

NEW JERSEY LAWYER

Get ready for the e-discovery regs

By Robert G. Seidenstein



he game changes, the rules change.

Discovery of electronically stored information (ESI) has presented challenges all its own.

Now, court rules are being amended to deal with the special concerns e-discovery presents.

And lawyers had better be prepared to comply, beginning Sept. 1.

The New Jersey Supreme Court has formally adopted rule changes that regulate discovery in the age of e-mail, voice mail, computer files and other information stored electronically.

Jeffrey J. Greenbaum, a major advocate of the changes, said their adoption "shows that New Jersey is taking the lead in

accommodating discovery to the realities of modern business."

The new rules place controls on the occasionally out-of-control discovery wars involving data maintained in computerized or electronic form.

Indeed, as more data are kept electronically, the need to prevent discovery searches from becoming unfocused, unduly expensive fishing expeditions — or worse, exercises in harassment — prompted the new rules.

Complicating the area is the fact that data often are destroyed or lost as a matter of course.



Jeffrey J. Greenbaum

The Supreme Court's Civil Practice Committee had said the state court system should adopt rules that parallel those scheduled to be implemented in the federal courts in December.

The Supreme Court now has taken that step.

Ironically, the federal model will be implemented in the state courts before it's implemented in the federal system.

Greenbaum of Sills Cummis Epstein & Gross in Newark, a member of the Civil Practice Committee that helped push for state adoption of the federal model, said consistency between the rules is a key benefit. He also played an active role in the development of the federal model for the American Bar Association's Section of Litigation.

Under the new rules, issues relating to discovery of ESI should be dealt with early in litigation.

The party responding to an information request should be allowed to withhold ESI if it is not reasonably accessible "because of undue burden or cost."

But the rule amendment also says, "If that showing is made, the court may nevertheless order discovery from such sources if the requesting party shows good cause."

It also says, "If a request does not specify the form or forms for producing electronically stored information, a responding party shall produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable."

However, the request may specify the form — and the other party may object.

Protections

The rule includes procedures for protecting privileged material produced inadvertently.

It also has a safe harbor from sanctions for ESI lost in the routine and good-faith operation of a computerized system.

That provision states, "Absent exceptional circumstances, the court may not impose sanctions under these rules on a party for failing to provide" data.

The proposed rules are not expected to eliminate all discord from the discovery process. For example, parties may disagree over the meaning of a "reasonably usable" form of information or over the exceptional circumstances that could lead to sanctions.

The changes appear in civil rules covering case management conferences (4:5B-2), scope of discovery (4:10-2), production of documents (4:18-1) and others.

The Discovery Subcommittee of the Civil Practice Committee had noted that under federal case law, once a party reasonably anticipates litigation, it must suspend its routine document-destruction policy and put in place a "litigation hold" to ensure relevant documents are preserved.

In a report, the subcommittee laid out the concerns raised by ESI discovery.

The subcommittee's report defined ESI as "any material that is stored in an electronic format, including, but not limited to, word processing documents, video and audio files, spreadsheets, presentations, e-mail, web pages, voice-mail, and text messages. ESI may be stored on a computer, a computer network, a backup tape or disk, a hard drive, flash drive, or other electronic media storage device."

The report pointed out, "ESI is dynamic: It can be changed, deleted, or corrupted in the process of retrieving it. ... ESI is stored in a variety of formats and is often unorganized with no standards or uniformity among employees, departments, or locations within a business or organization. Record-retention systems regularly record over digital information."

In addition, ESI "thought to be deleted or destroyed sometimes can be recovered, albeit at substantial cost," the report states, adding, "ESI is voluminous and expensive to review."