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e-Discovery, ESI & Alignment of Federal Rules in the Internet Age

- The Scope, Content & Management of evidence has transformed in the electronic age.
- Resulting rule changes created a new category of information: Electronically Stored Information (ESI).
- Interactions between Federal and State laws concerning electronic discovery generally relates to amendments to the Federal Rules of Civil Procedure (FRCP).
- The road to amend and align the FRCP with the Internet age has been long and arduous, more work still to be done.
- The amended federal rules went into effect on Dec 1, 2006.
- The interaction and alignment with federal rules open up limitless layers of confusion, interpretation and opportunities.
- This has precipitated complex and interesting exchanges amongst IT, counsel and the judiciary.

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Why This Matters for North Carolina?



- The road map from North Carolina state courts on hypothetical lawyers should satisfy their obligations related to production of ESI is still evolving.
- Not all states have adopted rules explicitly permitting discovery of ESI.
- There are areas of overlap and in some cases, elements of federal rules have not been adopted.
- Wherever adopted, generally modeled on federal Rule, not all federal rules were adopted, however.
- Disagreements or disjunctions may exist between state case laws and federal rules.

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The Scope & Implications of the Rule Changes

- The "new" category of information: ESI comes with a variety of definitional changes and paradigm shifts in the way evidence is stored, extracted, processed and presented.
- All of these "definitional changes" and "paradigm shifts" present unforeseen challenges to the lawyers and the judiciary in both interpreting and processing this new kind of evidence.
- This resulted in enhanced and complex interactions with IT concerning the prudent understanding of the various life cycles of the ESI.
- Three "Key Concepts" have emerged:
 - Accessibility of the ESI
 - Balancing the need for information vs. cost and time of discovery
 - Determination of Safe harbor provisions vis-a-vis inadvertent privilege generation
- All these have constitutional implications.

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How Does the FRCP Apply to Local Jurisdictions ?

- FRCP Amendments have been in play for some time.
- Courts' bent is towards "practicality" and "foreseeable" nature of "safe harbor," spoliation and disclosure.
- FRCP is only a guideline at the state level; states have varying rules when it comes to discovery.
- Only a handful of states have actually started applying or adopting the new rules.
- Will continue to evolve as lawyers test the new rules in state courts.

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What Has Really Changed?

- Procedurally a whole lot has changed and yet nothing seemed to have altered substantively except the following:
 - (i) explosion in volume of the new types of ESI,
 - (ii) tremendous increase in the number of cases coming under the purview of ESI,
 - (iii) interplay between "cost shifting" and "specter of sanctions," raising important questions related to constitutional protection.
- The yawning gap between "law" and "technology" continues to persist.
- While the "staffing requirement" has increased significantly, the "response time" seems to have decreased dramatically.
- Available preparation time for Trial lawyers and the judiciary has shrunk significantly.

Be prepared without being Alarmed !!

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e-Discovery Elements in Scope for Adoption

- *ESI: Definition, content and scope.*
- *Form of Production: Evidence storage & retrieval.*
- *Inaccessibility: Cost & Time vs. Need Analysis.*
- *Privilege Process: Related to safe harbor.*
- *Safe Harbor Provision: Related to inadvertent production & privilege.*
- *3rd Party Subpoenas: Based on accessibility analysis.*
- *Time of Discovery: Directly related to accessibility.*
- *Cost Shifting Presumptions*

Sanctions for Frivolous Motions

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Elements of Dispute Resolution Related to Scope of e-Discovery

- *Specificity of discovery*
- *Predicted relevance and usefulness of the discovery material.*
- *Assessment of quantum of information, accessibility from various sources and comparative ease of access.*
- *Relevance and Context of issues at stake in litigation.*
- *Sanctions predicated on failure to produce relevant information that likely may have existed but is destroyed or no longer available on more easily accessed sources.*
- *Likelihood of finding relevant, responsive information.*

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Sanctions for litigants injecting possible asymmetry in the adjudication process.

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Established e-Discovery Cases of Prominence

- Cost Shifting analysis likely to be based on established *Zubulake* factors, in cases involving disputes related to accessibility.
- Responding party to identify sources, requesting party to show good cause.
 - *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 319 (S.D.N.Y. 2003) (ordering defendant to search and produce 5 backup tapes out of 94 backup tapes to determine whether relevant information, which was not readily available elsewhere, existed on the backup tapes).
 - *Delta Financial Corp. v. Morrison*, 2006 N.Y. Misc. LEXIS 2232 (S. Ct. N.Y. August 17, 2006) (ordering plaintiff to do sample searches to determine whether relevant information existed on backup tapes, thereby shifting the cost of complete test run and review to the defendant).

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Emerging Technology Presents Novel Questions of Constitutional Law

- Questions emerge regarding constitutional protection of electronic information.
- How are the courts confronting new challenges on electronically stored information?
- Adapting legal doctrines to reflect new realities as they protect core constitutional principles.
- Newer cases put newer interpretative glosses on First, Fourth, Fifth and Sixth Amendments.

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Expanding the Frontier of the First Amendment Jurisprudence

- Does the prohibition on "tweeting" a criminal trial violate the First Amendment?
 - *United States v. Shelmut*, 2009 U.S. Dist. (M.D. GA. Nov. 2, 2009)
- The court, while invoking the constitutionality of the Federal Rule of criminal procedure Rule 53, observed that the First Amendment was not violated by the prohibition of Twitter in the courtroom.
- Federal Rule of Criminal Proc. Rule 53
 - "[T]he court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."
 - *Shelmut*, at 2, Citing Fed. R. Crim. P. 53

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... Expanding the Frontier of the First Amendment Jurisprudence

B. Can the Internet blogger remain anonymous or hide behind the veil of pseudonym under the First Amendment?

- *Independent Newspapers, Inc. v. Brodie*, 966 A.2d432 (Md. 2009)
- The Maryland Court of Appeals observed that:
 - "Before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion." *Id.* at 445
 - "anonymity or pseudonymity is part of the internet culture." *Id.* at 425

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How Far Does the Constitutional Boundary of the Fourth Amendment Extend?

- Is your email search accorded the same protection against unreasonable searches and seizures?
- Is the Fourth Amendment protection waived for the electronic transmission of data from the United States to a foreign legal services provider?
 - *Newman McIntosh & Hennessey v. Bush*

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... How Far Does the Constitutional Boundary of the Fourth Amendment Extend?

- Is the state police usage of GPS devices, to trace defendant's movement, a violation of the Fourth Amendment?
 - *People v. Weaver*
- Is there a bright constitutional line in the complex cybet universe?

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Can You Hide Behind The Fifth Amendment Protection in the Cyberspace?

- Fifth Amendment's privilege against self-incrimination may not be applicable in the corporate setting
 - A thin line separates personal records and corporate records
- *In re Grand Jury Proceedings*, 349 F. Supp. 417 (N.D. Ohio 1972) remains viable as a precedent in the explosion of ESI.
- Fifth Amendment's Self-Incrimination clause does not protect an individual from revealing password to an encrypted hard drive.
 - *In re Grand Jury Subpoena to Sebastien Boucher*, 2009 WL 424718 (D. Vt. Feb. 19, 2009)

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Where Do We Go From Here?

- From civil to criminal, every case of today is likely to have some technology component.
- Evidence in many cases may entirely reliant on electronically stored information.
- Electronic discovery is critical – rules governing them will continue to morph and evolve.
- Constitutional protection continues to remain intact.
- Judges and lawyers may have to confront the changing realities by adapting to new paradigms while expanding the constitutional boundaries.

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