

Client Alert

A report
for clients
and friends
of the firm July 2005

Proposed Amendments to the Federal Rules of Civil Procedure Regarding Electronic Discovery

Electronic discovery is commonplace in federal court litigation and so too are questions and disputes concerning compliance with discovery requests. As a result, the federal judiciary is preparing to implement new rules of procedure for the early stages of litigation, many of which will clarify issues that have caused substantial confusion.¹

On June 16, 2005, the U.S. Judicial Conference's Committee on Rules of Practice and Procedure recommended the adoption of amendments to Federal Rules of Civil Procedure 16, 26, 33, 34, 37, and 45, bringing the amendments one step closer to final adoption. The proposed rule amendments offer guidance to litigants engaged in electronic discovery, and encourage parties, and courts, to address potential issues early in litigation. The proposed rule changes are also intended to bring much needed uniformity to the practice of electronic discovery before the adoption of divergent local rules by district courts frustrates the realization of a uniform national standard.

The proposed amendments that will be presented for approval to the full Judicial Conference in September, and later the U.S. Supreme Court and Congress, address five related areas pertaining to electronic discovery.

First, the amendments encourage early attention to discovery issues surrounding electronically stored information. Second, the proposed rule changes clarify a party's obligations in providing discovery of electronically stored information that is not reasonably accessible. Third, the amendments offer a "safe harbor" against privilege waiver for inadvertent production of electronic information. Fourth, the amendments facilitate the application of Rules 33 and 34 to electronic discovery. Finally, the proposed rules provide a "safe harbor" for a party that fails to produce electronically stored information that is destroyed because of the routine operation of a party's computer system.

Early Attention to Electronic Discovery Issues

Proposed amendments to Rule 26(f) require parties to specifically address issues relating to the discovery of electronically stored information during the discussions required by Rule 26(f) to develop a proposed discovery plan. The issues that deserve attention depend on the specifics of the case, but may include the form in which electronically stored information may be produced, the time period for which discovery will be sought, whether information is reasonably accessible, and the preservation of discoverable information that might otherwise be deleted or overwritten in the routine operation of a party's computer system. Parties may also discuss whether the court should enter an order protecting the right to assert privilege after inadvertent production of privileged information. Proposed changes to Rule 16 allow judges to include any electronic discovery-related agreements arising from Rule 26(f) conferences in their scheduling order. However, awareness and early discussion of potential electronic discovery problems will decrease the risk of later controversy even if such agreements are not made part of the scheduling order.

¹ Text of the proposed amendments is available at <http://www.uscourts.gov/rules/newrules6.html>.

Information that Is Not Reasonably Accessible

Under proposed changes to Rule 26(b)(2) a party seeking discovery of electronically stored information that is not “reasonably accessible” must first obtain a court order based on a showing of good cause. The good cause analysis weighs the requesting party’s need for the information against the burden on the responding party.² While the proposed amendments do not define the term, the Committee Notes suggest that “reasonably accessible” information likely includes any information that the responding party routinely accesses or uses, but may not include disaster recovery data, legacy data, deleted data, or other data that requires significant cost, effort, or burden to produce.

Safe Harbor for Inadvertent Production of Privileged Information

Recommended amendments to Rule 26(b)(5) will allow parties to avoid unintentional waivers of privilege that otherwise result from production of a privileged document. Because the huge volume of electronically stored information often makes preliminary privilege reviews difficult, Rule 26(b)(5)(B) provides a procedure by which a responding party that inadvertently produces privileged information can assert that claim within a “reasonable time.” After receiving timely notice of a claim of privilege, the receiving party must return, sequester, or destroy the privileged information. A variety of factors, including the date when the producing party learned of the production, the extent to which receiving parties have used the information, and the magnitude of production, bear on whether notice is given within a reasonable time.

Applicability of Rules 33 and 34

Proposed amendments to Rules 33 and 34 will allow parties to request or produce information in electronic format by including specific references to “electronically stored information.”³ Additionally, Rule 34(b) provides that, if the request does not specify a form of production, a responding party may choose to produce electronically stored information in the format in which it is ordinarily maintained or in an electronically searchable form. Production in more than one form may be ordered for good cause.

Rule 37 Sanctions Safe Harbor

The proposed amendment to Rule 37 addresses the routine deletion of information that accompanies ordinary computer usage. Under Rule 37(f) a party may not be sanctioned, absent a court order requiring preservation of electronically stored information, for failing to provide information that is lost due to routine computer operation if the party took reasonable steps to

preserve potentially discoverable information. Potentially discoverable information includes anything the party knew or should have known to be discoverable in the action.

The unique features of electronically stored information warrant special discovery considerations. While the proposed Civil Rules amendments are not yet effective, their suggestions are useful to litigants facing electronic discovery.

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² Committee on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee 11 (Aug. 3, 2005).

³ The term “electronically stored information” is intended to be broad enough to cover both current and future types of computer-based information.