LEGAL TECH

Federal Rule Amendments Were Enacted to Deal with ESI

By Scott Unger

Ray Tomlinson is widely credited with the creation of electronic mail in 1972. Emails started becoming widely used by businesses and individuals in the mid-1990s. Over the course of the past 20-plus years, there has been an exponential growth in the use of electronic communications. Today, we communicate through electronic mediums that were unthinkable back in the early 1970s. The convenience and ability to text, email, tweet, post and fax has profoundly affected our system of jurisprudence.

This exponential growth of electronic communications or electronically stored information (ESI), over the course of the past 20 years, has also had profound effects on our system of jurisprudence. First, the gathering, production and review of ESI have increased the costs associated with prosecuting and defending civil disputes.

Secondly, ESI has caused a significant increase in discovery disputes. ESI differs from other forms of evidence, primarily because ESI can change. Sometimes, this information can change over time, and the ESI can even be inadvertently altered when it's being collected in good faith. Moreover, ESI may be automatically deleted after a certain set amount of time has passed. Unfortunately, the volume and uniqueness of ESI has resulted in discovery disputes that have overburdened the judiciary. These disputes have resulted in delays and additional expenses.

Thirdly, ESI has led to confusion and stress as to what ESI must be retained and produced during the course of the discovery phase. Unfortunately, most trial lawyers do not understand everything there is to know about ESI. It is incumbent upon today's trial lawyers to ask the right persons questions about ESI.

These issues and others resulted in changes to the Federal Rules of Civil Procedure (FRCP), which are "designed to promise simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." Fed.R.Civ.P. 1. The resulting amendments to the federal rules were approved by the United States Supreme Court on April 29, 2015, and became effective on Dec. 1, 2015.

The first major change was the amendment of the "scope" of discovery in the federal courts. The scope of permissible discovery is without question the most notable change in the recently amended rules. Prior to the enactment of these amendments, discovery within the federal court system was similar to the scope in New Jersey state court proceedings. The New Jersey Rules of Court allow parties to request the production of evidence "reasonably calculated to lead to the discovery of admissible evidence." R. 4:10-2(a).

In contrast, as amended, FRCP 26 defines the scope of discoverable information as that which is:

> relevant to any party's claim and defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The elimination of the "reasonably calculated to lead to the discovery of admissible evidence" test, and adoption of a "proportionality" test in defining the scope of discovery, is directly related to the recognition of the costs and delays that have been caused by ESI. The new "proportionality" test requires that the court consider the amount in controversy, the ease in producing information, the parties' financial wherewithal, and the potential benefits and burdens associated with the discovery. Trial lawyers need to be aware that there are currently differing "scopes" of discovery between New Jersey's state and federal courts. Perhaps, over time, New Jersey will modify the scope of discovery to mirror the new "proportionality" test?

The amendments also changed Rule 16, or Initial Pretrial Conference. First, the amendment of Rule 16 provides that the initial pretrial conference shall take place the earlier of 90 days (as opposed to the prior 120 days) after a defendant is served or 60 days (as opposed to the prior 90 days) after any defendant has appeared in the case. The purpose behind shortening this window of time is to reduce delay at the beginning of the case.

Furthermore, the amendment to Rule 16 requires that the parties and court discuss and consider how ESI will be handled, along with any agreements between the parties concerning the inadvertent disclosure of evidence or communications covered by the attorney-client privilege or the work-product doctrine. The authors of the amendments recognized that the inadvertent production of privileged documents has risen significantly with the growth of ESI.

The amendment to Rule 16 necessitates that trial lawyers consider ESI early on in the litigation. In order to have intelligent, meaningful discussions with both adverse counsel and their client, trial lawyers need to think about ESI. Moreover, trial counsel should take affirmative steps to ensure that ESI is preserved by all parties. Trial lawyers should send both adverse counsel and their own client a letter setting forth their responsibilities to preserve ESI.

Finally, the amendment to FRCP 37(e) seeks to create a set of rules aimed at creating uniform rules avoiding the spoliation of electronic evidence and the preservation of ESI. Prior to the amendment to Rule 37(e), there was a split among the circuits as to when a sanction was warranted as a result of the failure to preserve ESI. For example, the United States Court of Appeals for the Second Court in *Residential Funding v. DeGeorge Financial*, 306 F.3d 99 (2d. Cir. 2002), held that a showing of mere negligence was sufficient to support an adverse instruction related to the destruction of ESI.

Conversely, willful or bad-faith spoliation was required for the imposition of an adverse inference instruction in the Fourth, Fifth, Ninth and Eleventh Circuits. See *Goodman v. Praxair Servs.*, 632 F.Supp. 2d 494, 519 (D.Md. 2009); *Rimkus Consulting Grp. v. Cammarata*, 688 F.Supp. 2d 598, 615 (S.D. Tex. 2010); *Faas v. Sears Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008); *Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998). Amended Rule 37(e) resolves that split among the Federal Circuits.

Federal Rule of Civil Procedure 37(e) now requires that parties take "reasonable steps" to preserve ESI. Assuming a party acts "unreasonably" in taking steps to preserve ESI, the amended rule permits the court "upon finding to another party from the loss of the information" to "order measures no greater than necessary to cure prejudice." However, if a party intentionally acted in a manner calculated to deprive another party of ESI in the litigation, then the court may "presume that the lost information was unfavorable to the party," or "instruct the jury that it may or must presume the information was unfavorable to the party," or "dismiss the action or enter a default judgment." Fed.R.Civ.P. 37(e)(2)(A)-(C).

The advent and use of electronic communications has affected litigation. Hopefully, the amendment to the aforementioned Federal Rules of Civil Procedure will reduce the costs and time associated with litigation. In order to effectively reduce these factors, it is incumbent upon trial lawyers, the courts and clients to understand and follow the rules. Parties need to discuss the scope of discovery at the initial pretrial conference. Moreover, they must think about and discuss ESI early in the proceeding. Finally, lawyers need to carefully explain to their clients why it is essential that they take "reasonable" steps to preserve ESI.

It will be interesting, over the coming years, to follow how courts will interpret these amendments. Optimistically, these amendments will result in a better, less expensive experience for litigants. Pessimistically, the amendments will make it more difficult for litigants to seek "just results." Time will tell. ■

The amendment to Rule 16 requires that the parties and court discuss and consider how ESI will be handled, along with any agreements between the parties concerning the inadvertent disclosure of [privileged] evidence or communications.

Unger is a shareholder and member of the Litigation Group at Stark & Stark in Lawrenceville. He concentrates his practice on litigation arising out of business and commercial disputes.

For daily technology news, go to legaltechnews.com.