

I Know About The Federal eDiscovery Rules, Now What About The States?

Renée T. Lawson

Biographical Information

Name: Renée T. Lawson

Position/Title: Partner

Firm: Morgan, Lewis & Bockius LLP

Address: One Market, Spear Street Tower
San Francisco, CA 94105

Phone: (415) 442-1443

Fax: (415) 442-1001

E-Mail: rlawson@morganlewis.com

Primary Areas of Practice: Commercial litigation and counseling, with an emphasis on breach of contract, fraud, antitrust, intellectual property and unfair business practices.

Law School: University of California Los Angeles

Work History: Renée Lawson was one of the original lawyers in Morgan Lewis's San Francisco office, joining the firm in 2003. She began her career at Brobeck, Phleger & Harrison.

Ms. Lawson is a partner in the Litigation Practice and a senior member of the eData team. She has represented both plaintiffs and defendants, and her clients have included some of Silicon Valley's largest technology companies as well

as individuals and smaller companies. She has prepared numerous complex cases for trial, and in 2006, led the effort to secure a mid-trial defense verdict in an intellectual property usurpation case after eight weeks of trial.

Ms. Lawson also has extensive experience with litigation avoidance and counseling, including issues related to electronic discovery, document retention and the monitoring of electronic communications. She has been a presenter on eData issues for the American Bar Association, American Legal Media, and Practicing Law Institute.

In 2006, the National Law Journal selected Ms. Lawson and her team for its “Defense Hot List.” Ms. Lawson also has been named one of the “Best Lawyers in the Bay Area” by the Bay Area Lawyer Magazine.

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By now, most counsel and companies at least know of, if not are quite familiar with, the eDiscovery amendments to the Federal Rules of Civil Procedure that went into effect on December 1, 2006. Many have taken steps to bring their records management and litigation practices in line with those rules. But the question then arises, what happens if we get involved in litigation in state court, not federal? Do I need to be preparing for two totally different eDiscovery scenarios?

The good news is that the institution of best practices in the context of the Federal Rules environment will take parties a long way toward credibility and compliance in state litigation. Still, there currently is no uniformity in state and federal eDiscovery laws – and there may never be.

In terms of rule-making, some states already have adopted or are considering adopting amendments mirroring the federal rules. But the states as a whole have not fallen in line to simply adopt the new federal rules as has been the norm in the past. Many states have adopted a “wait-and-see” approach to see what works – and, perhaps, what doesn’t work – with the federal eDiscovery rules. Others, like Texas, have embarked on their own approach.

The absence of comprehensive eDiscovery rules leaves a vacuum to be filled by the courts’ common law and, perhaps surprisingly, many state courts are not blindly relying on the federal rules and courts for guidance. One need look no further than one case – *Coleman Holdings, Inc. v. Morgan Stanley & Co.* – to appreciate that the hazards of eDiscovery in the state courts are as significant, if not more significant, than in the federal courts.

Given this uncertain environment, the purpose of this Article is to provide an overview of the states' distinctly un-uniform approach to eDiscovery in two respects: *First*, the state of the states' rule-making efforts. *Second*, what the state courts are doing in the real-world cases to fill the void created by the absence of comprehensive state eDiscovery rules.

I. The State Of The States' Rulemaking Efforts

While still relatively few states have adopted comprehensive eDiscovery rules, many states have active rules committee efforts underway. Attached as an Appendix is a survey of various states' current eDiscovery rules or rule-making efforts. Still others have not yet even embarked on eDiscovery rule-making efforts.

Following is an overview of the various approaches to eDiscovery rules currently undertaken or available to the states:

A. The Federal Rules Approach

A number of states have adopted or are in the process of drafting eDiscovery rules that roughly mirror the amended Federal Rules of Civil Procedure. Such states include Arizona, Idaho, Indiana, Iowa, Minnesota, Montana, and New Jersey.

B. The Wait-And-See Approach

Other states have undertaken a wait-and-see approach to evaluate how the new Federal Rules play out in practice. California – with its significant inventory of litigation – is perhaps the best example of this.

In 2005/06, the California Judicial Council drafted proposed amendments to California Rule of Court 212 (now Rule 3.720, *et seq.*). Like Federal Rule of Civil Procedure 26, the proposed amendments would have required parties in California state litigation to meet and confer on eDiscovery issues prior to a case management

conference, including data preservation, production format and privilege preservation. On the eve of the scheduled adoption set for January 2007, however, the Judicial Council put the proposed rules on hold in order to evaluate the effect of the amended Federal Rules in practice.

C. The Strike-Out-On-Your-Own, Or Texas Approach

Many might be surprised to hear that Texas was the first state to adopt rules that specifically address eDiscovery – in 1999, well before the proposed federal amendments.

Since that time, Texas has required that a party seeking electronic data in discovery specifically identify the requested information and also specify the form in which that data should be produced. Unless otherwise ordered, the responding party need only produce data that is reasonably available in the ordinary course of business in reasonably usable form. For any electronic data requiring extraordinary steps for retrieval or production, the rule requires the court to enter a cost-shifting order directing the requesting party to pay the reasonable expenses. Tex. R. Civ. Proc. 196.4. Texas also provides a ten-day safe harbor from the date of production for declaring a privilege. If the responding party amends its production to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege. Tex. R. Civ. Proc. 193.3.

Mississippi and Idaho subsequently adopted approaches similar to Texas Rule of Civil Procedure 196.4, although the cost-shifting mechanism in those states is discretionary rather than mandatory for the trial court.

D. The Uniform Approach

The National Conference of Commissioners of Uniform State Laws (the association behind the Uniform Commercial Code) has drafted the “Uniform Rules Relating to the Discovery of

Electronically-Stored Information.” The draft rules have been submitted for approval of the full Conference as of the time of this writing (late July/early August 2007). The draft can be found at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007annualmeeting_draft.htm . Upon approval, the rules are intended for states to consider for potential adoption.

The Uniform Rules are based on and do not substantially differ from the Federal Rules. As a result, they include all of the major attributes of the Federal Rules – inclusion of Electronically Stored Information; early meet and confer conference and order; sanctions limitation in good faith circumstances; form of production rules of Rule 34(b); production distinction between reasonably accessible and inaccessible data; procedure for privilege claw-back. One significant difference is that the meet and confer conference at the outset of the litigation is not tied to a particular hearing given that the Uniform Rules are stand-alone and not tied to the other processes of the Federal Rules of Civil Procedure such as the Rule 16/26 conference, which the states may not have adopted.

Given that the proposed Uniform Rules are still in draft, no states have adopted them.

II. State Courts’ Common Law – Filling The Void:

Perhaps the most dramatic eDiscovery case to date arose out of a state court in Florida – a state currently without comprehensive eDiscovery rules.¹

As most likely are aware, Ronald Perelman won a \$1.58 billion verdict against Morgan Stanley in 2005, following the court’s imposition of a partial default judgment against Morgan Stanley for

¹ Florida’s existing Rules of Civil Procedure 1.280 and 1.350 have been held to apply to the discovery of electronic data. *See Strasser v. Yalamanchi*, 669 So.2d 1142 (Fla. App. 4th Dist. 1996). Florida’s Civil Procedure Rules Committee is evaluating amendments in light of the new Federal Rules. *See Appendix*.

its mishandling of electronic discovery. *Coleman Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071 (Fla. 15th Cir. Ct. 2005). Although the Florida Court of Appeal reversed the judgment this year, it did not disturb the circuit court's eDiscovery sanctions rulings. *Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings, Inc.*, 2007 WL 837221 (Fla. App. 4th Dist. Mar. 21, 2007). As such, the *Morgan Stanley* case continues to serve as the eDiscovery terror case, in state court or otherwise.

So what are the state courts using as guidance on eDiscovery issues? In the absence of comprehensive eDiscovery rules, state courts have a variety of approaches to consider. See *Analog Devices, Inc. v. Michalski*, 2006 WL 3287382 (N.C. Super. Nov. 1, 2006) (unpublished). Currently, the most common are the Federal Rules/*Zubulake* and the Conference of Chief Justices Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information.

A. The Federal Influence On The State Courts – Or Surprising Lack Thereof

Many commentators have assumed that the state courts would look for guidance to the Federal Rules of Civil Procedure or the seminal *Zubulake* decisions from the Southern District of New York as the standard-bearers on eDiscovery issues. Surprisingly, there are relatively few citations to the federal eDiscovery rules or *Zubulake* in state court decisions. Many of those cases do rely on the federal analysis. *Delta Fin'l Corp. v. Morrison*, 819 N.Y.S.2d 908, 911-914 (Sup. Ct. Nassau Co. July 20, 2006); *Acierno v. Goldstein*, 2005 WL 3111993 (Del. Ch. Nov. 16, 2005) (unpublished); *Coordinated Proceeding Special Title, The Clergy Cases III*, 2005 WL 5588436 (Cal. Super. Feb. 25, 2005) (unpublished). But some state courts have rejected the federal court precedent. See, e.g., *PST Serv. Inc. v. Anodyne Health Partners, LLC.*, 2004 WL 5311742 (Ga. Super. Dec. 8, 2004); *Toshiba Am. Elec. Components, Inc. v. Superior Ct.*, 124 Cal. App. 4th 762 (2004); *Vision Point of Sale, Inc. v. Haas*, 2004 WL 5326424 (Ill. Cir. Sept. 27, 2004).

B. “The Guidelines” for State Trial Courts

One significant eDiscovery resource available to the state trial courts is the “Guidelines for State Trial Courts Regarding Discovery Of Electronically-Stored Information.”

In 2004, the Conference of Chief Justices established a Working Group to develop guidelines to assist state courts in determining eDiscovery issues. The Conference approved the Guidelines in August 2006, which are available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>.

The Guidelines specifically state that they are not intended as model rules. And although they recognize “the benefits of uniformity” and are “largely consistent with the revised Federal Rules,” they also acknowledge that the states will embark on their own processes and determinations in the development of their own eDiscovery rules.

The state courts, as well as state rule-making bodies, have looked to the Guidelines for guidance since their issuance. *See, e.g., Bank of Am. Corp. v. SR Int’l Bus. Ins. Co., Ltd.*, 2006 WL 3093174 (N.C. Super. Nov. 1, 2006) (unpublished); *Reply to Comments Regarding Petition to Amend Rules 16, 26, 26.1, 33, 34, 37, and 45, Arizona Rules of Civ. Proc.*, Ariz. Sup. Ct. No. R-06-0034, at 7-8 (Ariz. 2006).

C. Cost-Shifting – A Prime Example Of The Divergence Between Federal And State eDiscovery Laws

One significant area in which some state courts have diverged from their federal counterparts is cost-shifting.

Zubulake I established a seven-factor balancing test for determining when the costs associated with electronic discovery should be shifted from producing party to requesting party. *Zubulake*

v. UBS Warburg, L.L.C., 217 F.R.D. 309 (S.D.N.Y. 2003) (“*Zubulake I*”). The court observed that the fact that a case involves eDiscovery does not alter the general rule in federal court that the producing party presumptively bears the cost of collection and production. Accessible data does not alter that presumption and cost-shifting is to be considered only when the producing party faces substantial expense in reconstructing inaccessible data.

Unlike federal law, California law provides that the party requesting the production of electronic data requiring “translation” into a useable form must bear the responding party’s reasonable expenses. *Toshiba*, 124 Cal. App. 4th 762. The *Toshiba* court started its analysis in the same place as the *Zubulake* court, from the presumption that a responding party must bear the expense of producing information. *Id.* at 769. Rather than set forth a detailed *Zubulake*-style cost-shifting analysis that follows from this initial premise, however, *Toshiba* held that a court should depart from this presumption if it has been expressly instructed to do so by the California legislature. The court then determined that California Code of Civil Procedure 2031 (now Cal. Code Civ. Proc. § 2031.280(b)) required the requesting party to pay the reasonable expense for translation of data into a useable form.

In New York, the standard is reversed; the presumption is that the requesting party pays for production. *Lipco Elec. Corp. v. ASG Consulting Corp.*, 2004 WL 1949062 (N.Y. Sup. Ct. Nassau Cty. Aug. 18, 2004). However, in some circumstances, the New York courts have shifted at least some costs associated with eDiscovery to the producing party. *Delta Fin’l.*, 819 N.Y.S.2d 908; *Waltzer v. Tradescope, Inc.*, 819 N.Y.S.2d. 38 (1st Dep’t. July 20, 2006; *Weiller v. New York Life Ins. Co.*, 2005 WL 3245345 (Sup. Ct. N.Y. Co. Mar. 16, 2005).

III. Conclusion

The lack of uniformity between the state and federal eDiscovery laws and processes is unlikely to wane in the near future, if ever. The

resulting maze of rules is yet one more reason why companies need to spend the effort – in advance of litigation – to get their eData houses in order. Such eData readiness can enable even the largest corporations to be nimble, efficient and compliant in whatever jurisdiction and court they ultimately may face.

Appendix:
A Survey of Current State eDiscovery Rules and Rulemaking Efforts

State	eDiscovery Rules
Arizona	<p>pending petition to amend Arizona Rules of Civil Procedure 16, 26, 26.1, 33, 34, 37 and 45 based on the Federal Rule amendments</p> <p>http://www.dnnsupremecourt.state.az.us/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/2/postid/227/view/topic/Default.aspx</p>
Arkansas	<p>Arkansas Supreme Court has published for comment suggested amendments to the Arkansas Codes of Civil Procedure and Evidence that remain in the comment period</p> <p>http://www.lexisnexis.com/applieddiscovery/lawLibrary/ArkansasPrivilege.pdf</p>
California	<p>proposed amendment to California Rule of Court 212.1 (Managing Discovery of Electronically Stored Information) to incorporate meet and confer prior to case management conference</p> <ul style="list-style-type: none"> ○ <u>on hold</u> <p>http://www.courtinfo.ca.gov/invitationstocomment/documents/spr06-13.pdf</p> <p>California Code of Civil Procedure § 2016.020 (incorporates “writing” of Cal. Evid. Code § 250, which includes electronic data)</p> <p>California Code of Civil Procedure §§ 2017.710-2017.740 enables the court to order the use of “technology” in conducting discovery in complex</p>

	<p>cases</p> <ul style="list-style-type: none"> ○ adopted 2001 <p>http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=02001-03000&file=2017.710-2017.740</p>
Delaware	<p>Civil Rules Advisory Committee is considering amended Federal Rules and will make recommendations on amendments</p> <p>http://courts.delaware.gov/Courts/Superior%20Court/?news_prev.htm</p>
Florida	<p>Civil Procedure Rules Committee's Subcommittee on Electronic Discovery evaluating amended Federal Rules</p> <p>http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/cb37bf08565c629785257301007007f2?OpenDocument</p>
Idaho	<p>Idaho Rules of Civil Procedure 33(c) (interrogatories); 34 (requests for production); 45 (subpoenas)</p> <ul style="list-style-type: none"> ○ adopted 7/2006 <p>http://www.isc.idaho.gov/rules/Discovery_Rule306.htm</p>
Illinois	<p>Illinois Supreme Court Rules on Civil Proceedings 201(b) (Full Disclosure Required – definition of “documents”); 214 (requests for production)</p> <p>http://www.state.il.us/COURT/SupremeCourt/Rules/Art_II/default.asp</p>

Indiana	<p>proposed amendments to Indiana Trial Rules 26 (General Provisions Governing Discovery), 34 (Production of Documents) and 37 (Sanctions)</p> <p>http://www.in.gov/judiciary/rules/proposed/2007/trial(jan).pdf</p>
Maryland	<p>Maryland Rule of Civil Procedure 2-504.3 (Computer-Generated Evidence)</p> <p>http://michie.lexisnexis.com/maryland/lpext.dll?f=templates&fn=main-h.htm&cp=</p>
Minnesota	<p>Supreme Court ordered amendments mirroring Federal Rules</p> <ul style="list-style-type: none"> ○ adopted 7/2007 <p>http://www.courts.state.mn.us/documents/0/Public/NewsPostings/Public_Notice_07/ORADM048001-0521.doc</p>
Mississippi	<p>Mississippi Rule of Civil Procedure 26(b)(5) (Electronic Data)</p> <ul style="list-style-type: none"> ○ adopted 2003 <p>http://www.mssc.state.ms.us/rules/RuleContents.asp?IDNum=2</p>
Montana	<p>Supreme Court orders amendment of Rule 26 mirroring federal rules</p> <ul style="list-style-type: none"> ○ adoption and amendment 2007 <p>http://fnweb1.isd.doa.state.mt.us/idmws/docContent.dll?Library=CISDOCSVR01^doaisd510&ID=003768488</p> <p>http://fnweb1.isd.doa.state.mt.us/idmws/docContent.dll?Library=CISDOCSVR01^doaisd510&ID=003769798</p>

New Hampshire	<p>amendment to Superior Court Rule 62 (meet and confer)</p> <ul style="list-style-type: none"> ○ adopted January 2007 <p>http://www.courts.state.nh.us/supreme/orders/ord20070118.pdf</p> <p>http://www.courts.state.nh.us/committees/adviscommrules/mar2006m.pdf</p>
New Jersey	<p>New Jersey Court Rules 1:9-2 (subpoenas); 4:5B-2 (case management conference); 4:10-2 (Electronically Stored Information); 4:17-4 (interrogatories); 4:18 (requests for production); 4:23-6 (sanctions)</p> <ul style="list-style-type: none"> ○ adopted 9/1/06 <p>http://www.judiciary.state.nj.us/rules/part4toc.htm</p>
New York	<p>New York Rules of the Commercial Division of the Supreme Court § 202.70 (Consultation Prior to Preliminary and Compliance Conferences)</p> <ul style="list-style-type: none"> ○ amended 2006 <p>http://www.nysba.org/nysbainfo/committees/cplr/rules/CommDivRules06.pdf</p>
North Carolina	<p>General Rules of Practice and Procedure, Rule 2 (Definitions), 17 (Case Management Conference), 18 (Discovery)</p> <ul style="list-style-type: none"> ○ amended July 2006 <p>http://www.ncbusinesscourt.net/new/localrules/NCBC%20Amended%20Local%20Rules%20-%202006.doc</p>

Texas	Texas Rules of Civil Procedure 196.3 (Asserting a Privilege); 196.4 (Electronic or Magnetic Data) <ul style="list-style-type: none">○ adopted 1999 http://www.supreme.courts.state.tx.us/rules/TRCP/trcp_part_2.pdf
Virginia	Virginia Judicial Council's Advisory Committee on Rules of Court published "illustrative" rules for comment in June 2007 http://www.valawyersweekly.com/archives/pdf/va/06/ediscovery.pdf

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