Oklahoma's New E-Discovery Rules

By Steven S. Gensler

E-discovery has officially arrived in Oklahoma. Unofficially, it has been here for many years. In 2008, for example, the Oklahoma Supreme Court decided a case involving sanctions against a party for deliberately destroying computer files.[1] And since at least 2003, the *Oklahoma Bar Journal* has been keeping readers up-to-date on many aspects of e-discovery.[2]

This year, however, marks the official beginning of the e-discovery era in Oklahoma. Recent work by the OBA Civil Procedure Committee has led the Oklahoma Supreme Court and the Oklahoma Legislature to adopt new e-discovery rules. On Feb. 9, 2010, the Oklahoma Supreme Court amended District Court Rule 5 to address the scheduling and management of e-discovery.[3] And on Nov. 1, a package of e-discovery amendments to the Oklahoma Code, passed and signed earlier this year, took effect.[4] With that, Oklahoma will join the federal courts – and approximately 28 other states – in having rules written specifically to address the discovery of electronically stored information (ESI).

This article presents the content of the new e-discovery rules and discusses how they will affect discovery practice in Oklahoma. Along the way, it explains various choices that the OBA Civil Procedure Committee made when developing the proposals that the House of Delegates approved and forwarded to the Legislature and the Supreme Court. It is essential to emphasize an obvious point — the committee did not enact the proposals into law; the Legislature and (for Rule 5) the Supreme Court did. Ultimately, all that matters is what those bodies intended. Nonetheless, the background behind the committee's choices hopefully sheds light on why the proposals emerged in the form that they did, and those insights may prove useful in understanding and applying the new e-discovery rules as they were enacted.

OVERVIEW OF THE CHANGES

The new e-discovery rules have three components. The main component consists of amendments to the discovery code. These amendments are, not surprisingly, the heart of the e-discovery rules. They contain the amendments that speak to core issues like the scope of e-discovery, the methods for seeking ESI, and the mechanics of producing it. The second component consists of amendments to Section 2004.1 of the pleading code governing subpoenas. These changes extend some of the practices and protections developed for party-to-party e-discovery to third-party e-discovery. The third component consists of amendments to District Court Rule 5 governing pretrial proceedings. These changes add e-discovery to the list of topics that the trial

judge can manage pursuant to the judge's scheduling and case-management powers.

For lawyers experienced with the e-discovery provisions of the Federal Rules of Civil Procedure, the Oklahoma e-discovery rules will be very familiar. Each of them parallels some part of the e-discovery amendments to the Federal Rules that took effect in 2006. The reason for the similarity is simple — all of the code provisions in question and District Court Rule 5 are modeled after analogous provisions in the Federal Rules. We did not need to write e-discovery rules from scratch. The 2006 e-discovery amendments to the Federal Rules already showed us the path forward.

But this was no simple cut-and-paste job. First, while the relevant code provisions and District Court Rule 5 are modeled after various Federal Rules, they occasionally depart from the Federal Rules in significant ways. One of the challenges for the project was to integrate the federal e-discovery provisions into Oklahoma's pretrial scheme. Second, each of the federal e-discovery amendments was considered on its own merits. As discussed in more detail later, not all of them made the cut. For those that did, however, the e-discovery case law that has been developing in the federal courts since 2006 should provide a valuable source of guidance for lawyers and the Oklahoma courts.[5]

CHANGES TO THE DISCOVERY CODE

Given that we are dealing with rules for e-*discovery*, it should come as no surprise that the primary amendments are to provisions of the discovery code. Four sections are affected: 1) Section 3226 addressing discovery generally; 2) Section 3233 addressing written interrogatories; 3) Section 3234 addressing document requests; and 4) Section 3237 addressing discovery sanctions.

12 O.S. 3226

The section that contains the greatest number of changes is Section 3226. At first blush, it may appear that Section 3226 was overhauled in its entirety. Subdivisions (A) and (B) certainly look quite changed. In reality, the changes to Section 3226, while important, are much more modest than they seem. Rather, the changed appearance results mostly from the reorganization of the existing content of subdivisions (A) and (B) and from the inclusion of explicit "proportionality" provisions in subdivision (B).

The Scope of Discovery: The changes to Section 3226 flow from a foundational question: Should the scope of e-discovery be different than the scope of traditional paper discovery? That question was prominent in the federal e-discovery rulemaking process. Many argued that the scope of e-discovery should be narrowed because of the sheer volume of ESI available and the resulting costs and burdens associated with e-discovery.

Ultimately, the federal rulemakers decided not to alter the general scope of discovery for ESI. But they did create a special provision to deal with one problem that is unique to e-discovery — the fact that some ESI is stored away in forms or systems that require considerable cost and effort to access. The classic example is information stored on back-up tapes or other systems that are designed for disaster recovery rather than regular use. The information is still there, but it can be very costly to access it.

The solution adopted by the federal rulemakers was to create a special tier for discovery from "inaccessible" sources of ESI. Under Federal Rule 26(b)(2)(B), a party that has inaccessible ESI is not required to search it initially, but instead may simply describe the inaccessible sources, say that they have not been searched, and then leave it to the court to determine whether there is good cause for them to be searched and under what conditions. (It is important to emphasize that this scheme does not affect discovery from accessible sources of ESI. For accessible sources — *e.g.*, active computer files and active email files — the scope of discovery is unchanged.) Our committee elected to incorporate the "two tier" scheme in our proposal. But there were two obstacles to integrating it into Section 3226.

First, the federal rulemakers had added the "inaccessible ESI" provision to the version of the Federal Rules that existed in 2006. We would be adding the provision to Section 3226, which is based on the *1980* version of Federal Rule 26. Federal Rule 26 had been significantly amended in 1983, 1993 and 2000, and most of those changes had not been incorporated into Section 3226.[6] Indeed, because of these differences, the place in Federal Rule 26 where the "inaccessibility" provision was added did not even exist in the version of Section 3226 we were working with.

That was not all. In 2009, the tort reform bill, HB 1603, amended Section 3226 to add a

provision requiring the automatic disclosure of damage calculations and supporting materials.[7] Keeping with the 1980 structure of the rule, however, the damage calculation provision was added to Section 3226(B) right where the "inaccessibility" provision would best fit if we followed the current federal structure. In short, differences between the structure and content of the 2006 version of Federal Rule 26 and the 2009 version of Section 3226 meant that we could not simply cut-and-paste the inaccessibility provision into Section 3226.

The committee decided to overhaul Section 3226(B) to have it track the current structure of Federal Rule 26(b). That entailed doing two things. First, it required moving the new damage calculation disclosure provisions to Section 3226(A) and making some changes there to get it to fit just right. Second, the committee updated Section 3226(B) to bring it in line with the current version of Federal Rule 26(b). That process began by updating Section 3226(B) to have it resemble the 2006 version of Federal Rule 26(b), which largely entailed added the changes from 1983 and 1993 that dealt with discovery limits and proportionality. Having done that, the committee could then follow the federal lead and fit the "inaccessibility" provision into Section 3226(B)(2)(b). The end result is that the content of Section 3226(B)(2) is now effectively the same as the content of Federal Rule 26(b)(2).

In doing these things, however, the committee did not believe that its proposal made any substantive change to Section 3226 apart from the addition of the "inaccessibility" provision. Obviously, the meaning of the 2009 damage calculation disclosure provision did not change upon being relocated to Section 3226(A). And while Section 3226(B)(2) now expressly includes the undue burden and proportionality limits in the rule, those concepts have long been an established part of Oklahoma discovery practice.[8] Indeed, the concepts have long been featured in the Oklahoma Discovery Code. Under Section 3226(G), lawyers already have a duty to make sure that their discovery requests, responses and objections do not impose undue burden or expense. Undue burden and expense are already grounds for the issuance of a protective order under Section 3226(C).[9] And Section 3226(F) already authorizes judges to regulate discovery by entering discovery plans, expressly stating that, when doing so, the court must protect the parties from "excessive or abusive" discovery.

In summary, while the new version of Section 3226 looks quite different from the former version, in substance the changes are modest. The only new concept is the creation of a two-tier scheme that distinguishes between accessible and inaccessible sources of ESI. All of the other changes are either organizational or, in the case of the "new" proportionality provisions, restate well-established norms. The result is that the content and structure of Section 3226(B)(2) will once again track that of Federal Rule 26(b)(2). Lawyers and judges alike will benefit by being able to draw more directly from the guidance provided by the case law applying the parallel federal provisions.

Post-production Claims of Privilege: The only other part of Section 3226 to be substantively amended was subdivision (B)(6) governing the process for claiming privilege or work-product protection. There are several changes. First, it was renumbered as Section 3226(B)(5). Second, it was divided into subparts (a) and (b). The content of the old rule located at subdivision (B)(6) now comprises subdivision (B)(5)(a). What is new is the content of subdivision (B)(5)(b).

In 2006, Federal Rule 26(b)(5) was amended to address the steps the parties should take in the event that a party has inadvertently produced material that it thinks qualifies for privilege or work-product protection. The producing party may notify the receiving party, at which point the receiving party may not use or disclose the material until such time as a court rules on the claim of privilege or work-product protection. Either side may bring the issue to the court and seek a ruling. New Section 3226(B)(5)(b) incorporates this provision.

It is crucial to appreciate that this new provision is procedural only. It does not speak to whether the material in question ever qualified for privilege or work-product protection. Nor does it speak to whether any applicable privilege or work-product protection was waived when the material was produced. (Readers should note that this question is now addressed, at least in part, by 12 O.S. 2502(E).[10]) Rather, the sole function of this provision is to allow the producing party to place a "hold" on the use of that material until the privilege, protection and waiver issues are resolved by the court.

Discovery Planning: Finally, it is necessary to identify and discuss an e-discovery amendment that was *not* made. Since 1993, Federal Rule 26(f) has required the parties to hold a discovery planning conference and submit a discovery planning report to the court. The purpose of the conference is to get the parties thinking about — and talking about — their discovery needs early in the case, with the hope that doing so will reduce confusion, increase cooperation and spotlight areas where there may be problems. The purpose of the report is to ensure that the court is fully-informed about the discovery needs and issues in the case when it enters the case management order.

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As part of the 2006 federal e-discovery amendments, Federal Rule 26(f) was amended to add several e-discovery topics to the list of topics to be addressed at the planning conference. The federal rulemakers considered this to be a critical part of the new scheme. They realized there were no "silver bullet" rule changes that could solve the many and evolving issues associated with e-discovery. Rather, the key would be sound judicial management. But even the best judicial management would fall short if the parties blundered about blindly and only brought e-discovery issues to the court's attention after they had festered into serious problems. In the world of e-discovery, an ounce of prevention is truly worth a pound of cure. The Advisory Committee notes to the 2006 amendment to Federal Rule 26(f) read like a sermon on the benefits of early planning and regular communication (not to mention the need for lawyers to approach e-discovery in the spirit of cooperation rather than knee-jerk adversarialism).

On the surface, the question of whether to add e-discovery to the list of topics for discussion might seem like a small one, if not an obvious one. But it was neither. That is because nothing in the current version of Section 3226 requires the parties to confer about discovery. Section 3226 does have a subdivision (F), but it is based on the 1980 version of Federal Rule 26(f) and simply provides that a party may *ask* another party to engage in discovery planning, and then ask the court to intervene if the overture is rebuked. So, for our committee, the question was not whether to *update* the early discovery planning rule to include e-discovery, it was whether to *have* an early discovery planning rule in the first place.

The members of the committee debated this question at length. Some, including myself, were strong believers in the benefits of discovery planning and urged that Section 3226(F) be amended to require it. Others resisted, concerned that a discovery planning requirement would increase expense and conflict with existing scheduling and case management practices in many counties, especially if it required the parties to submit a report in advance of the court issuing a case management order. The committee reached a compromise — our proposal would require the parties to confer about discovery but would not require a report unless the court so ordered. Ultimately, however, the committee withdrew the Section 3226(F) proposal after it failed to receive the support of the OBA Board of Governors.

Speaking only for myself, I think the absence of an early planning requirement significantly weakens the impact of the e-discovery amendments. If we have learned anything from the last four years of e-discovery in the federal courts, it is that most e-discovery problems are preventable. And when genuine e-discovery disputes do arise, they cause far less damage when detected and resolved early.

It is critical that lawyers not view the absence of a mandatory discovery planning provision as signaling that e-discovery planning is not important. The committee did not withdraw its Section 3226(F) proposal because people disputed the value of early communication and cooperation in discovery. The proposal was withdrawn because some people questioned whether we needed to enshrine a fixed conference requirement into the rules in order to achieve it. Indeed, the main argument raised against the Section 3226(F) proposal — both within the committee and at the Board of Governors — was that Oklahoma lawyers already "pick up the phone" and work things out before serious problems arise.

I hope that is an accurate description of practice in all parts of the state. Moreover, I hope that litigation culture will lead Oklahoma lawyers to make sure that they give serious thought early in their cases to whether there is likely to be e-discovery, and then to talk with each other and try to either resolve potential issues or at least identify them early for the court to resolve. The surest way to create an e-discovery disaster is to put off dealing with it until it's too late. Going forward, I would expect judges to become less and less patient and understanding with lawyers who present thorny e-discovery problems that never would have arisen if the lawyers had simply looked ahead and talked to each other.

12 O.S. 3233

Section 3233 deals with interrogatories. While most e-discovery does not involve interrogatories, the two can intersect. If the answer to an interrogatory can be derived from business records, and the burden of deriving the answer would be no greater for the requesting party than for the answering party, then Section 3233(C) allows the answering party to tender the business records in lieu of writing an answer.

Section 3233(C) is amended to make clear that this procedure applies to ESI as well as paper records. While the principle is the same for ESI, the application of the rule to ESI does raise new issues. Foremost is that the usability of ESI may require access to a particular operating system or to proprietary software. Depending on the circumstances, a party that wanted to invoke Section 3233(C) might have to make its operating system or software available to the requesting party, and might even have to provide technical support, in order to satisfy the condition that the burden of deriving the answer be no greater for the requesting party. This does not in any way require any party to provide access to its operating systems or proprietary software. If a party does not wish to do that, it always remains free to derive the answer itself and answer the interrogatory as asked.

12 O.S. 3234

Section 3234 is another section that looks like it has been amended extensively. In part, it has. The new version includes several important provisions designed to clarify and streamline the use of "document requests" to obtain ESI. But, like Section 3226, much of the difference is due to the fact that the existing content was reorganized to improve clarity and understanding.

"ESI Requests": Section 3234(A) authorizes "document requests" and defines what they can be used to obtain. It has been amended to specifically list ESI among the materials that can be requested. This is not a change in practice; courts and lawyers long have construed Section 3234(A) to reach computer files and e-mail and the like. The listing of ESI simply confirms well-established practice.

It is important to note that the amendment does not refer to any particular forms of ESI or to any particular information storage technology. One of the lessons learned during the federal rulemaking process was that information technology continues to expand and evolve at a pace that makes it futile to try to capture current technology in the rule. Technology-specific rules would become outdated very quickly. Thus, the phrasing of Section 3234(A) is deliberately open-ended and inclusive in order to capture future information technologies.

Reorganized By Topic: Section 3234(B) is the part that looks the most different. In part, this is because the existing content was reorganized. Previously, Section 3234(B) had no subparts, and the contents bounced back and forth between topics. It is now divided into five subparts that are organized around particular topics. For example, subpart (3) now contains all of the provisions governing the content of requests to produce, while subpart (4) now contains all of the provisions governing the response to the request to produce. The e-discovery provisions have been integrated into the new subparts, appearing in subparts (3) through (5).

The Mechanics of Requesting and Producing ESI: Probably the most important issue in using "document requests" to obtain ESI is the form in which the ESI is to be produced. Consider a request that required the production of e-mail. In what form would the e-mail be produced? Would it be printed out and produced as paper? Would it be produced as an electronic file? If produced as an electronic file, would it be produced as an "imaged" document like a pdf file or in its so-called "native format"?

The choice between those forms can be very important for two reasons. First, paper copies

are not computer searchable, but most native format materials are. Second, paper copies and electronic files that only provide images of the documents contain nothing but what appears on the face of the page. In contrast, electronic documents produced in their native format often include additional types of hidden information automatically retained by the software, including "metadata" (information about the creation and history of the document, like when it was created, who created it, who viewed it and when) and embedded data (*e.g.*, a tracking of any revisions). Thus, parties who receive paper productions or imaged electronic files may be missing out on information that would have been available from the native format document. It should come as no surprise, then, that when parties get into e-discovery disputes it is often because of a disagreement over form of production.

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Given the importance of the issue, one might expect the new e-discovery provisions to specify what form of production is to be used. But they do not, and with good reason. During the federal rulemaking process, form of production was one of the most hotly-debated issues. Some wanted a rule that said that native format production was always required if requested. Others wanted a rule that allowed the producing party to produce in whatever form it wanted. Like Federal Rule 34(b), Section 3234(B) eschews either extreme and adopts a middle path. It does not require parties to produce ESI in any particular form. Rather, it allows the requesting party to specify the form of production it wants. In response, the producing party can object and state the form of production it intends to make. Ultimately, disagreements about the form of production are for the court to resolve.

There are two reasons why Section 3234(B) does not mandate any particular form of production. First, the question of form of production overlaps with the scope of discovery. Much of the fighting over form of production is really a proxy fight over whether the requesting party will receive the hidden metadata that details the document's history. This can be important information. Indeed, parties often seek discovery of this type of information, usually by deposing witnesses familiar with the document. But document history is not always relevant to the issues in the case. It would make little sense to mandate that ESI be produced in a form that would contain all of the metadata all of the time, including in cases where it would be irrelevant. Second, in some cases (*e.g.*, routine cases with only a few, simple documents) a party might prefer to get hard copies rather than computer files.

In short, there is no one-size-fits-all approach to form of production. Accordingly, the new provisions do not try to provide one. Rather, they are designed to flag the issue for the parties early in the case so that if there is going to be a disagreement it can be spotted quickly and either worked out privately or presented to the court. The best way to avoid costly "do-overs" is to make sure that any disagreements are resolved before the first production is made.

Finally, Section 3234(B)(5) defines what constitutes an appropriate manner of production, setting default rules that can be altered by party agreement or court order. Subpart (a) contains the familiar language governing paper productions. Subpart (b) is new; it addresses electronic productions and provides that they must be made in either a form in which the ESI is ordinarily maintained or in a form that is reasonably usable. The principal purpose of this language is to make clear that a party may not select a form of production intended to degrade the usability of ESI. Subpart (c) then provides that a party need not produce ESI in more than one form. This means, for example, that a party could not ask for ESI to be produced in paper format (printed out) and also ask for the same ESI as a computer file.

12 O.S. 3237

The e-discovery issue that probably gets the most attention in the legal press is that of sanctions. Lawyers and clients are exposed to a

seemingly never-ending stream of horror stories involving e-discovery sanctions ranging from monetary sanctions to the dreaded "adverse inference instruction." The worst stories often involve not the deliberate destruction of evidence but spoliation that resulted from a party's failure to take appropriate steps to preserve ESI after litigation was reasonably anticipated.

The subject of sanctions was discussed at length during the federal e-discovery rulemaking process. Many participants urged the Advisory Committee to develop rules that would clearly define the duty to preserve ESI. Others emphasized the need for a rule limiting e-discovery sanctions to cases of reckless or intentional conduct, and not for ordinary negligence in preservation or production. Ultimately, the federal Advisory Committee declined to write general rules governing preservation or spoliation, at least at that time.[11] But it did create the so-called "safe harbor" provision of Federal Rule 37(e), which provides that a party may not be sanctioned under the Federal Rules for the loss of ESI if the loss resulted from the routine, good faith operation of an electronic information system. Federal Rule 37(e) is directed at situations where ESI is lost, even though the party took appropriate steps to preserve its ESI, because the party's computer system nonetheless deleted it in the ordinary course of business. It is critical to understand, however, that Rule 37(e) does not mean that parties may sit back and idly watch their document retention programs purge discoverable files. Rather, the "routine" and "good faith" operation of the party's information system presumes that the party will take reasonable steps to intervene and prevent the loss of discoverable files once the duty to preserve ESI is triggered. In many situations, that means the party must implement an appropriate "litigation hold" in order to seek shelter in Federal Rule 37(e)'s safe harbor.

Our committee agreed with the idea of having a "safe harbor" from sanctions when parties act reasonably. We also agreed that it was appropriate to condition the availability of the safe harbor provision on parties taking reasonable steps to intervene, such as by implementing reasonable litigation holds once the duty to preserve attaches. Without that, parties could set up aggressive "retention" (*i.e.*, destruction) programs and stand by while important ESI was purged until a formal document request was made or a court entered a preservation order.

Our committee took the concept of the safe harbor one step further, however. Due to the limits on what the federal rulemakers can address under the Rules Enabling Act,[12] Federal Rule 37(e) applies only to *rules-based* sanctions. It does not preclude courts from issuing sanctions under other authority. Because our committee makes proposals to the Legislature, however, our proposals can address any topic within the Oklahoma Legislature's power. Thus, our proposal departed from Federal Rule 37(e) in a subtle but important way. Under Section 3237(G), the safe harbor covers sanctions generally, not just sanctions under Section 3237.

Because it covers all sources of sanctions, Section 3237(G) provides greater protection than Federal Rule 37(e). That makes the harbor "safer," but it does not make the harbor bigger. It is still a small harbor. It only applies to the loss of ESI. It only applies to the routine and good-faith operation of an electronic information system. And it is subject to the party implementing a sufficient litigation hold once a lawsuit is filed or becomes likely. When ESI is lost as a result of a non-routine or a bad-faith operation of an electronic information system, or when ESI is lost because the party should have but failed to implement a reasonable litigation hold, Section 3237(G) provides no protection. Nor will Section 3237(G) provide protection to people who deliberately destroy ESI.

CHANGES TO THE PLEADING CODE

When most people think of e-discovery, they think of it, quite naturally, in its party-to-party form. But e-discovery often involves non-parties. To be precise, parties often seek ESI from non-parties by subpoena.

Most of the e-discovery reforms that were adopted for party-to-party discovery have been incorporated into non-party discovery under Section 2004.1. The principal amendments 1) make clear that ESI may be sought by subpoena; 2) incorporate the provisions of Section 3226(B)(2)(b) regarding "inaccessible" ESI; 3) incorporate the provisions of Section 3226(B)(5)(b) regarding the process for making a post-production assertion of privilege or work-product protection; and 4) incorporate the provisions of Section 3234(B) regarding the form of production of ESI.

No special amendments were made to address the cost or burden that requests for ESI might impose on non-parties. That may seem curious. If anyone needs special protection

from the costs and burdens associated with the abuse or overuse of e-discovery, it would seem to be strangers to the suit. While that may be true, the committee determined that the existing rule already provides non-parties with ample protection. For example, Section 2004.1(C)(1) already instructs the parties to not make requests that would impose undue cost or burden on non-parties and authorizes sanctions against parties who do. Section 2004.1(C)(2)(B) lets a non-party avoid compliance with an objectionable subpoena simply by making a timely objection to it. Finally, a non-party may seek to quash or modify an objectionable subpoena under Section 2004.1(C)(3)(a). Non-parties should look to these existing protections to deal with any special problems of undue cost or burden that e-discovery subpoenas may generate.

CHANGES TO THE RULES FOR DISTRICT COURTS

In 2006, Federal Rule 16(b)(3) was amended to add e-discovery to the list of topics the court might address in the case management order. That makes eminent sense, and our committee voted to propose a similar change. In Oklahoma, however, case management is addressed not in the code but in Rule 5 of the Rules for District Courts. Accordingly, this aspect of the committee's proposal was formulated as an application to the Oklahoma Supreme Court for an order amending Rule 5.

The Oklahoma Supreme Court agreed with the proposal and granted the application. The amended version of Rule 5 took effect on Feb. 9, 2010. It bears emphasizing that the new version of Rule 5 does not mandate that parties conduct e-discovery at all, let alone establish any fixed terms regarding when or how it is to be done. Rather, the sole change is to add e-discovery to the list of subjects to be addressed, as needed, at any scheduling or other pretrial conferences that the court might wish to conduct.

CONCLUSION

Discovery has never been easy, or cheap. With the advent of e-discovery, both the difficulty and the cost of discovery can quickly get out of control. The new e-discovery rules are meant to *help*. They are meant to help make the process more manageable. They are meant to help contain the cost. They are no panacea. But they do represent progress in the right direction.

Still, rules alone cannot solve all of the challenges that e-discovery presents to the modern civil litigation system. The issues are too complex. The volume is too great. The technology moves too fast. The solutions that work in one case will not necessarily work in the next.

The message underlying the e-discovery rules — sometimes set forth in black letter and sometimes written between the lines — is that the best way to deal with e-discovery problems is to prevent them from happening in the first place. That requires sound judicial case management. But it starts with good lawyering. In this context, that means lawyers who understand the issues, who understand their clients' needs and capabilities, and who communicate with each other to prevent the avoidable problems and to identify and resolve the real problems before they get out of control.

Author's Note: I have been a member of the OBA Civil Procedure Committee since 2006 and served as the chair of the E-Discovery Subcommittee that developed these proposals. I have also served as a member of the Advisory Committee on the Federal Rules of Civil Procedure since 2005. In preparing this article I have drawn on my experiences as a participant in these various activities. However, any opinions expressed herein are my own and are not to be taken as the views of the federal Advisory Committee or the OBA Civil Procedure Committee.

1. *Barnett v. Simmons*, 2008 OK 100 (2008).

2. Sarah Jane Gillett and Matthew A. Sunday, *Ethical Considerations and Consequences in the Realm of Electronic Discovery*, 79 Okla. B.J. 2767 (Dec. 2008); Jim Calloway, *Metadata – What Is It and What Are My Ethical Duties?*, 79 Okla. B.J. 2529 (Nov. 2008); Eric S. Eissenstat, *Making Sure You Can Use the ESI You Get: Pretrial Considerations Regarding Authenticity and Foundation*, 79 Okla. B.J. 525 (March 2008); Drew T. Palmer and Cherish K. Ralls, *The Duty to Notify: The Ethical Use of Metadata in Oklahoma*, 78 Okla. B.J. 3141 (Dec. 2007); Elliot Paul Anderson, *What Lies Beneath: Native Format Production and Discovery of Metadata in Federal Court*, 78 Okla. B.J. 999 (April 2007); Jerry Green and Susan F. Carns, *E-Discovery: The New Federal Rules*, 77 Okla. B.J. 3093 (Nov. 2006); Stephen P. Friot, *Discovery of Electronic Documents and Other Digital Data*, 74 Okla. B.J. 1463 (May 2003); Jim Calloway, *Tools for Electronic Discovery*, 74 Okla. B.J. 1529 (May 2003).

3. Order Amending Rule 5 of the Rules for District Courts, 2010 OK 8.

4. SB 2039 (2010).

5. See *Crest Infiniti II LP v. Swinton*, 2007 OK 77, ¶ 2 ("We may look to discovery procedures in the federal rules when construing similar language in the Oklahoma Discovery Code."); *Scott v. Peterson*, 2005 OK 84, ¶ 22 ("The Discovery Code was adopted from the federal scheme and we have looked to federal authority construing federal Rule 26 for guidance when applying our similar provision.").

6. To give one example, the required initial disclosure provisions of Federal Rule 26(a)(1) were added in 1993 and amended in 2000. Until last year, none of those provisions had been incorporated into Section 3226, though that did change when HB 1603 added the provision requiring parties to disclose damage calculations and supporting materials.

7. See https://www.sos.ok.gov/documents/legislation/52nd/2009/1R/HB/1603.pdf.

8. See *Crest Infiniti II LP v. Swinton*, 2007 OK 77, ¶ 16 ("Discovery may be limited or denied when discoverable material is sought in an excessively burdensome manner."); *Farmers Ins. Co. Inc. v. Peterson*, 2003 OK 99, ¶ 3 (same).

9. See *YWCA of Oklahoma City v. Melson*, 1997 OK 81, ¶ 25 (stating that courts should enter protective orders if discovery "is needlessly or excessively intrusive, burdensome, or oppressive").

10. Section 2502(E) of the Evidence Code was added in 2009 as part of HB 1597. See https://www.sos.ok.gov/documents/legislation/52nd/2009/1R/HB/1597.pdf. It is modeled after Rule 502 of the Federal Rules of Evidence, which took effect in September 2008. Section 2502(E) provides that an inadvertent disclosure of a communication covered by the attorney-client privilege or the work-product rule does not waive those protections so long as the holder of the privilege or protection took reasonable steps to prevent the disclosure and took reasonable steps to rectify the error. 12 O.S. 2502(E).

11. In light of experience since 2006, and at the near-unanimous urging of the practicing bar, the federal Advisory Committee has begun a new project to consider amendments to the Federal Rules that would directly address preservation duties and spoliation sanctions.

12. 28 U.S.C. §2072.

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