

Presented:31st Annual Corporate Counsel InstituteFebruary 19-20, 2008
Houston, TX**Attorney Ethics and Technology****Jason Boulette**

Author contact information:
Jason Boulette
Boulette & Golden L.L.P.
1221 S. MoPac Expressway, Suite 300
Austin, Texas 78746

jason@boulettegolden.com
512-732-8901

TABLE OF CONTENTS

INTRODUCTION	1
I. THE FEDERAL RULES	1
A. “ELECTRONICALLY STORED INFORMATION”	1
B. PRESERVATION OBLIGATIONS.....	2
1. The Scope of the Obligation	2
2. Litigation Holds	3
3. Reasonably Accessible v. Not Reasonably Accessible.....	5
4. Other Limitations On ESI Obligations	8
5. Rule 37(e).....	9
II. INTERNET DISCOVERY	10
A. USE OF BLOGS IN INFORMAL DISCOVERY	11
B. USE OF BLOGS IN FORMAL DISCOVERY	11
C. THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT	12
1. Determining Whether Blogging Constitutes a “Communication”.....	13
2. Determining Whether The Lawyer “Knows” A Blogger Is Represented.	15
CONCLUSION.....	16

INTRODUCTION

This paper will cover two distinct aspects of attorney ethics with respect to technology. First, the paper will explore counsel's ethical obligation to ensure the preservation of electronically stored information ("ESI") under the amended Federal Rules of Civil Procedure. Second, the paper will explore the counsel's ethical obligations with respect to the use of the Internet to obtain discovery in connection with a dispute.

I. THE FEDERAL RULES

As originally adopted, Rule 34 of the Federal Rules of Civil Procedure focused on discovery of "documents" and "things."¹ In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase.² Since 1970, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic.³ Lawyers and judges interpreted the term "documents" to include electronically stored information, because it was obviously improper to allow a party to evade discovery on the basis that the "document" label had not kept pace with changes in information technology.⁴ As technology continued to evolve, however, it became increasingly awkward to say that *all* forms of electronically stored information, many of which were dynamic in nature, fit within the traditional concept of a "document."⁵

Accordingly, in 2006, Rule 34(a) and several other rules relating to discovery were amended to address ESI and confirm that it stands on equal footing with discovery of more traditional forms of information.⁶ The change confirmed that a request for the production of "documents" should be understood to encompass, and the response to same should include, electronically stored information, unless discovery in the action has clearly distinguished between electronically stored information and "documents."⁷ The advisory committee note to Rule 34 also specifically stated that references to "documents" in other discovery rules that were not amended (*e.g.*, Rules 30(f), 36(a), and 37(c)(2)), should be interpreted to include ESI "as circumstances warrant."⁸

A. "Electronically Stored Information"

The amended rules make frequent use of the phrase "electronically stored information."⁹ Notwithstanding the obvious importance of the phrase, the drafters of the amended rule felt the wide variety of computer systems in use and the rapidly evolving nature of technological change counseled against "a limiting or precise definition of electronically stored information."¹⁰ Instead, the drafters opted for a commonsensical understanding of the phrase: "any type of

¹ FED. R. CIV. P. 34, advisory committee's note ¶ 1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ FED. R. CIV. P. 34, advisory committee's note ¶ 3.

⁹ *See, e.g.*, FED. R. CIV. P. 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(a), 34(b), 37(f), and 45.

¹⁰ FED. R. CIV. P. 34, advisory committee's note ¶ 2.

information that is stored electronically.”¹¹ This same commonsensical understanding of the phrase applies to the other amended rules that make use of it.¹² Moreover, to account for future developments in technology, the drafters specifically noted that Rule 34 should be broadly understood to encompass information stored in *any* medium.¹³

B. Preservation Obligations

A lawyer’s obligation to ensure that relevant information is preserved is so well founded that the Texas Lawyer’s Creed specifically requires each attorney to vow that he or she will cooperate in discovery.¹⁴

Although most attorneys understand the obligation to preserve hard copy documents, the inherent differences between ESI and hard copy documents require counsel to take special care in ensuring that ESI remains available for production:

This is because a distinctive feature of computer operations is the routine alteration and deletion of information that attends ordinary use of the computer. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. The routine operation of computer systems includes the alteration and overwriting of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copy documents.¹⁵

1. The Scope of the Obligation

Prior to the amended federal rules, the scope of a party’s obligation to preserve ESI was given considerable attention in *Zublake v. UBS Warburg*.¹⁶ According to *Zublake IV*, a party is

¹¹ *Id.*; see *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007) (holding that data stored in RAM, however temporarily, is ESI subject to discovery).

¹² FED. R. CIV. P. 34, advisory committee’s note ¶ 3.

¹³ *Id.*

¹⁴ See Texas Lawyer’s Creed, Art. III (17), *reprinted in* 52 Tex. Bar. J. 1304 (1989) (“I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable.”). “The Texas Lawyer’s Creed—A Mandate for Professionalism” was adopted by joint order of the Texas Supreme Court and the Texas Court of Criminal Appeals on November 7, 1989. On November 9, 1994, the four chief judges of the Federal districts in Texas signed a proclamation “commending” to all lawyers practicing in federal district courts in Texas “a thorough study” of the Texas Lawyer’s Creed.

¹⁵ *Ferron v. Search Cactus, L.L.C.*, 2008 WL 1902499, at *1 (S.D. Ohio 2008) (slip copy); see also FED. R. CIV. P. 26(f) (requiring counsel to discuss issues related to the preservation of ESI as part of their initial discovery conference).

¹⁶ See *Zublake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003) (“*Zublake IV*”) (addressing preservation of backup tapes). The *Zublake v. UBS Warburg LLC* litigation spawned a series of cases addressing various aspects of a party’s obligations with respect to ESI. See *Zublake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (“*Zublake I*”) (addressing the production of back up tapes); *Zublake v. UBS Warburg LLC*, 2003 WL 21087136 (S.D.N.Y. 2003) (“*Zublake II*”) (addressing reporting obligations); *Zublake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (“*Zublake III*”) (addressing cost shifting); *Zublake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (“*Zublake IV*”) (addressing preservation of backup tapes); *Zublake v. UBS Warburg*

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Ethics: E-discovery

Also available as part of the eCourse

[Ethics: eDiscovery](#)

First appeared as part of the conference materials for the
31st Annual Corporate Counsel Institute session

"Ethics: E-discovery"