



## Ohio Supreme Court Adopts Civil Rules on E-Discovery

by Janet E. Hales

Ohio has implemented new civil rules to address the growing number of cases involving evidence found in e-mails and other electronically stored information (ESI). The Ohio Supreme Court's amended civil rules, effective July 1, 2008, are modeled on rules that have been in effect in federal courts since December 1, 2006. Some of the rules, however, more explicitly address Ohio practices. For example, the language of Ohio Rule 16 (regarding pretrial conferences) expressly includes an accommodation for any agreements by the parties for resolving issues of privilege or other ways of "protecting designated materials after production" and Ohio Rule 26 (regarding scope of discovery) identifies four criteria for courts to consider in analyzing whether discovery is unduly burdensome or costly, but still does not require pre-discovery disclosures or a parties' discovery planning conference.

Here is a short summary of the new Ohio Civil Rules affecting e-discovery:

- **Civ. R. 16** (pretrial conferences) – ESI discovery issues are appropriate topics for resolution during pretrial conferences.
- **Civ. R. 26** (scope of discovery) – clarifies that discovery of ESI is permitted but establishes that a party is not required to produce ESI if the production is too burdensome or costly as is the case with traditional discovery. The four criteria for analyzing claims of undue burden mirror criteria in Federal Rule 26(b) (C).
- **Civ. R. 34** (production of documents) – allows a party requesting ESI to specify the format(s) in which ESI should be produced and requires the responding party to articulate any objections to the requested format(s). If objecting, the responding party must state the format(s) it intends to use for production.

• **Civ. R. 37** (failure to make discovery; sanctions) – unlike the Federal Rule 37, Ohio’s Rule 37 provides factors a judge should consider in determining whether to sanction a party that has destroyed potentially relevant ESI. The factors are:

- “1. Whether and when any obligation to preserve information was triggered;
2. Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;
3. Whether the party intervened in a timely fashion to prevent the loss of information;
4. Any steps taken to comply with any court order or party agreement requiring preservation of specific information;
5. Any other factors relevant to its determination under this division.”

The Staff Notes to Ohio Rule 37 remind us that the amendment “does not attempt to address the larger question of *when* the duty to preserve electronically stored information is triggered ... addressed by case law ... and the discretion of the trial judge.” Regardless of these factors timely preservation is paramount.

• **Civ. R. 45** (subpoena) – a subpoena may be used to obtain ESI from nonparties.

To review the online version of Ohio’s Amended Rules of Civil Procedure <http://www.sconet.state.oh.us/Rules/default.asp>.



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