

Preservation Obligations and Spoliation Issues in Electronic Discovery

July 1, 2013

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Electronic discovery may still be a daunting topic for some litigants, but understanding how to comply with the South Carolina Rules of Civil Procedure, while limiting the amount of electronically stored information to be preserved, collected, and reviewed, is imperative for both clients and their counsel. Failing to properly account for, preserve and produce electronic discovery may lead to serious setbacks, and perhaps even sanctions, for unwary litigants.

In 2011, the South Carolina Rules of Civil Procedure were modified in amendments to Rules 16, 26, 33, 34, 37 and 45 and are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure.

Specifically, Rule 34, "**Production of Documents and Things and Entry Upon Land for Inspection and Other Purpose,**" states:

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents, or electronically stored information (including writings, drawings, graphs, charts, photographs, phonorecords and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

Rule 34 of the South Carolina Rules of Civil Procedure permits a party to discover electronically stored information and to identify the form or forms in which it is to be produced. Therefore, a party can request production of the electronically stored documents and information in “native format,” which would include any secondary data embedded within the documents and files. This secondary data, commonly referred to as “metadata,” contains details of a file’s history, including how, when and by whom a given file was collected, created, formatted, accessed, or modified, as well as demographics such as size, location, storage requirements and media information. Some examples of metadata for electronic documents include: a file’s name, a file’s location, directory structure or pathname, file format or file type, file size, file creation, access, modification dates and file permissions. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. [Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 2007 U.S. Dist. LEXIS 33020, 73 Fed. R. Evid. Serv. \(Callaghan\) 446 \(D. Md. 2007\).](#)

The wealth of forensic information stored within metadata translates into a natural fit for litigation. Although South Carolina state courts have yet to weigh in on the use of metadata specifically, federal litigants elsewhere in the Fourth Circuit have successfully utilized embedded data to prevail on spoliation allegations. See [E.I. du Pont de Nemours & Co. v. Kolon Indus., 803 F. Supp. 2d 469, 474, 2011 U.S. Dist. LEXIS 79406 \(E.D. Va. 2011\)](#). In *Kolon Industries*, the plaintiff moved for sanctions relating to the defendant’s spoliation of evidence, specifically contending that key executives within the organization deliberately deleted relevant electronic documents once suit had been filed, and thereafter attempted to further conceal that conduct. The plaintiff successfully proved the allegations to the United States District Court using metadata identifying the creation date of the documents, the last written date of the documents, and the last accessed date of the documents. The Court found the defendant violated its duty to preserve documents and materials relevant to litigation or pending litigation, to a sufficient enough extent that sanctions were appropriate, including attorneys’ fees, expenses and costs related to the motion, as well as an adverse inference instruction to the jury.

Based on trends observed from federal courts and the ever-expanding role technology plays in daily life, South Carolina litigants should consider metadata as a critical component of electronic discovery.

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