinely produced. Rather, production should only be made upon agreement or upon a showing of good cause.

Embedded metadata is text, numbers, content, or other information that is directly or indirectly inputted into a native file by a user and that is not typically visible to the user viewing the output display of the native file on a computer screen or as a printout. The Protocol states that unlike substantive or system metadata, embedded metadata is “generally discoverable,” subject to the potential redaction of substantive metadata, and “in appropriate cases” should be produced as a matter of course. The Protocol recommends that if the parties decide to produce embedded metadata, they should discuss and agree on methods to remove other forms of metadata while preserving the embedded metadata.

As with the other district court protocols, the Maryland Protocol seeks to anticipate and resolve in advance ESI discovery issues that are most likely to be in dispute. One hopes that all of these protocols end up being a positive development. To the extent that the protocols eliminate needless discovery disputes, they will advance the civility of the profession and the goals of Rule 1—a just and speedy resolution of disputes. Whether they will also help render litigation “inexpensive”—the third of Fed. R. Civ. P. Rule 1’s goals—will depend upon the reasonableness of the parties and the level of engagement of the magistrate or the district court, especially in “asymmetric” cases where one party has no ESI and the opposing party has nothing but ESI. Further, as the bar has more

experience with protocols, an increased standardization of ESI discovery practice not dependent on the unique facts of each case may emerge that may contribute to national ESI discovery standards.

The Ethics of Metadata E-Discovery

Anyone in a litigation practice who uses the “track changes” feature of Microsoft Word may have had the experience of transmitting a document to an opponent in a manner that permits the opponent to see this metadata—tracking changes that were made. To avoid this accident, senders can transmit documents only as PDFs or use software that “scrubs” the metadata before transmission. Or they may turn to the ethics committee of their bar associations for assistance. Several ethics committees have spoken on this subject, and, much like the e-discovery case law, there is a split of authority on what a lawyer is allowed to do or should do.

In September 2007, the Legal Ethics Committee of the D.C. Bar released Opinion 341 on the ethics of mining metadata in electronic communications a lawyer receives from opposing counsel. Maryland, New York, Florida, and Alabama also have released opinions on this issue, as has the American Bar Association. The opinions vary in their conclusions about a lawyer’s obligations in this situation.

Under D.C. Bar Ethics Opinion 341, if the receiving lawyer has “actual knowledge” that the sending lawyer of such a communication has inadvertently transmitted metadata, then the receiving lawyer is under an obligation of honesty not to review the metadata. Such actual prior knowledge would arise if the sending lawyer tells the receiving lawyer about the inadvertent production before the receiving lawyer has reviewed the metadata or when upon review it is apparent that the inadvertently produced metadata was unintentionally included.

While Opinion 341 permits the practice of metadata mining when an attorney does not have actual knowledge that the metadata was transmitted inadvertently, other ethics opinions take a different view. The New York State Bar Association Committee on Professional Ethics, in Ethics Opinion 749 from December 14, 2001, and the Florida Bar Association Ethics Committee, in Ethics Opinion 06-02 from September 15, 2006, found such metadata mining to be unethical. The Alabama State Bar Office of the General Counsel, in its Ethics Opinion 2007-02 from March 14, 2007, distinguished electronic records that are exchanged among counsel, such as motions, from other electronic records. According to the Alabama opinion, “[t]he mining of metadata [from electronic records exchanged among counsel] constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party.” The opinion further states that the production of metadata during discovery “will ordinarily be a legal matter within the sole discretion of the courts.” In Maryland, metadata is reviewable by a recipient without having to determine whether the sender transmitted the metadata inadvertently. Maryland Bar Ass’n Ethics Docket No. 2007-09.

The general lesson for counsel is to be well aware of the relevant local rules and ethics opinions in the jurisdictions as they relate to ESI. Especially when practicing in jurisdictions away from “home” counsel should not make assumptions that the ESI-related ethics rules are consistent between jurisdictions.

Identification of Key Players

In this post-Atlantic Research (*U.S. v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007)) era, persons with cost-recovery or contribution claims must properly and in a timely manner identify “key players,” custodians of relevant ESI. *Consol. Aluminum Corp. v. Alcoa, Inc.*, 2006 U.S. Dist. LEXIS 66642 (M.D. La. July 19, 2006) illustrates the risk of ignoring this admonition. Alcoa sent a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cost-recovery demand to Consolidated in 2002 and promptly put a litigation hold on the electronic documents of four Alcoa employees involved with the remedial investigation and cleanup. In 2003, Consolidated filed a declaratory judgment action seeking to be absolved of liability.

**Anyone in a litigation practice
who uses the “track changes”
feature of Microsoft Word may have
had the experience of transmitting
a document to an opponent in a
manner that permits the opponent
to see this metadata.**

In 2005, Consolidated propounded discovery that prompted Alcoa to expand its key player list by eleven more names. It was not until this expansion that Alcoa suspended its janitorial e-mail deletion policy and backup tape maintenance policy, which at Alcoa meant that e-mail older than about seven months was no longer available. The district court sanctioned Alcoa for the loss of relevant information—in effect determining that Alcoa should have identified these additional individuals as key players in 2002 or, at least, a lot earlier than 2005. The district court declined to impose an adverse inference instruction sanction on Alcoa but ordered Alcoa to bear the cost of redepositing the eleven new key players, among others, as well as “any other employees of Alcoa later determined to be ‘key players’ in this litigation whose emails

have not been preserved” and to pay the costs and fees associated with the motion for sanctions and “in investigating and attempting to obtain the discovery in issue.” *Id.* at *36.

Admissibility of ESI

Obtaining ESI does not guarantee its admissibility. Admissibility issues must be addressed with ESI as with all other forms of evidence. In fact, due to chain-of-custody concerns and the various ways in which ESI can be modified somewhat transparently, establishing admissibility may be more of a challenge with ESI than with other types of evidence.

A recent opinion from Magistrate Judge Grimm of the United States District Court for the District of Maryland emphasizes the need for litigants to remember that when using ESI at trial and even in support of a motion for summary judgment, the rules of evidence must be observed in order to ensure the admissibility of the ESI. *Lorraine v. Markel Amer. Ins. Co.*, Civil Action No. PWG-06-1893, 2007 WL 1300739 (D. Md. May 4, 2007). Specifically, the court stated:

Whether ESI is admissible into evidence is determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence. Failure to clear *any of these evidentiary hurdles* means that the evidence will not be admissible.

Id. at *5 (emphasis added). The magistrate then identified five evidence rules that could present hurdles for the admissibility of ESI: (1) Federal Rule of Evidence 401 addressing relevance; (2) authenticity under Rule 901(a); (3) hearsay as defined by Rule 801, and if it is hearsay whether an exception (Rules 803, 804, and 807) is applicable; (4) the question of whether the form of the ESI that is being offered as evidence is “an original or duplicate under the original writing rule, or if not, is there admissible

secondary evidence to prove the content of the ESI (Rules 1001–1008)”; and (5) Rule 403 (whether the probative value of the ESI is substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403). *Id.*

Both sides in *Markel* had moved for summary judgment, and the magistrate rendered this decision in the context of denying both sides’ motions because neither party had submitted “admissible evidence” to support the facts set forth in its respective motion. The parties had submitted copies of e-mail messages as exhibits to their respective motions but had failed to properly authenticate the e-mails. *Id.* at *4.

Much of Magistrate Judge Grimm’s memorandum addresses issues not directly related to the resolution of the case, so the reality is that the bulk of the decision is *dicta*. Nonetheless, *Markel* is a good reminder that steps must be taken from the outset of litigation—and sometimes before—not only to preserve potentially responsive ESI, but also to preserve and collect ESI in such a way that ensures its future admissibility is not compromised. This will require early discussions among in-house and outside counsel and IT departments and records managers, as well as thorough documentation of the ESI preservation, collection, analysis, and production processes.

Paraphrasing from Charles Darwin’s *Origin of Species*: (“Not the strongest will survive, but the one who can adapt the best to change”), the mark of genius is the ability to adapt. Invariably, courts, counsel, and clients will adapt to the new frontier of e-discovery. They will do so either by choice or because they must conform to the requirements of court protocols and guidelines, bar ethics rulings, or case law. To be sure, practitioners who accept Captain Picard’s challenge will vigorously and positively respond to the rapidly evolving legal and technical landscape of e-discovery. Those who do not will be left gazing glumly into the sky from galaxies far away. 🌳