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FEDERAL DISCOVERY

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2006 Amendments to the Federal Rules of Civil Procedure

The most recent amendments to the Federal Rules of Civil Procedure are scheduled to go into effect on Dec. 1, 2006.[1] These amendments are primarily dedicated to setting forth the principles and procedures governing discovery of electronically stored information, although some of the new rules have application beyond the context of electronic discovery.

Because the new rules will apply not only to cases filed after the effective date of the amendments, but also, to the extent just and practicable, to all pending cases, attorneys at the early stages of litigation involving electronic data must be prepared to address these new rules immediately.

Although many cases already involve extensive discovery of electronically stored information, until now arrangements for such discovery have been ad hoc, worked out on a case-by-case basis, and often only after court intervention and protracted ancillary litigation over the extent and costs of that discovery. The new rules provide a comprehensive framework intended to guide the parties and the courts in

determining the scope and conditions for conducting electronic discovery. At their heart is the recognition that electronic discovery can be highly burdensome on both the producing and the receiving parties, and that the contours of electronic discovery should be fashioned taking into account the specific circumstances of each case, with the goal of minimizing unwarranted burdens on all sides.

Rule 26(f) Discovery Planning Conferences

The amendments provide that at the Rule 26(f) discovery planning conference, to be held in most cases at least 21 days prior to the Rule 16(b) scheduling conference with the court, the parties must now include among the topics for discussion "any issues relating to preserving discoverable information," and must include in their proposed discovery plan "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."[2] The Advisory Committee Notes identify the following areas concerning electronic discovery that may be appropriate to address: (1) topics to be covered and the time periods for which discovery will be sought; (2) sources of electronically stored information within each party's control; and (3) the burden and cost of retrieving and reviewing various types of electronically stored information.[3]

The requirement that parties also now discuss preservation issues at the 26(f) conference applies to all types of evidence, but is likely to be particularly pertinent in the context of electronic data which may otherwise be destroyed automatically pursuant to the ordinary operation of a computer system. In recognition of the fact that "[c]omplete or broad cessation of a party's routine computer operations could paralyze the party's activities,"[4] the Advisory Committee directs the parties to "pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities." Interestingly, although amended Rule 16(b) specifically includes provisions for disclosure of electronically stored information among the items that may be covered in the court's initial scheduling order, that rule is silent with respect to document preservation orders, and the Advisory Committee Notes expressly caution against the routine entry of preservation orders.[5]

The Advisory Committee points

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out that counsel should be armed with an understanding of their clients' information systems prior to the Rule 26(f) conference in order to develop a discovery plan that takes into account the capabilities of their computer systems. It may even be advisable for counsel who do not have a particularly sophisticated understanding of electronic data storage systems to request basic information concerning the other parties' storage systems in advance of the Rule 26(f) conference, so that they may consult with an expert prior to the meeting.

Information Not 'Reasonably Accessible'

The amended rules carve out at least a temporary reprieve from highly burdensome electronic discovery requests, directing that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[6] If the requesting party still wants production of material designated as not reasonably accessible, it must bring a motion to compel. On a motion to compel, the party resisting discovery bears the initial burden of establishing that the information is not reasonably accessible, after which the burden shifts to the party seeking discovery to show good cause to nevertheless obtain the requested information. A showing of good cause must take into account the generally applicable limitations on discovery set forth in Rule 26(b)(2)(C), which requires a case-specific weighing of the burdens and costs of production against the likely benefit of the requested discovery. Among the considerations the Advisory Committee lists as appropriate for this inquiry are the quantity and quality of information available from other more accessible sources; the usefulness and importance of the information sought and its significance in the litigation; and the resources of the parties. The Advisory Committee observes that some discovery may be needed in order to address these considerations, and stresses that the court may couple any order to produce material designated as not reasonably accessible with limitations or conditions for that discovery, including complete or partial cost-shifting.[7]

Requests for Production

The extensive revisions to Rule 34 start with the title of that rule, which now expressly refers to production of electronically stored information. The revised rule lists electronically stored information as among the items that a requesting party may inspect, copy, test or sample. It also requires that electronically stored information be "translated" into reasonably usable form by the responding party. The most significant changes in Rule 34 are the detailed procedures it sets out for determining the form in which electronically stored information will be produced.

Under Rule 34(b), the requesting party may specify the form or forms in which the electronically stored information is to be produced. A request may designate different forms for different categories of electronically stored data. The responding party then serves a response, stating which items it will produce in the form requested, as well as any objections to the request, including objections to the requested form for production of electronically stored information. If the responding party objects to the designated form of production, or if no form is specified in the request, the responding party must specify in its response the form or forms in which it intends to produce the electronically stored information. Where no form is designated in the request, the responding party must either produce the information in the form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable. It is then up to the requesting party to bring a motion to compel if it is not satisfied with the scope or form of the responses offered by the responding party.

The Advisory Committee encourages attorneys to make use of the procedure outlined above to settle on the form in which electronic information will be produced before the actual production, noting that this may "permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs." It warns that a party who simply produces the information in the form of its choice, without first serving the response called for in Rule 34(b), runs the risk of having to re-produce some or all of the information in a different form following litigation over the form of production.

One additional protection offered to responding parties by the new Rule 34 is that electronically stored information need only be produced in one form, regardless of whether it exists in multiple forms in the client's systems.[8] Finally, Rule 45 is also amended to provide for similar procedures in serving and responding to subpoenas.

Interrogatories

The amendments to Rule 33 expressly authorize a party to specify electronically stored information in response to an interrogatory whose answer can be derived from those records, with one important caveat. Reliance on electronic records in response to an interrogatory is permissible only if "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served."[9] The Advisory Committee explains that this condition may require the responding party "to provide some combination of technical support, information on application software, or other assistance" in order to use electronically stored information to respond to an interrogatory.

Safe Harbor

In recognition of the complexities inherent in managing large quantities of electronic data, the amended rules create a safe harbor, which, absent exceptional circumstances, prevents the imposition of discovery sanctions under Rule 37 where a party fails to provide electronically stored

information that was "lost as a result of the routine, good-faith operation of an electronic information system."[10]

This safe harbor provision is by no means a green light for the "automatic" destruction of discoverable information. The Advisory Committee cautions that the good faith requirement of this provision will operate to prevent a party from exploiting such routine operations to thwart its discovery obligations. It observes that good faith will often require a party's intervention in the routine operations of its information storage systems to impose a "litigation hold" when the party is under an obligation to preserve records because of pending or reasonably anticipated litigation. Moreover, the safe harbor applies only to sanctions under Rule 37, and does not limit the court's authority to impose sanctions under other sources of authority. Finally, the Advisory Committee says that the limitation on "sanctions" contained in this provision would not restrict the court's authority to make other "kinds of adjustments frequently used in managing discovery," such as requiring a party to produce additional witnesses or respond to additional interrogatories as a substitute for the lost information.[11]

Privileged/Work-Product Info

One of the most interesting aspects of the amended rules is their recognition that it is not only unavoidable, but in some instances desirable, that a party will reveal to its adversaries information it wants to protect under the attorney-client privilege or work-product doctrine. The Advisory Committee Notes recognize that the risk of waiver from inadvertent production of protected material and the costs necessary to avoid such waiver have added both expense and delay to discovery. The Advisory Committee points out that these burdens are magnified in the context of electronic discovery because of the volume of that information and the peculiar features of electronic information which often include embedded data or other files not visible or apparent to the creator or reader.

In order to minimize the costs in both time and money required for an exhaustive screening of voluminous discovery materials, a new provision, Rule 26(f)(4), invites parties to agree in advance to procedures for asserting claims of privilege or work-product protection following production, and to have the court include those arrangements in its scheduling order. The Advisory Committee Notes actually describe two mechanisms that would permit the parties to curtail wholesale privilege reviews of discovery material. Under the first, referred to as a "quick peek," the responding party provides materials to the requesting party before conducting a privilege review, with the understanding that no waiver will result. The requesting party then designates the documents it wants actually produced, and it is only those designated documents which are then subject to privilege review by the responding party. The other arrangement identified with approval by the Advisory Committee is known as a "clawback" agreement, under which the parties agree that documents produced without the intent to waive privilege or work-product protection will be returned once the producing party has identified them as mistakenly produced.[12] The committee cites these two arrangements as illustrative, and notes that other types of voluntary arrangements may also be appropriate.

In the absence of an agreed-to procedure for dealing with the inadvertent production of privileged or protected material, new Rule 26(b) now sets forth the procedure for resolving these disputes. It provides that the party claiming that it has produced privileged or protected material must notify any party who has received that material of its claim and the basis for it. A party receiving such notification must promptly return, sequester or destroy the information, and may not make use of it until the privilege claim is resolved. If it has disseminated the information to anyone else prior to receiving the notification, it must take steps to retrieve the information. If the receiving party wishes to contest the producing party's designation of the material as privileged or protected, or wishes to assert a claim of waiver, it must present the information to the court for a determination.[13] This rule does not address how the court will resolve the underlying question of whether there has been a waiver, but simply sets out the mechanism for asserting those claims, placing the burden for seeking court intervention on the receiving party rather than the producing party. Clearly, a pre-existing agreement preserving any claims of privilege or work-product protection in case of inadvertent production will carry substantial weight in any subsequent court determination of whether a waiver has occurred.

The amended rules seek to provide a framework for the discovery of electronically stored information that offers concrete guidance to courts and attorneys while maintaining flexibility in this complex and evolving area of pretrial litigation. It remains to be seen whether the amended rules strike the correct balance. In any event, counsel who are informed about their own client's information storage systems in particular, and about storage of electronic information in general, will be best equipped to navigate this critical new domain.

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1. The amendments will take effect automatically barring congressional action to the contrary, which is highly unlikely.
2. Amended Rule 26(f)(3).
3. Advisory Committee Notes, Amended Rule 26(f).
4. Id. (citing Manual for Complex Litigation (4th), §11.422).
5. Id.
6. Amended Rule 26(b)(2)(B).
7. Advisory Committee Notes, Amended Rule 26(b)(2).
8. Amended Rule 34(b)(iii).
9. Amended Rule 33(d).
10. Amended Rule 37(f).
11. Advisory Committee Notes, Amended Rule 37(f).
12. Advisory Committee Notes, Amended Rule 26(f).
13. Amended Rule 26(b)(5)(B).