

# Technology

## Welcome to the World of E-Discovery

### *Why Native File Formats and Meta Data Make a Difference When Considering Electronically Stored Information*

BY DANIEL J. SIEGEL

**L**awyers may kick and scream, but electronic discovery (commonly called e-discovery) is now part of the Rules of Civil Procedure. Those attorneys who had hoped it would disappear like Nehru jackets can no longer avoid the reality that, effective Aug. 1, 2012, technology, and all of its repercussions, are part of the litigation landscape.

What caused this seismic shift is that the Pennsylvania Supreme Court has amended the Rules of Civil Procedure to include e-discovery. In doing so, the court did not follow the trail (and the extensive case law) created by the federal courts. Instead, the court chose a different path, and it is hard, if not impossible, to tell where it will lead. Only time will tell.

Allow me to explain. On June 6, 2012, the court amended Rules of Civil Procedure 4009 (“Production of Documents and Things. General Provisions”):

(a) Any party may serve a request upon a party pursuant to Rules 4009.11 and 4009.12 or a subpoena upon a person not a party pursuant to Rules 4009.21 through 4009.27 to produce and permit the requesting party, or someone acting on the party’s behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, **[electronically created data, and other compilations of**

**data from which information can be obtained, translated, if necessary, by the respondent party or person upon whom the request or subpoena is served through detection or recovery devices into reasonably usable form] and electronically stored information),**

Because it takes time for case-law to develop, litigators will have little guidance and neither will the judges who must rule upon the disputes.

or to inspect, copy, test or sample any tangible things **or electronically stored information,** which constitute or contain matters within the scope of Rules 4003.1 through 4003.6 inclusive and which are in the possession, custody or control of the party or person upon whom the request or subpoena is served[;], and

may do so one or more times.

(b) A party requesting electronically stored information may specify the format in which it is to be produced and a responding party or person not a party may object. If no format is specified by the requesting party, electronically stored information may be produced in the form in which it is ordinarily maintained or in a reasonably usable form.

The court also revised the introduction to Rule 4011:

**Rule 4011. Limitation of Scope of Discovery [and Deposition]**

No discovery **[or deposition], including discovery of electronically stored information,** shall be permitted which

(a) is sought in bad faith;

(b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;

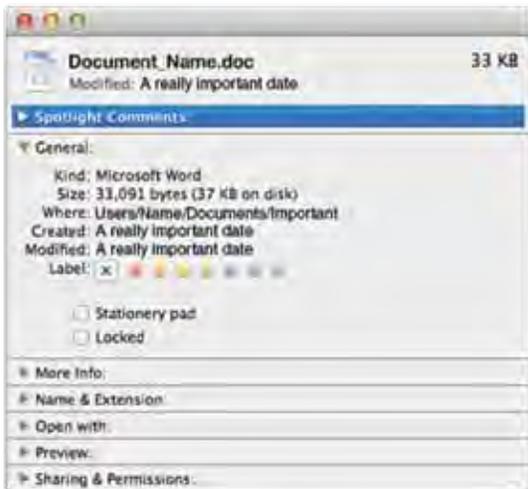
(c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6;

(d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or

(e) would require the making of an unreasonable investigation by the deponent or any party or witness.

The court also added the following note to Rule 4009.11:

**Note: A request seeking**



**electronically stored information should be as specific as possible. Limitations as to time and scope are favored, as are agreements between the parties on production formats and other issues.**

The court added a note to Rules 4009.11, 4009.12, 4009.21, 4009.23 and 4011 advising attorneys to “See also Rule 4009.1 generally regarding electronically stored information.” Unfortunately, these Rules changes don’t provide the type of guidance lawyers had hoped for. Or, at the least, the new Rules do not parallel the Federal Rules, under which there is extensive case law. In fact, the court explicitly rejected the approach adopted by the federal courts in its “Explanatory Comment – Electronically Stored Information:”

A. No Importation of Federal Law

Though the term “electronically stored information” is used in these rules, there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information. The treatment of such issues is to be determined by traditional principles of proportionality under Pennsylvania law as discussed in further detail below.

B. Proportionality Standard

As with all other discovery, electronically stored information is governed by a proportionality standard in order that discovery obligations are consistent with the just, speedy and inexpensive determination and

## Survey: We Really, Really, REALLY Like Our Smartphones

A staggering 68 percent of smartphone users surveyed said they “couldn’t live” without their devices, according to a recent study conducted by the Online Publishers Association.

The OPA survey says an estimated 44 percent of the U.S. Internet population, ages 8-64, owns a smartphone (estimated 107 million consumers), up from 31 percent (73.2 million consumers) in 2011.

Other findings from the survey:

- Android users continue to lead Apple iOS users, with both platforms growing in share since last year; Blackberry and all other platform shares declined rapidly over the same period.
- Smartphone users are trending older and more balanced between males and females, and are more affluent – the majority of smartphone users come from households earning \$50,000 or more per year.
- Fifty-seven percent of the U.S. Internet population, ages 8-64, are expected to own a smartphone by early 2013 (estimated 142.3 million consumers).

Over the course of a week, regular smartphone activities include accessing content/information (93 percent); accessing the Internet (59 percent); checking email (58 percent); listening to music (46 percent); using a social network (48 percent); playing games (43 percent); downloading and using apps (39 percent); making purchases (14 percent); and reading books (14 percent). It should be noted that all those activities showed decreases from 2011, with the exception of accessing content, which was the same. ■

## Get Juice from PowerCup

PowerLine’s PowerCup Mobile Inventor helps you plug in on the go. We’ve all been there – the long car trip and suddenly, someone’s device runs out of juice. That’s where the PowerCup comes in.

It looks like a cup of coffee from some



trendy java joint. And it fits in your vehicle’s cupholder. But on top, there are two plugs for AC cords and one for a USB cord. The PowerCup plugs into your car’s 12V power socket and can power up to three devices.

PowerCup is fairly quiet and takes up a minimum of space. And if it keeps your passengers plugged in, connected and online, it’s worth the \$35 price (from Amazon). ■



## Projecting With a Camera

It’s a digital camera! It’s a projector! It’s both! Nikon’s COOLPIX S1000pj is a 12.1-megapixel camera with a 5X wide-angle zoom lens that lets you display the HD images and movies you’ve just taken with the touch of a button.

The addition of the projector doesn’t add much weight or size to the camera. In fact, were it not for the round opening on the front marked “projector,” it would be pretty much indistinguishable from other point-and-shoot models. Your images and movies can be displayed at sizes as large as 40 inches diagonal.

The projector is very bright, but the darker the room, the better the viewing experience. The rechargeable lithium ion battery will last for about 220 photos. The S1000pj lists for \$429. ■

# e-discovery

resolution of litigation disputes. The proportionality standard requires the court, within the framework of the purpose of discovery of giving each party the opportunity to prepare its case, to consider: (i) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (ii) the relevance of electronically stored information and its importance to the court's adjudication in the given case; (iii) the cost, burden and delay that may be imposed on the parties to deal with electronically stored information; (iv) the ease of producing electronically stored information and whether substantially similar information is available with less burden; and (v) any other factors relevant under the circumstances.

## C. Tools for Addressing Electronically Stored Information

Parties and courts may consider tools such as electronic searching, sampling, cost sharing and non-waiver agreements to fairly allocate discovery burdens and costs. When utilizing non-waiver agreements, parties may wish to incorporate those agreements into court orders to maximize protection vis-à-vis third parties. See, e.g., Fed. R. Evid. 502(c).

## D. Eliminating References to "Depositions"

The elimination of specific references to "depositions" in Rule 4011 is not intended to exclude depositions from the scope of this rule. The reference was eliminated because there was no reason to call out this one form of traditional discovery among many.

While this Note is intended to provide guidance, in actuality it provides little. The court clearly intends to encourage "traditional principles of proportionality." What does that mean? That question is especially difficult to answer in light of Rule 4009.1(b), which permits a "party requesting electronically stored information [to] specify the format in which it is to be produced and a responding party or person not a party may object." This is a recipe for discovery disputes, particularly because so many attorneys simply don't understand

e-discovery or the methods information is stored, maintained or produced.

To compound the problem, the Rule states, "If no format is specified by the requesting party, electronically stored information may be produced in the form in which it is ordinarily maintained or in a reasonably usable form." In other words, a party can produce it in any way it wants. That is where more problems will arise.

The best and most economical way to produce electronic data is in its native form. Think about it. It is easy to copy the files from one computer to another, but it may be easier for the less tech-savvy (and others with less-than-honorable motives) to merely print out the material. Why is this a problem, you ask? The answer is that printed information does not show the metadata, the information behind the data. In other words, it won't show that a person manipulated a spreadsheet and changed the formula in a cell so that it would provide a result that it should not have. Or, it won't show the revisions in documents that can be game changers.

The court's goals are clearly laudable, but it seems a fait accompli that judges in Pennsylvania who handle discovery disputes are on their own. Because it takes time for case-law to develop, litigators will have little guidance and neither will the judges who must rule upon the disputes. And because the court made it clear that Pennsylvania was not adopting the Federal Rules, Pennsylvania judges must instead create their own body of law until, as is inevitable, the Supreme Court weighs in on a dispute and fills in some, if not all, of the blanks that are currently empty.

Pennsylvania lawyers, welcome to the world of e-discovery. ■

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Black & Decker iShred



Swingline Stack & Shred 100X

**THERE ARE ALL KINDS OF WAYS TO SHRED DOCUMENTS**, but Black & Decker and Swingline offer two of the more unique. Black & Decker's iShred has received honors from the Industrial Designers Society of America for its sleek look. Its six-sheets-at-a-time device looks cool and has fully enclosed blades, eliminating the chance for accidents. Swingline's Stack & Shred lets you load 100 sheets at a time. All you have to do is close the lid and get back to work.

FEATURES	BLACK & DECKER iSHRED	SWINGLINE STACK & SHRED 100X
DIMENSIONS	16.13" X 16" X 29.75"	17" X 12" X 14"
WEIGHT	17.9 POUNDS	27.2 POUNDS
CUT SIZE	0.16 INCHES	0.25 INCHES
NOISE LEVEL	68 DB	N/A
KEY FEATURES	AUTO START/STOP/REVERSE, FULLY ENCLOSED BLADES	HANDS-FREE SHREDDING
WHAT IT SHREDS	DOCUMENTS, STAPLES, CREDIT CARDS	DOCUMENTS, CREDIT CARDS, STAPLES, PAPER CLIPS
SHEET CAPACITY	6 SHEETS	100 SHEETS
BIN CAPACITY	N/A	7 GALLONS
PRICE	\$99.88	\$499.99