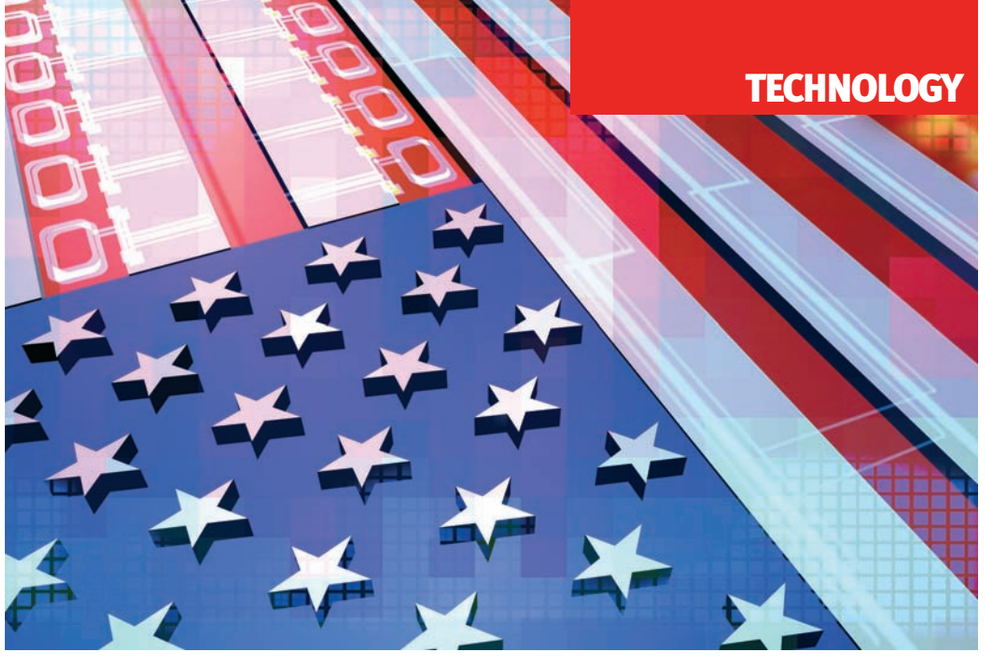


Reza Alexander believes that new US electronic disclosure rules herald a wake up call which will reverberate throughout the rest of the world

WHERE AMERICA LEADS...

Globalisation means that European-based multinationals cannot ignore the effects of US legislation. Anyone who doubts this needs only to look at Sarbanes-Oxley. So the recent amendments to the US Federal Rules of Civil Procedure (FRCP), which came into effect on 1 December 2006, will have a far reaching effect on how electronic records are managed within most organisations.

Like the fallout which followed Sarbanes-Oxley in 2002, the amended FRCP rules will trigger a sense of urgency within corporate America, obliging most corporations to operate and enforce an enterprise-wide, resilient and consistent records management programme. As remote as they may seem to practitioners outside the US, these rules are worthy of serious consideration. Lessons can be learned on how organisations should proactively handle the proliferation of electronic documents and ensure that they have effective policies and procedures in place, not only to respond effectively to disclosure obligations, but also to successfully manage the flow, storage and retrieval of information.

The rules force the parties to focus their attention on the issue of electronic disclosure as soon as litigation is contemplated. They also force them to consider the potentially daunting issue of where and in what form the electronic disclosure data might be residing. The parties are required to meet, discuss and agree on a protocol for the disclosure process, all within very short and strict time scales.

These amendments provide a welcome and long overdue solution to the problems raised by disclosure and document retention. They should also act as a wake up call for corporations and all those who handle electronic data and advise on disclosure and compliance issues.

With the exception of the strict and very limited time scales imposed by the American rules in the planning stages of disclosure, there are interesting similarities between the recent US FRCP and their current English equivalent, the Civil Procedure Rules (CPR). The common thread and underlying tone is that of cooperation and early analysis of the scope and process of disclosure, a theme which is echoed throughout the CPR and encouraged by groups within the litigation support industry such as LiST (Litigation Support Technology Group).

In order to appreciate the significance of the recent rule changes, let us look at five of the most important changes to the FRCP.

Definition of disclosable material Rule 34 (a)

Rule 34(a) seeks to remove ambiguity about what is meant by the terms 'documents' and 'data compilations'. Disclosable material will include electronically stored information (ESI). ESI can be voluminous, dynamic and indestructible, it can include any digitally stored record, regardless of how it was generated.

However, the amended rules go further than merely saying that ESI is disclosable. There is now a duty to preserve and produce such data, and corporations must understand how to request, protect, review and produce ESI when faced with a disclosure order or a subpoena.

The definition of ESI, which has parallels with the definition of 'document' in the CPR, is welcome and provides clarity. In future there should be much less legal wrangling over what is meant by the term. The definition is also flexible enough to accommodate any future changes and technological developments.

Streamlining and cooperation Rules 16(b), 26(f) and 34(b)

These three 'meet and confer' rules complement each other and have been drafted primarily with the aim of fast tracking the disclosure process and reaching early consensus on how to deal with it.

Rule 16(b) deals with the requirements for pre-trial conferences and effective scheduling and management between the parties. By compelling the parties to file an electronic disclosure plan within 120 days of a complaint being filed in court (with costly sanctions for non compliance) this rule clearly attempts to streamline the disclosure process at the very outset. Although seemingly draconian in nature, this rule echoes the corporate mood and the need for enterprises to keep costs in check. It will keep the legal costs to a minimum.

Another benefit of this rule is that it will force the legal teams to understand the IT environments of the parties at the outset of a dispute, allowing them to identify where the data resides and how best to preserve, harvest and produce it. It puts the spotlight on the electronic disclosure issues in a case at the very outset.

Rule 26(f) complements Rule 16(b) as it obliges the parties to meet no later than 99 days after the complaints are filed and to agree on some form of protocol. The aim is to encourage uniformity, structure and a more coherent and predictable flow during the disclosure process.

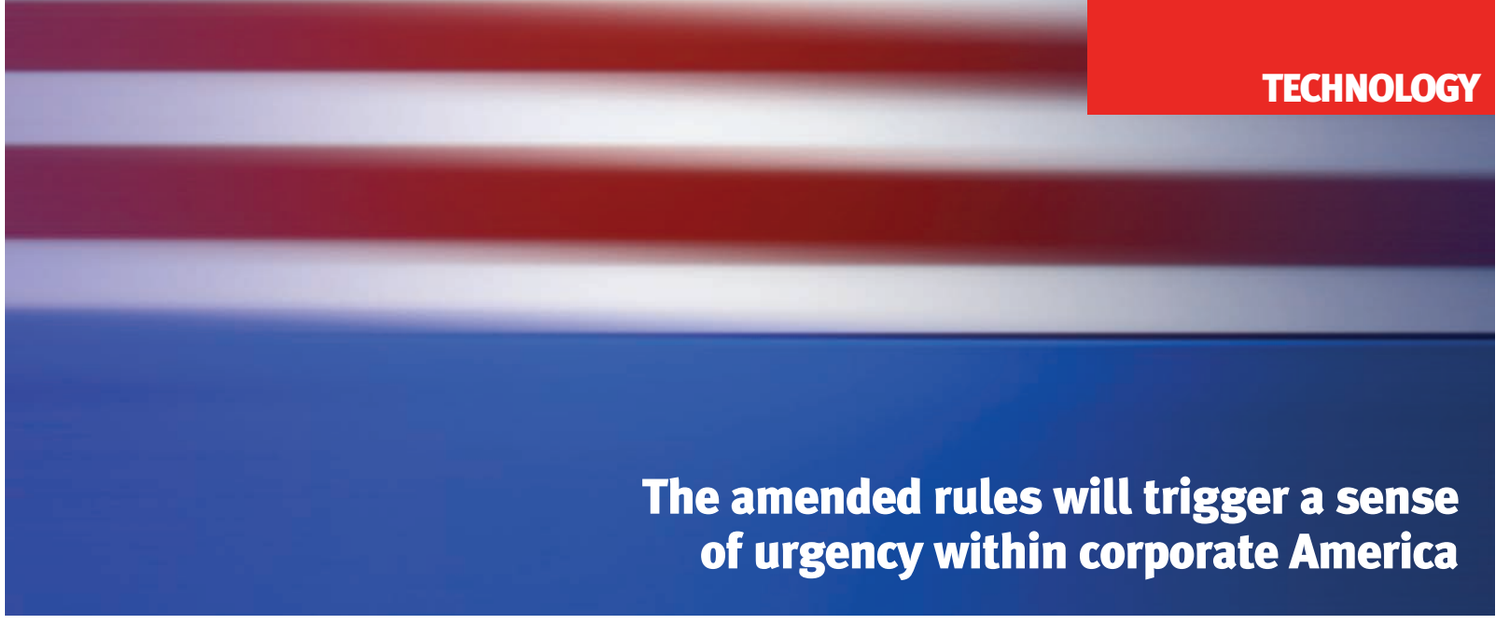
This meet and confer stage makes absolute sense as it focuses the attention of the parties on formulating a plan which will assist them in completing their disclosure obligations in the most co-operative and non confrontational manner. This is bound to save costs in the long run.

Rule 34(b) sets out protocols for how documents are to be produced to requesting parties. Parties are required to make early decisions about the disclosure document format, thus saving further costs.

As a starting point the rule provides that no party can produce paper printouts of documents whose originals are in an electronically searchable format unless both parties agree, or the court orders it. Interestingly the rule does not stipulate the format of production but does allow the requesting party to specify the form or forms of production and allows the responding party to object, giving reasons for the objection.

The rule goes on to provide a workable framework for resolving any potential disputes over the

A little paranoia is a good thing



The amended rules will trigger a sense of urgency within corporate America

form of production. If the requesting party does not stipulate a preferred format (or indeed, if the responding party objects to the requested format) the responding party must notify the requesting party of the format in which they intend to disclose the electronically stored material, with the option of producing it either in a form in which the information is ordinarily maintained or alternatively in a reasonably usable form.

There is no corresponding rule giving such clear guidelines in the UK CPR. This might be a possible area for revision of the CPR in the future, as it could prove to be a long term cost saver.

Accessibility of electronic data Rule 26(b)(2)

This rule differentiates between accessible and inaccessible data. A party need not provide disclosure of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. An example of this might be accessing data within an antiquated computer system. If the court makes an order compelling disclosure then the onus is on the responding party to show that the information is not reasonably accessible.

This rule, which understandably received a lot of attention during the public comment period, addresses the problem that ESI is often located and duplicated in a myriad of locations with varying accessibility. In practical terms it provides the responding party with some protection in not having to go to the expense and trouble of tapping into difficult-to-access sources. In turn it gives the requesting party the knowledge of the sources which the responding party will not be searching but which can be accessed if warranted.

The rule removes the uncertainty about who pays for the processing of inaccessible data, a development which may well be the preferred approach to adopt in the UK.

Inadvertent disclosure of privileged material Rule 26(b)(5)

This rule clarifies the position when privileged material is inadvertently disclosed. Such material is not to be used or relied on by the receiving party and is to be preserved by the producing party until the claim is resolved.

There is nothing unusual about this clawback rule; it is one which is adhered to in the UK too. The rule is necessary given the voluminous nature and complexity of ESI and the short time scales available for effective document reviews. In that context an insidious mix of privileged and non-privileged documents may be commonplace.

However, in practical terms, once privileged and sensitive material is disclosed, the information is understandably vulnerable.

Relief from spoliation sanctions Rule 37(f)

This rule provides a much needed safe harbour when electronic evidence may have been lost and become irrecoverable as a result of routine and good faith business processes. It serves two purposes.

1 It focuses attention on the need to ensure that litigation holds have been communicated effectively and that effective litigation hold policies are enforced as soon as litigation is contemplated.

2 It provides relief from spoliation sanctions in the event that electronic data may have been lost as the result of routine business practice.

This relief could theoretically be applied to an organisation which otherwise had a documented, systematic approach to records retention and destruction, but where some data had been routinely overwritten within a few days of the organisation receiving notice of litigation and before preservation notices were distributed effectively across the entire organisation.

It does, however, present an interesting irony from a risk management perspective. In order to comply with internal risk management policies on document retention, some corporations may have to ensure that antiquated computer or record keeping systems are kept functioning for indefinite periods. In such cases they may be effectively depriving themselves of the opportunity to argue that such information is inaccessible and should not have to be disclosed.

Summary

The rules are without doubt welcome and long overdue. They provide solutions to some of the problems in the arena of electronic disclosure and should prove to be solid foundations on which to build over the coming years.

The rules pave the way for a commonsense approach to disclosure, data retrieval and preservation in an electronic world and are worthy of being voluntarily adopted in other countries. They represent a proactive, legally defensible and sensible approach to the harvesting and production of electronic data, whether for disclosure purposes or for a regulatory investigation.

A little paranoia is a good thing. The rules will without a doubt have a dramatic and lasting effect on the way in which US organisations manage litigation. They will force the many organisations who have not yet confronted the whole issue of ESI to stand up, take note and re-educate themselves.

Lawyers who traditionally have had to focus on the facts and the law, will now also increasingly have to focus on the management of the electronic data made relevant by any dispute, with consistent records management operations becoming cornerstones in the plans of many organisations.

The following points will be worth bearing in mind when negotiating and planning any electronic data disclosure project:

- Do not demand a category of ESI that you would not be able to produce.
- Have a clear understanding and appreciation of the time and expense required to produce the required ESI.
- If the cost of production exceeds the value of case then settle and do not waste the court's time or the organisation's funds.
- Fully understand and communicate the preservation and litigation hold requirements and ensure that they are adhered to strictly.

Imperative in all this is the need to ensure that lawyers, clients and their respective IT departments communicate with each other and understand the issues. All areas of an organisation need to understand the benefits and importance of implementing effective document management systems, records retention policies and forensically sound data harvesting methodologies.

Reza Alexander is UK litigation support manager, DLA Piper UK LLP, www.dlapiper.com, and is also a founding and active member of both the Litigation Support Technology Group [LiST] and the Sedona Conference WG6: International Electronic Information Management, Discovery and Disclosure Group.

For more information, visit LiST www.listgroup.org, ILTA (International Legal Technology Association), www.peertopeer.org/home.aspx; the Electronic Discovery Reference Model (EDRM) project, www.edrm.net and the Sedona Conference, www.thesedonaconference.org