E-Discovery and HIM: How Amendments to the Federal Rules of Civil Procedure Will Affect HIM Professionals

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New federal rules on evidence gathering take effect December 1. Here's a summary and a look at how HIM professionals can prepare.

Barring congressional action, on December 1, 2006, a series of amendments to the Federal Rules of Civil Procedure (FRCP) governing e-discovery will take effect. Are you ready? You and your organization must be prepared to respond to e-discovery requests for information.

This article focuses on two important professional practice topics for HIM professionals: a description of the structure and content of the FRCP and a discussion of how HIM roles will change through implementation of its e-discovery amendments.

The Federal Rules of Civil Procedure

The FRCP govern legal proceedings for civil lawsuits in United States district (federal) courts. The FRCP are promulgated by the United States Supreme Court and approved by the United States Congress. They are comprised of 11 different categories and 86 different rule sets, as summarized in the table "Outline of the Federal Rules of Civil Procedure," below.

The Judicial Conference of the United States gives its Committee on Rules of Practice and Procedure the power to appoint an Advisory Committee on the Rules of Civil Procedure, which has primary responsibility to monitor the effectiveness of the Rules of Civil Procedure and make recommendations for proposed amendments. Since their establishment in 1938, the FRCP have undergone nine revisions (1948, 1963, 1966, 1970, 1980, 1983, 1987, 1993, and 2000). "The FRCP are not changed very often, so the courts take notice when they are," notes John Patzakis, vice chairman and chief legal officer of Guidance Software, an e-discovery software vendor.

The US district judge has the ultimate authority in courtroom legal procedure and a very important role in advancing common law practice and establishing new positions. The district court judge applies the substantive laws of the state when making decisions.

Magistrate judges or special masters can also resolve e-discovery disputes. District judges have heavy caseloads; therefore, using magistrate judges and special agents for e-discovery disputes can achieve significant litigation cost and time savings.

Each state will have (or will develop) its own rules regarding e-discovery. Most state e-discovery rules will be adopted based on the FRCP and landmark case law. Over time, the 2006 FRCP amendments will create a whole new set of challenges, opportunities, and responsibilities for legal, IT, and HIM professionals. The endeavors will vary somewhat by state, but regardless of jurisdiction, e-discovery will become an integral function of e-HIM®.

HIM professionals then must be knowledgeable about their state laws regarding discovery and seek the advice of their legal counsel as necessary when responding to e-discovery requests.

How the Role of HIM Professionals Will Change

Change is perhaps the one true constant under which HIM professionals operate today.

Adapting sound information management to emerging electronic practice is the biggest challenge. "Now, more than ever, HIM professionals are being called upon to ensure a systemized approach to electronic record management that conforms to state and federal legal requirements."[1] To do this, however, requires a consideration of how HIM roles and functions will change through amendments to the FRCP and landmark e-discovery case law. Summarized on the following pages is an assessment of how those roles and responsibilities will change and evolve through e-discovery.

Electronic Records Management

Important Case Law

Danis v. USN Communications, No. 98 C7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000)

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 2003 U.S. Dist. LEXIS 7939, 91 Fair Empl. Prac. Cas. (BNA) 1574, 55 Fed. R. Serv. 3d (Callaghan) 622 (S.D.N.Y. May 13, 2003) ("*Zubulake I*")

Zubulake v. UBS Warburg LLC, 2003 U.S. Dist. LEXIS 7940, 91 Fair Empl. Prac. Cas. (BNA) 1590 (S.D.N.Y. May 13, 2003) ("*Zubulake II*") Please note: *Zubulake II* does not relate to disclosure of electronic data.

*Zubulake v. UBS Warburg LLC,*Z 216 F.R.D. 280, 2003 U.S. Dist. LEXIS 12643, 92 Fair Empl. Prac. Cas, (BNA) 684, 56 Fed. R. Serv. 3d (Callaghan) 326 (S.D.N.Y. July 24, 2003) ("*Zubulake III*")

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 2003 U.S. Dist. LEXIS 18771, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D.N.Y October 22, 2003) ("*Zubulake IV*")

Zubulake v. UBS Warburg LLC, 2004 U.S. Dist. LEXIS 13574, 85 Empl. Prac. Dec. (CCH) P41728, 94 Fair Empl. Prac. Case (BNA) 1 (S.D.N.Y. July 20, 2004) ("*Zubulake V*")

The Professional Impact

HIM and IT professionals should familiarize themselves with *Zubulake v. UBS Warburg* (I–V). These five e-discovery cases were decided by the Honorable Shira A. Scheindlin, a United States district judge for the Southern District of New York. Judge Scheindlin's rulings, along with the Sedona Guidelines (see below) are rapidly defining the e-discovery standards and records management practices for business and healthcare.

Laura E. Ellsworth, a partner in the law firm Jones Day, and Kathleen Massey, vice president of litigation for Motorola, Inc., interviewed Judge Scheindlin in March 2004. They asked, "What are the first 10 steps to ensure your company is prepared to comply with e-discovery obligations?"

Judge Scheindlin answered (paraphrased):

1. Establish a well thought-out records retention policy that takes into account any statutory or regulatory obligations.
2. Make sure someone is really in charge of records retention and that he or she knows what he or she is doing.
3. Establish a records retention committee that meets regularly.
4. Disseminate the records retention policy to all employees and test them.
5. Set up a response team every time there is a litigation need to preserve documents.
6. Consult outside counsel regarding records retention policy.
7. Retain an outside vendor, if case warrants it, to assist in organizing litigation holds.
8. Encourage outside counsel to raise preservation costs at the earliest time.
9. Ensure general counsel is educated and knowledgeable about organizational technology and an organization's choices for storing records.
10. Be very careful to avoid destruction of documents when it is clear there is a duty to preserve, because sanctions can be imposed when documents are destroyed with duty to preserve.[2]

Danis v. USN Communications is important to the HIM profession because as evidenced in this case, the courts can impose fines upon organizations (and its individuals, such as CEOs) when organizations employ individuals unqualified in appropriate

records management practices. Therefore, organizations must ensure the HIM function is appropriately and effectively managed.

What to Do

Read the *Zubulake v. UBS Warburg* opinions of Judge Scheindlin to understand e-discovery industry practices and how a foremost legal expert applied the principals of the Sedona Guidelines in the courtroom.

Review the Sedona Guidelines, available on the Sedona Conference Web site at www.thesedonaconference.org.

Organizations must employ qualified and competent HIM professionals who are knowledgeable in e-HIM and state and federal regulations regarding electronic health information management. When unqualified individuals are responsible for the records management function, the organization and its management are at risk for fines or sanctions.

HIM and IT professionals should maintain ongoing education, training, and competency in recognized healthcare electronic systems applications and standards, such as HL7, HIPAA, ASTME, ANSI, and CCHIT.

Subpoena Processing

Important or Related Case Law

Ayers v. SGS Control Servs. 2006 WL 1519609 (S.D.N.Y. pr. 3, 2006)

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 2003 (S.D.N.Y. May 13, 2003) ("*Zubulake I*")

The Professional Impact

HIM professionals must be aware that e-discovery will be a two-tiered process. The two-tiered discovery process is outlined under 26(b)(2) and provides for balance between the production of electronically stored information that is "reasonably accessible" versus electronically stored information that is "not reasonably accessible."

Subpoena processing is a pretrial HIM function that will change significantly through e-discovery.

As determined in *Zubulake I*, any relevant evidence is admissible and therefore can be subpoenaed.

In Ayers, the court ordered production of payroll and time-keeping records in electronic manipulable form, without a third-party subpoena and despite the organization's prior hard-copy production of the documents.

It is important, therefore, to identify early in litigation (before, if possible) what the true costs to produce electronically stored information are. If deemed excessive, burdensome, or inaccessible, the court can impose mechanisms for sharing the cost of production of information.

Subpoenas will outline requirements that permit testing, sampling and inspection, and copying of paper and electronic records.

Provisions are also in place for subpoenas to designate the form or forms (e.g., paper and electronic, including allowing on-site review and access to information systems and computers) of production of electronically stored information. Electronically stored information need not be produced in more than one form, unless the court orders it for good cause.

What to Do

Review the trial category (category VI) of the FRCP.

Read the relevant FRCP involving subpoena processing including 45, 45(a)(1)(C), 45(c)(1), 45(c)(2)(B), 45(d)(1)(A), 45(d)(1)(B), 45(d)(1)(C), 45(d)(1)(D), 45(d)(2)(A), 45(d)(2)(B).

Refer to Federal Rules of Evidence (803(6)) for admissibility standard of record and Evidence Rule 502 addressing waiver of privilege.

Legal, HIM, and IT professionals should identify which requests for information via subpoena will present an undue burden or cost to the organization to produce.

Organizations should establish a means for determining the actual costs for production of electronically stored information.

Legal, HIM, and IT professionals should establish a "subpoena response plan" for objections to production of certain types of data, including requiring a court order when data requests are determined too costly and burdensome to produce. The response plan should include the following actions:

1. Identify the date of subpoena service.
2. Assess the validity of the subpoena (appropriate jurisdiction, seal, fees).
3. Determine the type and nature of case (civil, criminal, class action) and the parties named. Is the organization or any of its providers a part of the litigation?
4. Determine whether or not information requested is under a legal hold. If not, immediately establish one and notify appropriate departments of the parties involved.
5. Determine whether a pretrial conference was held in which the parties met and identified issues related to e-discovery, including the form or forms in which data should be produced. If so, obtain a copy of Form 35.
6. Determine the level of privacy protection of the information being requested (i.e., subpoena, court order, attorney-client privilege). Establish provisions for "quick peeks" and "claw backs."
7. Identify when and in what forms the information will be produced (Form 35).
8. Determine the apparent or known issues of the case. Determine what relevant data must be produced and how to access and produce it.

Records Storage, Retention, and Destruction

Related Case Law

Broccoli v. Echostar Communications Corporation, 229 F.R.D. 506 (D. Md., August 4, 2005)

Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005)

In re Prudential Ins. Co. of America Sales Practices Litig. 169 F.R.D. 598 (D.N.J. 1997)

Wachtel v. Guardian Life Ins. Co., 2006 WL 1286189 (D.N.J. May 8, 2006)

Williams v. Sprint/United Mgmt. Co., 2005 U.S. Dist. LEXIS 21966 (D. Kan. Sept. 29, 2005) ("Williams I")

United States v. Philip Morris, 327 F.Supp.2d 21, 25 (D.D.C.2004)

U.S. v. Arthur Andersen, LLP, 374 F.3d 281 (5th Cir. 2004)

Zubulake v. UBS Warburg LLC, 220 F.R.D.212, 217, (S.D.N.Y 2003) ("*Zubulake IV*")

The Professional Impact

In *Broccoli*, the court held that "Echostar acted in bad faith in its failure to suspend its e-mail and destruction policy or preserve essential personnel documents in order to fulfill its duty to preserve the relevant documentation for purposes of potential litigation." Sanctions were imposed upon the organization, including an adverse spoliation jury instruction.

In its decision *In re Prudential Ins. Co. of America Sales Practices Litig.,* the court imposed $1 million in sanctions for destroying documents relevant to pending litigation.

Coleman v. Morgan Stanley is a landmark e-discovery case that healthcare organizations and HIM and IT professionals should familiarize themselves with. In Coleman, sanctions were imposed upon the defendant for "its numerous willful and grossly negligent discovery abuses." Sanctions imposed included:

- Shifting the burden of proof on fraud issue to the defendant
- Court reading to the jury a statement of facts recounting defendant's duty to preserve evidence and its failure to do so; such facts would be deemed conclusive
- The defendant being ordered to compensate plaintiff for costs and fees associated with the dispute

Through the FRCP, related e-discovery case law, as well as thoughts outlined in the Sedona Guidelines, organizations are expected to establish a records management culture that fosters compliance with all state, federal, and regulatory requirements.

HIM professionals need to be aware that "electronically stored information is characterized by exponentially greater volume than hard-copy documents."[3] They must also remember that the current hybrid records management encompasses electronic medical records as well as any and all information stored, created, or accessed within the organization, including e-mail, voice mail, text messages, metadata, back-up tapes, and legacy information systems.

HIM and IT professionals should begin to conduct comprehensive organizational information flow assessments to determine the forms, methods, formats, and systems used to manage, store, retain, and destroy documents, and electronic, voice, and digital information. They need to be able to effectively respond to complex e-discovery litigation or threaten imposition of sanctions.

Williams v. Sprint has become a landmark e-discovery case concerning metadata. It established the following standard:

> When a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.

Williams v. Sprint also stands apart from some other e-discovery cases cited because it doesn't follow the Sedona Guidelines concerning preservation and production of metadata.

What to Do

Review the FRCP aimed at discovery of electronically stored information.

Relevant e-discovery sections include 16, 26, 33, 34, 37, 45, and Form 35.

Refer to AHIMA practice brief "The New Electronic Discovery Civil Rule," published in the September 2006 issue of the *Journal of AHIMA* and available online at www.ahima.org.

Legal, HIM, and IT professionals must establish policies and processes for ongoing monitoring and updates to organization document storage, retention, and destruction schedules.

Ensure organizational records management storage and destruction policies:

1. Identify and document the method, location, and native file format of information created within the organization.
2. Recognize that the organization is not obligated to retain all information created or received, unless a business or legal obligation exists for an organization to maintain information. Retaining information beyond these reasons could pose liability for the organization.
3. Specifically delineate the organization's electronic records maintenance, storage, and destruction schedules.
4. Determine how the organization would define "good faith operation" of its electronic information system if called upon to do so.
5. Establish internal audits or controls to measure compliance with the organization's storage, retention, and destruction policies. A records management storage, retention, and destruction policy that is not followed is not only useless, it is a

potential liability.

6. Recognize that FRCP Rules 37 and 37(f) provide for sanctions and safe harbors, while FRCP 26 provides for provisions to balance the proportionality of e-discovery requests for information.

Risk Management/Litigation Hold

Related Case Law

Rambus v. Infineon Technologies, 220 F.R.D. 264, 282 (E.D. Va. 2004)

Stevenson v. Union Pacific 354 F.3d 739 (8th Cir.2004)

Wiginton v. C.B. Richard Ellis, No. 02 C6832, 2003 WL 22439865, *7 (N.D. Ill. Oct. 27, 2003)

Zubulake v. UBS Warburg LLC, No. 02 Civ. 1243 (SAS). 2204 WL. 1620866, *12 (S.D.N.Y. July 20, 2004) ("*Zubulake V*")

The Professional Impact

Through the FRCP, related e-discovery case law, and thoughts outlined in the Sedona Guidelines, organizations must evaluate and enhance their risk management and litigation hold processes.

HIM and IT professionals should meet with legal and risk management to discuss current policies and procedures for suspension and destruction of electronic records in the face of threatened or pending litigation.

What to Do

Legal counsel and senior management should assess the organization's current litigation hold process.

The organization should review all current policies and procedures related to risk management, including subpoena processing and the establishment of litigation holds.

Steps to be taken include:

1. Identifying all individuals responsible for receipt and processing of subpoenas (e.g., risk management and HIM departments).
2. Documenting the organization's current process to identify and communicate threatened or pending litigation.
3. Documenting how information is preserved in the face of pending litigation. It should be determined:

    - Who is responsible for establishing a legal hold
    - How data and systems will be secured and for how long
    - Who must be notified
    - The cost and burden to preserve the data
    - Under what circumstances the legal hold will be lifted
    - How the organization expects to respond to the e-discovery request (through an external e-discovery litigation software vendor or through internal IT systems)

4. Determining how large amounts of electronic data will be accessed, manipulated, and produced in response to an e-discovery request.

Professional Litigation Support

Case Law

Sanders v. State, S.W.3d, 2006 WL 561853 (Tex.App. -Waco)

The Professional Impact

Litigation support will evolve as a profession for IT and HIM professionals.

E-discovery requests will be limited at first, but the FRCP amendments—coupled with the advent of sophisticated enterprise investigation systems and complex needs for record searching and retrieval—will create new roles and responsibilities for HIM and IT professionals.

In *Sanders*, the Court of Appeals of Texas affirmed the trial court's determination that the "software used by law enforcement investigators properly preserved, authenticated and retrieved digital evidence from the appellant's computer." This case is important to HIM because it establishes that in the future, the courts may take judicial notice of the reliability (or unreliability) of particular methods to search and produce electronic information.

On July 27, 2006, by a vote of 270-148, the House passed HR 4157. This legislation promotes the use of health IT to improve the safety and quality of the nation's healthcare system. This legislation also will help establish national benchmarks and standards by which organizations can measure and compare their safety and quality outcomes. As a result, it will be necessary through sophisticated litigation support mechanisms for organizations to demonstrate their compliance with national safety and quality standards. HIM and IT professionals should therefore begin to understand the features and functionality of the business litigation support vendors in existence in the marketplace today.

What to Do

HIM and IT must maintain effective and ongoing communication with legal counsel in cases involving discovery of electronically stored information. HIM and IT professionals should advise legal counsel at the outset of a case as to the forms, format, location, and accessibility of any and all information maintained by the organization relevant to a case.

Organizations should establish a team of legal, IT, and HIM professionals to address potentially complex e-discovery needs. The team must be knowledgeable of IT litigation support technology and establish a functional requirements list tailored to the needs of the organization.

A New HIM Function

Laws, rules, and regulations are major impetuses behind the policies and procedures we develop to manage health information. As HIM professionals we are keenly aware of our compliance responsibilities.

As the amendments to the e-discovery FRCP change the legal process, so too will they affect the roles of IT and HIM professionals. The challenges and responsibilities will vary by state—and they will evolve slowly—but regardless of the jurisdiction, it is apparent that the ability to respond to e-discovery requests will become an increasingly integral function for both IT and HIM professionals.

Outline of the Federal Rules of Civil Procedure

Category	Category Description	Rules in Category	General Content in Category
I	Scope	1 and 2	Category I describes the purpose of the rules and their role in governing civil action in federal district courts.
II	Commencement of civil suits	3 to 6	Category II contains the rules that provide for the commencement of a civil suit, including the filing, summons, and service of process (legal notice).
III	Pleadings and motions	7 to 16	Category III provides for civil suit pleadings, motions, and defenses and counterclaims. The "complaint" is the plaintiff's pleading. The "answer" is the defendant's pleading.
IV	Parties	17 to 25	Category IV describes the capacities in which a party or parties can be sued. It maintains the provisions describing the mechanisms for the filing of countersuits, joinder claims, class action lawsuits, and other actions.

V	Discovery	26 to 37	Category V contains the rules governing discovery (e-discovery included). In general, the discovery rules help ensure that neither party is subjected to surprises at trial. In many states discovery can occur only through formal request. In contrast, the FRCP requires parties to divulge certain information without a formal discovery request.
VI	Trial	38 to 53	Category VI provides for the plaintiff's right to a trial by jury or by the court. Additionally, this category contains the rules that describe how cases are assigned for trial, how actions are dismissed, and how subpoenas are handled. On December 1, 2006, FRCP 45 (subpoenas) will be amended to conform with the e-discovery rules.
VII	Judgment	54 to 63	Category VII maintains the provisions governing legal judgment and costs. "Judgment" is the decree and any other order from which an appeal lies. Category VII judgment rules maintain provisions for establishing new trials, amending judgments, and the enforcement of judgments.
VIII	Provisional and final remedies and special proceedings	64 to 71	Category VIII contains the series of rules that provide for the final provision or remedy of a case. The rules covered in this category include seizure of property, injunctions, offers of judgment, and execution of judgments.
IX	Special proceedings	72 to 76	Category IX contains the rules governing special civil action proceedings, such as condemnation of real and personal property, magistrate judges, and pretrial orders.
X	District courts and clerks	77 to 80	Category X provides direction concerning the business and operations of the district courts. The rules covered in this category include hours of operation, filing of pleadings and orders, trials and hearings, orders in chambers, procedures for books and records maintained by the clerk, the role of stenographers, and transcripts as evidence.
XI	General provisions	81 to 86	Category XI explains to which proceedings the rules apply (United States district courts vs. state courts) and provides direction on their general applicability, jurisdiction and venue, local rules applications, and judges directives.

The Sedona Principles: Helpful Guidelines for e-Records Management

Just as laws, rules, and regulations drive change, so do thought leaders. The Sedona Conference is a 501(c)(3) research and educational institute comprised of academics, industry experts, lawyers, and judges dedicated to the advancement of law and policy in the areas of antitrust law, intellectual property rights, and complex litigation.

Since its establishment in 1997, the Sedona Conference has concentrated on the development of principles, guidelines, and best practices in new and emerging litigation practices.

As e-HIM evolves, so too will the complexities of e-HIM litigation. “The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,” published in September 2005, provides practical, balanced, and authoritative direction in addressing the key issues in electronic records management.

The following five principles are well recognized in business today and can apply equally in healthcare settings, even with the added privacy and security requirements imposed upon healthcare organizations and providers through HIPAA.

The Sedona Guidelines

1. An organization should have reasonable policies and procedures for managing its information and records.

2. An organization's information and records management policies and procedures should berealistic, practical, and tailored to the circumstances of the organization.
3. An organization need not retain all electronic information ever generated or received.
4. An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of information and records.
5. An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation, or audit.

The Sedona Principles, the Sedona Guidelines, and other useful e-discovery and e-records management publications are available free to the public from the Sedona Conference Web site at www.thesedonaconference.org.

Notes

1. AHIMA e-Discovery e-HIM Workgroup. "The New Electronic Discovery Civil Rule." *Journal of AHIMA* 77, no. 8 (2006): 68A–H.
2. "Interview of Judge Shira A. Scheindlin." The Sedona Conference. 2004. Available online at www.thesedonaconference.org/dltForm?did=ScheindlinInterview.pdf.
3. US Courts. "Summary of the Report of the Judicial Conference Committee in Rules of Practice and Procedure." September 2005. Available online at www.uscourts.gov/rules.

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