



## Hitting the High Points of the New Electronic Document Discovery Rules Craig Ball

The last time the Federal Rules of Civil Procedure were amended to deal with electronic evidence, eight-track tapes were the hot technology, the Internet and cell phones were the stuff of science fiction and computers were room-sized behemoths owned by corporations, universities and governments. Times have changed, and the rules have again changed with the times.

For the last six years, some of the best minds of the bench and bar worked to amend the rules to address the enormous challenge posed by discovery of electronic evidence. These amendments took effect on Dec. 1, 2006, and, even if you don't regularly appear in federal court, the new rules merit your attention because they're sure to rapidly impact state court practice, too.

Here's a synopsis of the principal amendments, along with some observations about their operation and impact.

### INTRODUCING ESI

There's a new species of evidence in town. It's called ESI, for electronically stored information, and it encompasses any potentially relevant data that's stored on computers, disks, tape, gadgets and the Internet.

The amendments don't so much create new rights as compel lawyers and litigants to deal with the central role computers and the Internet play in business and our lives. ESI comprises a startling 95 percent of all information created nowadays, yet legions of lawyers have been remiss in marshalling this rich evidentiary resource, preferring instead to focus on familiar paper documents. The Federal Rules of Civil Procedure make clear that discovery of ESI stands on equal footing with discovery of paper documents and require that any request for production of documents be understood to include a request for ESI. Although the committee members who drafted the ESI amendments could have stretched the definition of "document" to include ESI, they wisely recognized that more was needed. After all, so much of the electronic information that impacts our lives — databases, Web content, voice messaging, even spreadsheets — bears little resemblance to conventional

documents. Instead, ESI is defined broadly to encompass the forms computer-based information takes today and adapt to whatever tomorrow brings.

The upshot of the new Federal Rules of Civil Procedure is that:

- ESI is discoverable;
- Litigants must preserve and produce ESI;
- Lawyers must understand how to request, protect, review and produce ESI;
- The courts have the tools to rectify abusive or obstructive electronic discovery

### PRESERVATION OF ESI

Though they don't detail what litigants must do to meet their obligation, the amended rules are grounded on the expectation that all parties will preserve potentially relevant ESI. Not only must accessible ESI be preserved, but electronic information that a party deems inaccessible must also be preserved so as not to pre-empt an opponent's right to compel production.

Preservation of ESI is challenging. Information stored on computers always consists of two or more "chunks" of data, typically a "file" plus information called system "metadata," describing the characteristics of the file and its place within the computing environment: location, size, name, origins and history. Metadata take many forms and are often important evidence in their own right. However, as metadata are designed to change in order to track such things as file access, modification and relocation, metadata can be quite fluid and its preservation demands special handling.

In a nod to preservation pitfalls inherent to a fluid and autonomous environment, the Federal Rules of Civil Procedure now grant a measure of protection to those who act diligently to preserve data but fail. Absent exceptional circumstances, amended Rule 37(f) prohibits a court from imposing sanctions

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**Solutions to CRM Corner -**

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*Message from the  
President, Patricia C. Franks*

Greetings,

I hope you enjoyed the January issue of *ARMAil* devoted to professional development for Records Managers. For me, one of the most interesting aspects of this profession is the diversity of skills and knowledge needed to perform daily tasks. And one of the benefits of membership in ARMA and CNYARMA is the ability to keep abreast of the ever-changing environment in which we work.

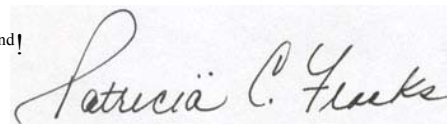
As of December 1, 2006, revisions of the Federal Rules of Civil Procedure came into effect. Some of those changes reflect the way in which the federal courts treat electronic records during the discovery process. While the rules don't apply to civil suits in state courts, many states have decided to model their own rules on the federal provisions.

Of course, Records Managers are not expected to provide legal advice. But we are expected to ensure that our organization's records management policies and procedures comply with current laws, regulations, and the legal climate.

If you're interested in learning more about the revised Federal Rules of Civil Procedure, be sure to mark Thursday, March 22, 2007, on your calendars. Peter A. Jones, Esq. of Bond, Shoeneck & King, will deliver a presentation entitled, "The Effect of Electronic Discovery on Records Retention."

For more information about the workshop, visit our website at <http://archives.syr.edu/cnyarma/>.

I hope to see you in Cortland on the 22<sup>nd</sup>!



**CNYAMA Report of the Treasurer**

*Submitted by Edward L. Galvin, Treasurer  
February 8, 2007*

<b>Balance as of 1/17/07</b>	<b>\$5816.62</b>
<b>INCOME:</b>	
Sponsor - Newsletter	
December Meeting	\$1500.00
Donations for Meet and Greet	\$ 250.00
	<b>\$1750.00</b>
<b>EXPENSES:</b>	
January Newsletter/Flyer	\$ 124.20
January Meet & Greet	\$1091.30
Supplies	\$ 2.13
	<b>\$1217.83</b>
<b>Balance as of 2/8/07</b>	<b>\$6348.99</b>



## CNY ARMA Holds Successful Meeting on Imaging

In keeping with our commitment to offer members timely, educational and interesting meetings, CNY ARMA's December meeting provided a look at two case studies using imaging software.



Jerry Edmonds, Director of Syracuse University's Project Advance [SUPA], spoke about the program which is a partnership program linking SU and secondary schools. It's mission is to offer qualified high school seniors the opportunity to enroll in Syracuse University courses for college credit. Since 1999 SUPA has utilized Xerox's DocuShare as a document management system to store and manage the varied documents associated with the program. DocuShare provides participating teachers with instructional materials, and serves as a repository for a range of public documents.

Deborah Montana is Records & Information Specialist at Upstate Cerebral Palsy where they have implemented OnBase document imaging for vital records. Upstate Cerebral Palsy is the premier provider of direct-care services and programs for individuals who are physically, developmentally, or mentally challenged and their families. Deborah spoke on the issues involved in implementing document imaging for consumer records, and discussed the project team, workflow, and the resources required to develop the project.

The meeting was held at Iron Mountain's headquarters in Syracuse on December 7th. Watch your e-mail for information on upcoming CNY ARMA meetings and events, and remember to periodically check our web site at: <http://archives.syr.edu/cnyarma/>



CNY ARMA's Meet and Greet

David Pita, President of the Boston Chapter of ARMA attended CNY's Meet and Greet on January 25th and was welcomed by: (l to r) Pat Franks, CNY ARMA President; Dianne Hagan, Director, ARMA International; and Jackie Lewis, CNY ARMA Board Member.



Adobe announced that it will release the PDF (Portable Document Format) 1.7 specification for submission to the ISO (International Standardization Organization) for maintenance as an open standard. This is good news concerning long-term sustainability for all of us who have used it over the years as a vendor-maintained defacto standard, albeit one that has an open/published specification and has been closely linked to such actual ISO standards as PDF/A\* (PDF/Archive).

*Congratulations*  
to Lorraine Anderson, who will continue as the Northeast Region Manager for another two years.

for the failure of a party to provide ESI lost as a result of the “routine, good-faith operation of an electronic information system.” But it’s a shallow “safe harbor” because, absent reasonable and timely preservation, a court isn’t likely to see good faith.

**THIRD-PARTY PRESERVATION AND PRODUCTION**

Many custodians store your ESI, and some are third parties subject to your direction or control. In framing your litigation hold, you may need to advise outside counsel, accountants, application service providers and contractors to hang on to what they have and, if you’re the requesting party, don’t forget to address third parties in preservation letters.

Note that Rule 45 governing subpoenas has been amended to support discovery of ESI from third parties, as well as to protect third parties from unduly burdensome requests for ESI.

**STEPPING FORWARD**

Amended Rule 26(a) requires that a party must, without awaiting a discovery request, promptly identify or produce ESI, documents and tangible things in the party’s possession, custody or control that the party may use to support its claims or defenses. You’ve got to step forward without a discovery request.

The duty to affirmatively disclose material supporting claims and defenses has been in the rules for some time, but its burdens were constrained by paper’s self-limiting nature. Paper is expensive and takes up space, so we tended to organize it or get rid of it. But trillions of bytes weigh nothing at all and occupy little space. Consequently, it’s all too easy to amass electronic information in unstructured volumes that, if on paper, would have driven us from our homes and offices long ago.

In order to promptly identify and produce ESI, we must first be able to find, preserve, collect, manage, review and duplicate it — a capacity few litigants and fewer lawyers currently possess, but that all must acquire. Until that occurs — and until better electronic records management emerges — the need to promptly step forward with ESI will be a frequent stumbling block.

**MEET AND CONFER**

Under the new Federal Rules of Civil Procedure, parties must not only be prepared to swiftly produce the ESI they expect to use, but they must also, very early on, be fluent and forthcoming about their preservation of ESI and issues relating to its disclosure or discovery. Amended Rule 26(f) requires that parties meet and confer shortly after the response date to address any issues relating to ESI, including its preservation and the form or forms in which it should be produced. The courts expect the conferees to arrive with answers and exert a genuine, good-faith effort to resolve e-discovery questions.

In some jurisdictions, the Rule 26(f) conference has been something of a “drive-by” event. Now, counsel must be prepared to field questions about information systems, backup and retention practices, customary formats and applications, data location, volume and composition and a host of other unfamiliar topics. Counsel needs to either know the systems and applications well or bring along someone who does. Early and earnest cooperation with the other side and transparency of process will be essential, and adversarial posturing is best checked at the door.

**INACCESSIBILITY**

Under the Federal Rules of Civil Procedure, no party need produce ESI that’s “not reasonably accessible,” but if an opponent objects, the claim of reasonable inaccessibility must be proven. No one yet knows what is and is not “reasonably accessible” where ESI is concerned, and the definitions extant vary according to whose ox is gored.

When a substantial volume of ESI is implicated, producing parties will claim inaccessibility despite ready access to individual files arguing that burden alone makes such access unreasonable. Information will be claimed to be inaccessible if stored on tape or consisting of data rarely accessed or simply so disorganized or commingled with privileged material that it’s costly to review.

Requesting parties will counter that anything’s accessible if you devote sufficient money and effort to the task — a contention technically accurate and generally impracticable. Judges — principally federal magistrates — will bridge the chasm as best they can. Plan on the court asking why ESI is difficult to access and pressing counsel to articulate exactly what they’re seeking and why they need it. Some judges will say, “Just give it to them” or “Do you want it badly enough to pay for it?” Mostly, we can expect to hear, “Get your technical people down here, go into my jury room and don’t leave until you’ve worked it out.” The inevitable “splitting of the baby” necessitates that companies hone their ability to rapidly assess the who, what, when, where and how much for their ESI.

**THE NEXT HURDLE**

Even if you satisfy the court that your side’s ESI isn’t reasonably accessible, the war isn’t over. A requesting party may compel production of inaccessible ESI by showing good cause. If you’re ordered to produce for good cause shown, you can ask the court to tailor the production order to minimize your burden, perhaps in ways such as cost-shifting that may persuade the requesting party to narrow or abandon the request. The court may also impose conditions to minimize undue burden by, e.g., granting access to less than all of the potentially responsive ESI (sampling parts of the data to assess its value to the case) or by requiring the use of data filtering and search mechanisms to narrow the scope of review and production.

*continued on next page*



**COST SHIFTING**

Cost-shifting has a salutary chilling effect on abusive or sloppy discovery, but risks closing the courthouse to meritorious claims against large enterprises and parties with poorly managed information. Here again, magistrates are the ones in the trenches and, in balancing the equities, must be sensitive to the impact of costs and cost-shifting, promoting proportionality without erecting barriers to justice. Abusive and overbroad discovery must have consequences. So, too, must the twin goals of expediency and cost-efficiency enunciated by the rules be furthered. From either side’s vantage point, there’s little incentive to be fast, frugal or focused when the opposition’s footing the bill.

**FORMS OF PRODUCTION**

Unless the other side expressly agrees or the court orders it, you can’t produce paper printouts of documents when the originals you hold are electronically searchable.

Per amended Rule 34(b), your opponent selects the form or forms in which you produce ESI. If you don’t produce as designated, you must produce as maintained in the course of business or in a reasonably usable form. Whether you preserved electronic searchability will be a decisive factor in assessing usability.

You can’t produce ESI in a form different from that selected by the requesting party unless you advise them of the form or forms you’ll supply and afford them an opportunity to object and seek assistance of the court. An unceremonious “here it is” courts trouble. It’s unclear how long before the production deadline you must make the alternate format disclosure; that is, it’s not specified whether a producing party designating a production format on the 30th day may then wait for objection, or must make the designation earlier and produce in the specified format on the 30th day.

**CLAWBACK PROTECTION**

The inadvertent production of privileged information is every lawyer’s nightmare. It occurred with regularity in the discovery of paper evidence even when we examined every page before production. But as the volume of ESI has grown, we progressively lost our ability to review everything item-by-item. Plus, it’s increasingly common for privileged and nonprivileged content to insidiously mix, e.g., privileged exchanges embedded in a thread of an apparently benign e-mail or within metadata. Recognizing the growing potential for inadvertent production, amended Rule 26(b)(5)(B) permits a party who has produced privileged or work product data to notify any party receiving the data of the fact of, and basis for, the privilege claim. After notice, any party receiving the allegedly privileged material must return, sequester or destroy the specified information, retrieve any copies shared with nonparties and may not use or disclose the allegedly privileged ESI until the claim of privilege is resolved.

The amendment allows any party challenging the claimed privilege the right to promptly present the disputed ESI to the court under seal, with the producing party obliged to preserve the disputed material until resolution.

The amended rule doesn’t affect the substantive law governing privilege; that is, the law of the forum or other applicable law still controls. Instead, the rule describes a framework for preservation of rights and presentation of claims. The ESI at issue must be logged as other privileged materials but it’s unclear how much detail is required. Must privileged ESI be logged item-by-item or may it be described more broadly so long as the description is sufficiently clear and complete to permit the parties and the court to understand the basis for the claim and determine whether waiver has occurred?

**FEAR, UNCERTAINTY AND DOUBT**

Life under the new Federal Rules of Civil Procedure won’t be easy, but overdue changes are often hardest. Requesting parties will curse the delay and unpredictability of the two-tiered inaccessibility analysis. Responding parties will bemoan the necessity and cost of collecting, reviewing and producing all the relevant electronic evidence they’ve blissfully been ignoring heretofore. First forays into meet-and-confer will consist of two people who don’t trust each other negotiating issues neither understands. Judges and magistrates will see dockets swell with e-discovery disputes. All will wish they better understood computers and that, in the rush to embrace automation, we hadn’t all been so quick to abandon records management.

Electronic evidence isn’t going away. It grows more important — more revealing, more varied, more detailed — each day. Despite the confusion and cost, the rules’ amendments insure that electronic discovery receives the overdue focus it warrants, and as we learn more about digital evidence and become adept at seeking, identifying, preserving, searching and producing ESI, the fear, uncertainty and doubt will go the way of eight-track tapes.

Craig Ball is a trial lawyer and certified computer forensic examiner based in Austin, Texas. He limits his practice to work as a court-appointed special master and as a consultant and expert in matters of electronic discovery and computer forensics. He can be contacted as [craig@ball.net](mailto:craig@ball.net) or via [www.craigball.com](http://www.craigball.com).

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**CALL FOR NOMINATIONS AND VOLUNTEERS:**

If you are willing to make a commitment to bringing quality and relevant educational sessions and networking opportunities to the membership, consider joining the Central New York ARMA Chapter Board of Directors. Requirements include up-to-date membership in ARMA International and the CNY Chapter, ability to work in a team environment, and a minimal investment of your time. You can make a difference!

To nominate someone or to express your own interest, contact either Jackie Lewis, 315-866-2920; Dianne Hagan 315-432-3804; or Eileen Keating 607-255-3530.



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By Patricia C. Franks,  
Ph.D., CRM

Certified Records Managers are in demand. If you doubt that statement, *google* the words to see the results. It's gratifying to see that many firms are now doing more than listing a CRM as desirable. They are now requiring the certification and using the title of Certified Records Manger as the title of the position as well.

If you want to learn more about the exam, try the five questions printed below. They are examples of the questions you'll find in the first five parts of the exam. The sixth part is a Case Study—which we'll cover in a later issue. For more information about the Institute of Certified Records Managers or the CRM examination program, visit <http://www.icrm.org>.

**Part I: Management Principles and the Records & Information Management Program**

1. In the field of records management, which person studies existing systems and procedures used in creating, processing, and distributing records?
  - a. Active records supervisor.
  - b. Forms analyst.
  - c. Records center supervisor.
  - d. Systems analyst.
  - e. Line supervisor.

**Part 2: Records Creation and Use.**

2. Which of the following will enable a forms analyst to get a clear picture of those items that are common to all of the forms in a department, those items that are common to some but not all of the forms in the department, and those items that are found on only one of the forms in the department?
  - a. A forms distribution chart.
  - b. An inventory and appraisal chart.
  - c. A recurring data chart.
  - d. A work process chart.
  - e. A form titles chart.

**Part 3: Records Systems, Storage, and Retrieval.**

1. Lateral filing equipment includes:
  - a. Open shelf filing.
  - b. Vertical files.
  - c. Side-open file cabinets.
  - d. All of the above.
  - e. A and c above.

**Part 4: Records Appraisal, Retention, Protection, and Disposition**

2. The function of the records inventory is to:
  - a. Gather descriptive data relating to an organization's word processing systems.
  - b. Collect information representing data residing on magnetic media.
  - c. Gather descriptive data representing the total information resources of an organization.
  - d. Survey an organization's paper work.
  - e. Analyze an organization's records to determine content.

**Part 5: Facilities, Equipment, Supplies and Technology**

2. The film size used for microfiche is:
  - a. 8 mm.
  - b. 16 mm.
  - c. 35 mm.
  - d. 70 mm.
  - e. 105 mm.



*answers to CRM on page 2*

## Disclaimer Notice

ARMAil is published at least five times during the fiscal year. Readership includes members of the Central New York Chapter of ARMA International, as well as interested records and information management professionals in the central New York area. The information contained in this newsletter does not necessarily reflect the views of the membership or the editor, nor is there any endorsement of advertisements or published seminar information. This newsletter is offered only as a source of information.

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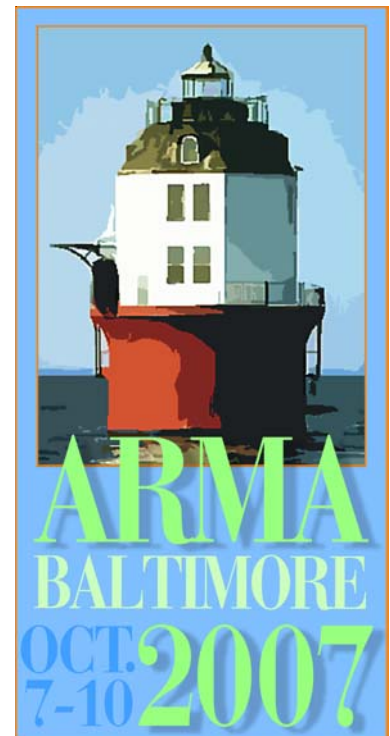
This year's Northeast Regional Leadership Meeting will be held June 7-9<sup>th</sup> at the Genesee Grande Hotel in Syracuse. We will be fortunate to have facilitating, Thomas F. Bower from the Kellogg School of Management, Northwestern University. President of Bower Communications, he is an executive coach, facilitator and management consultant for businesses and individuals. Tom Bower consults with an emphasis on

personal leadership, performance based methods, and communications. Tom Bower served in the U.S. Air Force with assignments in Libya and France. Tom has participated in leadership, consultation and volunteer roles for numerous regional boards and civic organizations.

This is an opportunity that will provide leadership instruction and will enhance your ability to lead both within your organizations and in roles of leadership within the ARMA Chapter environment. We hope to see you there.



Recognized for his dedication and commitment to the CNY Chapter, Ed Galvin was presented with the 2006 Chapter Member of the Year Award. Ed is the Director of Archives and Records Management at Syracuse University.



## F Y I

For those ARMA members who attend SAA meetings:

Penn State archivist Jackie Esposito will be the featured speaker at the Society of American Archivists Records Management Roundtable meeting at the next SAA Annual Meeting in Chicago, August 29 - September 1. Jackie will speak about the advantages of using a function-based classification system for university records at Penn State and discuss the challenges staff had to overcome to create and use the system. (*The Records Manager*, 1-1, Nov. 2006)





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