OCEG GRC Illustrated Series
Using Technology to Build Governance, Risk & Compliance
March 6, 2007
sponsored by: Cisco Deloitte. SAP Register for this FREE Webinar Now

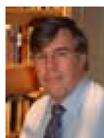
CE
Compliance Executive
> The Daily Information Source for Compliance Executives

Popular Topics

Compliance Regulations
Risk Management
Governance & Ethics
Data Integrity
Technology Choices
Recruitment

Start your search
Search Top Searches

Columnists



Alan Calder
Diana Newcombe
Steve Wright
Adrian Bowles

Leading Companies

• OCEG • TowerGroup • Yankee Group • Forrester • Nortel • Novell • Accenture • Wolters Kluwer • BMC Software • JPMorgan Chase

Make this site your homepage

CE Interactive

• Osprey Compliance Lunch Meeting
• Unlocking Value in

Home > Compliance Regulations > Article

Printer friendly version

New Rules Force Compliance

The recent amendments to the US Federal Rules of Civil Procedure (FRCP), which came into effect on 1 December 2006, will have a far reaching impact on how electronic records are managed within most organizations according to Reza Alexander, DLA Piper LLP.

Under the new rules most corporations will now be obliged to operate and enforce an enterprise wide, resilient and consistent records management program.

As remote as they may seem to practitioners outside the USA these rules are worthy of serious consideration. Lessons can be learned on how organizations should proactively handle the proliferation of electronic documents and ensure they have effective policies and procedures in place not only to respond effectively to disclosure obligations but also to successfully manage the flow, storage and retrieval of information.

The rules force the parties to focus their attention on the issue of electronic disclosure as soon as litigation is contemplated. They also force them to consider the potentially daunting issue of where and in what form the electronic disclosure data might be residing. The parties are required to meet, discuss and agree on a protocol for the disclosure process, all within very short and strict time scales.

These amendments provide a welcome and long overdue solution to the problems raised by disclosure and document retention. They should also act as a wake up call for corporations and all those who handle electronic data and advise on disclosure and compliance issues.
Interestingly, the new federal rules are heralding an unprecedented level of cooperation between technical and legal teams.

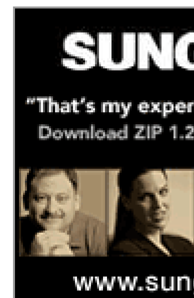
With the exception of the strict and very limited time scales imposed by the American rules in the planning stages of disclosure, there are interesting similarities between the recent US FRCP and their current English equivalent, the Civil Procedure Rules ("CPR"). The common thread and underlying tone is that of cooperation and early analysis of the scope and process of disclosure, a theme that is echoed throughout the CPR and encouraged by groups within the litigation support industry such as LiST (Litigation Support Technology Group).

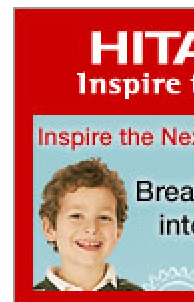
In order to appreciate the significance and raison d'etre of the recent rule changes this article will look and comment on five of the most important changes to the FRCP and their impact on practice.

Definition of Disclosable Material - Rule 34 (a)

Rule 34(a) seeks to remove ambiguity about what is meant by the terms "documents" and "data compilations". Disclosable material will include "Electronically Stored Information" ("ESI"). ESI can be voluminous, dynamic and indestructible, it can include any digitally stored record, regardless of how it was generated.

Sponsors





However, the amended rules go further than merely saying that ESI is disclosable: there is now a duty to preserve and produce such data and corporations must understand how to request, protect, review and produce ESI when faced with a disclosure order or a subpoena to produce relevant documents.

The definition of ESI, which has parallels with the definition of "document" in the CPR, is welcome and provides clarity. In future there should be much less legal wrangling over what is meant by the term "document". The definition is also flexible enough to accommodate any future changes and technological developments.

Streamlining and Cooperation in the Disclosure process - Rules 16(b), 26(f) and 34(b)

These three "meet and confer" rules complement each other and have been drafted primarily with the aim of fast tracking the disclosure process and reaching early consensus on how to deal with it.

Rule 16(b) deals with the requirements for pre-trial conferences and effective scheduling and management between the parties. By compelling the parties to file an electronic disclosure plan within 120 days of a complaint being filed in court (with costly sanctions for non compliance) this rule clearly attempts to streamline the disclosure process at the very outset.

Although seemingly draconian in nature, this rule echoes the corporate mood and the need for enterprises to keep costs in check. It will keep the legal costs to a minimum.

Another benefit of this rule is that it will force the legal teams to understand the IT environments of the parties right at the outset of a dispute, allowing them to identify where the data resides and how best to preserve, harvest and produce it. It puts the spotlight on the electronic disclosure issues in a case at the very outset.

Rule 26(f) complements Rule 16(b) as it obliges the parties to meet no later than 99 days after the complaints are filed and to agree on some form of protocol. The aim is to encourage uniformity, structure and a more coherent and predictable flow during the disclosure process.

This "meet and confer" stage makes absolute sense as it focuses the attention of the parties into formulating a plan, which will assist both parties in completing their disclosure obligations in the most co-operative and non-confrontational manner. This is bound to save costs in the long run.

Rule 34(b) sets out protocols for how documents are to be produced to requesting parties. Parties are required to make early decisions about the disclosure document format thus saving further costs.

As a starting point the rule provides that no party can produce paper printouts of documents whose originals are in an electronically searchable format unless both parties agree, or the court orders it.

Interestingly the rule does not stipulate the format of production but does allow the requesting party to specify the form or forms of production and allows the responding party to object, giving reasons for the objection.

The rule goes on to provide a workable framework for resolving any potential disputes over the form of production. If the requesting party does not stipulate a preferred format (or indeed, if the responding party objects to the requested format) the responding party must notify the requesting party of the format in which they intend to disclose the electronically stored material with the option of producing it either in a form in which the information is ordinarily maintained or alternatively in a reasonably usable form.

There is no corresponding rule giving such clear guidelines in the CPR. This might be a possible area for revision of the CPR in the future as it could prove to be a long term cost saver.

Accessibility of Electronic Data - Rule 26(b)(2)

This rule differentiates between "Accessible" and "Inaccessible" data. A party need not provide disclosure of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost, an example of this might be accessing data within an antiquated computer system.

If the court makes an order compelling disclosure then the onus is on the responding party to show that the information is not reasonably accessible.

This rule, which understandably received a lot of attention during the public comment period, addresses the problem that ESI is often located and duplicated in a myriad of locations with varying accessibility.

In practical terms it provides the responding party with some protection in not having to go to the expense and trouble of tapping into difficult to access sources. In turn it gives the requesting party the knowledge of the sources, which the responding party will not be searching but which can be accessed if warranted.

The rule removes the uncertainty about who pays for the processing of inaccessible data, a development that may well be the preferred approach to adopt here in the UK.

Inadvertent Disclosure of Privileged Material - Rule 26(b)(5)

This rule clarifies the position when privileged material is inadvertently disclosed. Such material is not to be used or relied on by the receiving party and is to be preserved by the producing party until the claim is resolved.

There is nothing unusual about this "claw-back" rule, it is one which is adhered to in the UK too. The rule is necessary given the voluminous nature and complexity of ESI and the shorter time scales available for effective document reviews. In that context the insidious mix of privileged and non-privileged documents may be commonplace.

However, in practical terms once privileged and sensitive material is disclosed the information is understandably vulnerable.

Relief from Spoliation Sanctions - Rule 37(f)

This rule provides a much needed "safe harbor" when electronic evidence may have been lost and become irrecoverable as a result of routine and good faith business processes.

The rule serves two purposes:

(1) It focuses attention on the need to ensure that litigation holds have been communicated effectively and that effective litigation hold policies are enforced as soon as litigation is contemplated.

(2) It provides relief from spoliation sanctions in the event that electronic data may have been lost as the result of routine business practice.

This relief could theoretically be applied to an organization, otherwise having a documented systematic approach to records retention and destruction, if some data had been routinely overwritten within, for example, a few days of the organization receiving notice of litigation and before preservation notices were distributed effectively across the entire organization.

It does however, present an interesting irony from a risk management perspective. In order to comply with internal risk management policies on document retention some corporations may have to ensure that antiquated computer or record keeping systems are kept functioning for indefinite periods. In such cases they may be effectively depriving themselves of the opportunity to argue that such information is "inaccessible" and should not have to be disclosed.

Conclusion

The rules are without doubt welcome and long overdue. They provide solutions to some of the problems in the ever-evolving arena of electronic disclosure and should prove to be solid foundations on which to build over the coming years. The rules pave the way for a common sense approach to disclosure, data retrieval and preservation in an electronic world. They represent a proactive, legally defensible and sensible approach to the harvesting and production of electronic data whether for disclosure purposes or for a regulatory investigation.

A little paranoia is a good thing. The rules will without a doubt have a dramatic and lasting effect on the way in which US organizations will manage litigation. They will force the many organizations who have not yet confronted the whole issue of ESI to stand up, take note and re-educate themselves firm-wide including in-house and outside counsel, IT departments and records managers.

In 2007 it is expected that most corporations will take more direct control of the overall process for discovery and review of electronically stored information and will take active steps to improve, streamline, and automate the discovery process in their respective companies.

Lawyers, who traditionally have had to focus on the facts and the law, will now also increasingly have to focus on the management of the electronic data made relevant by any dispute, with consistent records management operations becoming cornerstones in the plans of many organizations.

The use of a repeatable process for response to disclosure and regulatory requests should become standard practise as should internal investigations and early case assessments.

The following points will be worth bearing in mind when negotiating and planning any electronic data disclosure project:

You need to know what to ask for when creating a disclosure request and what to preserve in the event of anticipated litigation.
Do not demand a category of ESI that you would not be able to produce.
Have a clear understanding and appreciation of the time and expense required to produce the required ESI.
If the cost of production exceeds the value of case then settle and do not waste the court's time or the organization's funds.
Fully understand and communicate the preservation and litigation hold requirements and ensure that they are adhered to strictly.

In short lawyers and their clients will need to have a much better grasp of the sort of issues electronically stored information will present before litigation actually occurs.

Smart litigation practices in the UK will already be attune to the steady increase of eDisclosure and regulatory investigations involving electronic data. For some time now they will have been implementing procedures, honing and refining their litigation support practices and advising their lawyers and clients to use best practices, technology and common sense to manage the onslaught of ESI in the most cost and time effective manner.

Imperative in all this is the need to ensure that lawyers, clients and their respective IT departments communicate with each other and understand the issues. All areas of an organization need to understand the benefits and importance of implementing effective document management systems, records retention policies and forensically sound data harvesting methodologies.

For those further interested in these issues, the UK Litigation Support Technology Group (LiST) has been and continues to be instrumental in developing an awareness and uniformity of approach to the use of technology in litigation and alternative dispute resolution in the UK. Its approach in some ways echoes the guidelines proposed by the recent FRCP.

For further information see :

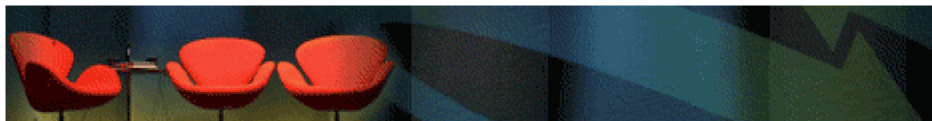
LiST
ILTA (International Legal Technology Association)
The Electronic Discovery Reference Model (EDRM) Project
The Sedona Conference

About the author

Reza Alexander is the UK Litigation Support Manager for DLA Piper UK LLP - responsible for the delivery of technology led litigation and document management solutions primarily to the firm's Litigation & Arbitration and Regulatory & Government Affairs departments.

Reza is also a founding and active member of both the Litigation Support Technology Group [LiST] and the Sedona Conference WG6: International Electronic Information Management, Discovery and Disclosure Group.

Reza's forte is in sourcing and identifying cost-effective and practical solutions to the inherent challenges of complex litigation and regulatory investigations - and is particularly keen in bridging the communications gap between lawyers and IT departments including the general advancement and wider education of litigation technology in the industry.



©2007 GDS Publishing Ltd. All rights reserved. Privacy Policy | Sitemap | Link Trading | Partners | Page Rank