Not a Bang, a Whimper: The Silent E-Discovery Revolution in State Court Practice

By Chad P. Brouillard

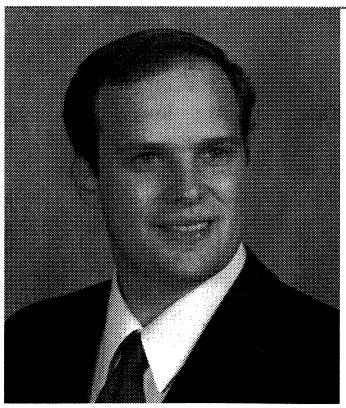
Since the proposed e-discovery updates to the Federal Rules of Civil Procedure were introduced in mid-2006, much ink has been spent describing an impending dramatic e-discovery revolution in litigation. Although federal litigation has been impacted, has the e-discovery revolution even come to state court practice, more than two years later? In my experience, the answer is "yes," but e-discovery has impacted our state practice in a subtle, not dramatic fashion.

Many practitioners by now are aware of the e-discovery rules as contained in the FRCP. As a quick recap, all potential litigants are under an affirmative duty to preserve relevant electronic stored information ("ESI"), which can be contained in virtually every device powered by electricity. To complicate matters for our clients, technical preparation needs to be in place well in advance of the first "e-discovery" lawsuit to prevent the destruction or modification of ESI. Although these preparations can probably only be implemented by the organization's IT department and in-house counsel, defense counsel can be deemed responsible for the identification and preservation of ESI under the federal rules.

The federal case law preceding and following the enactment of the revised FRCP has turned out to be dramatic indeed. The federal courts have leveled hefty financial sanctions at companies, defense counsel and individual litigants themselves for a failure to ensure that relevant data either was not destroyed by human hand or automatic computer processes. In addition, the federal courts have issued spoliation jury charges, which can be fatal to a case by allowing the jury to assume a cover-up took place.

In contrast, things seem quiet on the state practice level. I am unaware of any Massachusetts case law yet concerning a hardcore e-discovery spoliation dispute leading to sanctions or an adverse jury inference. That being said, electronic documents are being used more on the state court level.

Moreover, the Massachusetts Superior Court recently issued Standing Order 1-09 that places affirmative e-discovery burdens on parties responding to routine document production requests.



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Under Part 3 (c) of the standing order, responding parties have to specify which "electronic storage locations" they searched or excluded from their search in response to *every request* for documents.

The change in state litigation also will continue to come from, of all places, our clients. Our clients increasingly use e-mail and scanned documents in lieu of traditional correspondence. They are in the midst of converting their own offices to paperless environments because of the costs savings. The costs of large-scale paper storage and production can often be reduced to a fraction by implementing electronic records storage.

Also, many industries are implementing paperless solutions for the benefits of increased efficiencies of documentation and reliability. In my firm's own practice area, medical malpractice defense, health care institutions are in the midst of implementing e-prescribing systems, electronic order entry, electronic health records, patient portals and the personal health record. The drive behind implementing these applications is not primarily cost, but better quality of care.

Increasingly, when we turn to our clients for responsive documents to discovery requests, it is they who come back to us with e-mail correspondence and discs containing .pdfs or .tiffs.

It is only a matter of time before opposing counsel is no longer satisfied during the discovery phase with the electronic documents purely in the form that we have produced them in. Disputes will inevitably turn to questions about how the underlying electronic information is created, modified, stored and destroyed — questions that get at the underlying reliability of the produced electronic records.

Counsel also will increasingly find themselves in the position of trying to have electronic records admitted into evidence for their client's benefit. The authentication of electronically stored information may require digging into the system and application metadata, the hidden log files that may tell us who did what, when and to which electronic document. Both sides will want access to this information to make arguments for and against the reliability and authenticity of an electronic record.

When the e-discovery rules came down in late 2006, commentators expected that the rules would have a dramatic effect on the litigation landscape beyond the federal courts. It has turned out so far that on the state level, e-discovery has entered the scene more like a silent revolution. Is your practice prepared?