E-Discovery Rules Coming to Virginia State Courts

BY JON M. TALOTTA AND MICHAEL M. SMITH

It appears that Virginia will soon join the federal courts and a growing list of state courts by amending the Rules of the Supreme Court of Virginia to specifically address electronic discovery. By some estimates, more than 90 percent of business information is now generated and stored electronically. Yet the Virginia Rules governing civil discovery were developed at a time when nearly all business records were generated and stored in paper form. Although the Supreme Court of Virginia was still accepting comments and suggestions at the time this article was submitted, Virginia state court practitioners should take note of the likely changes – which are similar in many respects to the 2006 e-discovery amendments to the Federal Rules of Civil Procedure[1] – and take steps now to adopt best practices that reflect the realities of civil litigation in the information age.

The proposed amendments to the Virginia Rules – as with the changes to the Federal Rules and other state court rules – target three broad issues relating to electronically stored information (ESI): issue identification; production; and preservation.

Issue Identification

Under the proposed changes to Virginia Rule 4:13, as with Federal Rule 26(f), the court may use the initial pre-trial conference to establish ground rules for the disclosure or discovery of ESI. Parties may be asked to address issues relating to ESI preservation and production, including the format in which ESI will be produced, issues relating to privileged and confidential/trade secret information, and inadvertent disclosures. An agreement regarding inadvertent disclosures and post-production claims of privilege could be especially important under the proposed rules, because, as discussed below, the revisions as currently proposed do not include "clawback" provisions similar to the amended Federal Rules.

Like its counterpart in the Federal Rules, the effect of the proposed changes to Virginia Rule 4:13 is likely to be that counsel must become familiar with a client's systems and ESI at the earliest stages of the proceedings (if not before the litigation begins). In-house counsel, and outside attorneys representing corporate clients, would be well advised to meet with IT personnel early on to learn how the company's systems work and its ESI is managed and retained, and also to educate the IT professionals on the important role they are likely to play in discovery.

Production

The proposed changes to Virginia Rules 4:1, 4:8, and 4:9 are intended to provide protections to both requesting and producing parties, and to establish a framework for resolving e-discovery disputes. The goal of these changes is to bring order, consistency, and baseline rules of reason to e-discovery, as well as to limit gamesmanship and the use of e-discovery as a weapon in litigation.

Inaccessible ESI: As with Federal Rule 26(b)(2), under the proposed changes to Virginia Rule 4:1(7), a party may seek protection from the burden of collecting responsive ESI based on undue burden or cost. This is a codification of the developing body of law recognizing that the potential costs and burden on a producing party of collecting some ESI may outweigh the probative value of that information. Thus, responsive ESI that is unreasonably burdensome or expensive to collect must be identified – but need not be produced – by the responding party. Once the "inaccessible" ESI is identified, the requesting party may petition the court to compel collection and production. In such disputes, the court will consider the request in light of the limitations on discovery set forth in Rule 4:1(b)(1), such as the needs of the case, the amount in controversy, the importance of the issue, and the resources of the parties. The court may order the producing party to collect and produce the requested information, or it may enter a protective order. As with Federal Rule 26, the proposed changes to Virginia Rule 4:1 also would allow the court to "specify conditions for the discovery," which could include requiring the requesting party to bear the expense of collecting the ESI at issue, although the producing party must still bear the costs of reviewing the ESI for relevance, confidentiality and privilege.

Format of ESI Production: The proposed revisions to Virginia Rule 4:9 would implement several notable changes to Virginia's rules of civil discovery. Under the proposed revisions to Virginia Rule 4:9(a), a party could request to inspect, test, or sample designated ESI. The proposed revisions to Virginia Rule 4:9(b) would allow the requesting party to specify the form in which ESI is produced (e.g., native files, exported files, PDFs, TIFs).[2] The producing party, however, may object to the requested form. Such an objection might be necessary in a particular case because each of the various formats in which ESI may be produced presents its own set of potential problems (e.g., inability to redact, risk of alteration, limited searchability). In resolving such disputes, courts would likely find guidance in the proposed revisions to Virginia Rule 4:9(b)(iii), which states that if a particular form for

production is not specified by the requesting party, the producing party must produce ESI in the form in which it is usually maintained, or in a form that is reasonably usable. As a practical matter, these changes should go a long way toward eliminating a producing party's strategic production of ESI in one format while retaining that same ESI in a more readily usable format for its own purposes in the litigation.

Other Noteworthy Changes: Under the proposed revisions to Virginia Rule 4:8, a responding party could produce ESI in lieu of answering an interrogatory (as is the current practice with hard copy documents), if the burden of deriving the answer to the interrogatory would be substantially the same for the requesting party as for the producing party. The proposed revisions to Virginia Rule 4:9(b)(iv) provide that a party need not produce the same ESI in more than one form. This should eliminate the burden on producing parties to collect and produce multiple copies of the same ESI simply because it is stored in more than one location.

Preservation

Inadvertent disclosure: The most significant divergence between the currently proposed revisions to the Virginia Rules and the 2006 e-discovery amendments to the Federal Rules is the lack of protection in the former against the risks of inadvertent disclosure of privileged or otherwise protected information. Because the production of ESI often involves very large quantities of information, there is always an increased risk of inadvertent disclosure in an ESI production. Federal Rule 26 includes a "clawback" provision that allows a party to demand the return of any privileged information or trial-preparation materials inadvertently produced during discovery (the Uniform Rules contain a similar provision). [3]

It is unclear whether a similar clawback provision will make its way into the proposed amendments to the Virginia Rules. Arguably, such protections can be more important in state court cases, where parties often are less sophisticated and have fewer resources, but nevertheless may be faced with the daunting task of reviewing vast amounts of ESI for privilege prior to production. Although search capabilities can reduce the costs of reviewing ESI for privilege, this task generally remains the most burdensome and costly aspect of the document production process, just as it continues to be with respect to the production of hard copy documents.

Of course, under the current proposed revisions to Virginia Rule 4:13, courts may nevertheless encourage parties to negotiate clawback agreements at the outset of the litigation. As a practical matter, such agreements can reduce the costs of ESI productions, particularly when combined with "quick peek" arrangements – which allow a requesting party to conduct an initial inspection of ESI (or hard copy documents and information) to identify the information requested for production, while allowing the producing party to assert privilege or other protections over the ESI identified for production by the requesting party during its initial inspection.[4]

Spoliation Safe Harbor: Recognizing the reality that all ESI and hard copy documents and information cannot – and need not – be saved indefinitely, and in order to reduce the proliferation of spoliation claims alleging intentional/negligent destruction, the proposed revisions to Virginia Rule 12(e) provide a safe harbor for the routine, good-faith deletion of ESI. "Absent exceptional circumstances," a party will not be sanctioned for deleting or erasing ESI "as a result of the routine, good-faith operation" of its electronic systems.

The safe harbor provision is especially important to corporate clients, but it will be of little or no value if the party does not already have in place sound ESI policies. For example, if a party cannot explain coherently and comprehensively what ESI it saves and why as a routine matter, it will be hard pressed to justify deletion or erasure of the specific ESI at issue in defending a spoliation claim. Investing up front in ESI best practices is likely to lower a party's exposure to litigation expense and discovery related liability.

Act Now to Ensure That Your Clients Are Protected

With federal and other state courts already implementing e-discovery rules, and Virginia courts likely to follow in the near future, sound ESI practices are essential both for practitioners and their clients. E-discovery law has been developing for more than a decade. In order to be ready for the adoption of the proposed e-discovery rules by the Virginia courts, state court practitioners should become familiar with the law underlying the amended Federal Rules and understand the potential differences.

Companies should implement records management policies that include procedures governing the retention and deletion of ESI, and should also include general parameters for litigation holds in anticipation of potential future litigation. Records and IT personnel need to understand their role in e-discovery before they are called to testify in a deposition, discovery hearing, or trial. The favorable resolution of discovery disputes or the admissibility of critical evidence may turn on the ability to explain the company's systems and defend its practices in layman's terms.

If your company, or a company you represent, has not yet established

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sound ESI policies and proactive litigation strategies, now is the time. Review your client's ESI policies, assist in developing standard templates and routine procedures for the identification, disclosure, production, and management of ESI, and, if possible, encourage your client to invest in technology to aid and automate these processes.

By adopting a standard approach and disclosure templates, your client can reduce the risk that it will make conflicting disclosures and assertions regarding its ESI and records managements across different cases, or mismanage or destroy discoverable ESI. Additionally, a standard approach can help streamline the process of identifying, gathering, reviewing, and producing ESI, greatly reducing the burden of each new case on legal records, IT, operations, and management personnel. Even small companies will benefit from proactive measures that make the retention and destruction of ESI regularized and routine.

The draft rules are designed to limit the potentially crushing burden of e-discovery on parties in litigation, but they do not operate on their own to make e-discovery easier and less expensive. They merely provide tools parties can use to reduce their own burden and expense, as well as to conduct more efficient and effective e-discovery on other parties. Only those attorneys who are proactive, knowledgeable, and prepared to handle e-discovery will be able to pick up these tools and use them effectively. Those who fail to prepare in advance and leverage the new rules upon passage will quickly find these tools being used against them. ∎

NOTES

1. The proposed revisions to the Virginia Rules also are similar in several respects to the Uniform Rules Relating to Discovery of Electronically Stored Information adopted by the National Conference of Commissioners on Uniform State Laws (the "Uniform Rules") in August 2007.
2. Under the proposed revisions to the Virginia Rules, the provisions regarding inaccessible ESI and the form of ESI production would also be applicable to a non-party required to produce ESI in response to a subpoena duces tecum.
3. It should also be noted that, in May 2007, the Advisory Committee on Evidence Rules approved a proposed addition to the Federal Rules of Evidence, Rule 502. Proposed Rule 502, among other things, is intended to address inadvertent disclosures of attorney-client communications and work product materials resulting from the burdens and risks inherent in reviewing vast amounts of ESI often at issue in civil litigation. Under the proposed rule, the inadvertent disclosure of attorney-client communications or work product material would not operate as a subject matter waiver, as may be the case in certain jurisdictions.
4. The Conference of Chief Justices suggest such agreements as a matter of course. See Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information, available online at www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf.

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