

REALITY BYTES: A NEW ERA OF ELECTRONIC DISCOVERY

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On December 1, 2006, the Federal Rules of Civil Procedure (FRCP) changed dramatically to explicitly address issues of electronic discovery or “e-discovery.” The amended rules affect all cases at the federal court level and force litigants to deal with e-discovery issues at the earliest stages of the case.

Some of the more significant rule changes are discussed below, and at the end of this article the authors identify practical considerations for dealing with the recently implemented e-discovery rules. For reference, a complete copy of the amended rules including the Committee Notes can be found at www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

1. **Rule 26(b)(2)(B) - Discovery Scope**

Amended Rule 26(b)(2)(B) recites:

“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**. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or costs. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.” (emphasis added).

Amended Rule 26(b)(2)(B) is unique in that it requires the producing party to affirmatively “identify” any inaccessible sources of potentially responsive information that it does not intend to search or use for production. Moreover, this identification must be of sufficient detail to allow the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

Some examples of “inaccessible” information might include “legacy data” stored on obsolete systems and information stored solely for disaster recovery.

A responding party can satisfy the requirement by listing generic categories or types of sources. If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised through a motion to compel or a motion for protective order. The responding party

must show that the sources of information are not reasonably accessible because of undue burden or cost. The requesting party may be entitled to discovery to test this assertion, such as allowing some form of inspection of such sources and/or taking depositions of witnesses knowledgeable about the responding party's electronically stored information.

Ultimately, if good cause is shown, the court may order production provided that the burdens and costs are justified under the circumstances. According to the Committee Notes, appropriate considerations include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

2. **Rule 26(f) - Discovery Planning Conferences**

Amended Rule 26(f) provides, in pertinent part:

“[t]he parties must, as soon as practicable and in any event **at least 21 days before a scheduling conference is held or a scheduling order is due** under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to **discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:**

(1) ..

(2) ...

(3) **any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced** ...” (emphasis added).

Amended Rule 26(f) directs the parties to discuss discovery of electronically stored information during their discovery-planning conference. For example, the parties may specify the topics for e-discovery and the time period for which discovery will be sought, the various sources that should be searched for electronically stored information, and whether the information is reasonably accessible, including the burden or cost of retrieving and reviewing the

information. Since many courts conduct scheduling conferences within ninety days after a complaint is filed, the parties must be prepared to discuss these issues early in the litigation.

Amended Rule 26(f) also directs the parties to discuss any issues regarding preservation of electronically stored information. This typically includes issues regarding the automatic creation and deletion or overwriting of information stored on the parties' computers and back-up systems. There is also an issue as to whether any of the electronically stored information is privileged. The volume and nature of electronically stored data creates unique problems in conducting privilege reviews; therefore, how to handle the inadvertent disclosure of privileged information in electronic form should be specifically addressed.

In addition, computer programs commonly retain drafts, editorial comments and other "deleted" matter in an electronic file not visible to the reader. Moreover, information describing the history, tracking or management of an electronic file is often not visible to the reader. These are just some examples of topics that need to be addressed in the Rule 26(f) conference.

Rule 26(f)(3) also explicitly directs the parties to discuss the form in which electronically stored information will be produced. This is also addressed by amended Rule 34, discussed in more detail below.

3. Rule 34 - Form of Production

Amended Rule 34(b) provides, in pertinent part:

".. The **request may specify the form or forms** in which electronically stored information is to be produced. ... If objection is made to the requested form or forms for producing electronically stored information - or if no form was specified in the request - the responding party must state the form or forms it intends to use. ... Unless the parties otherwise agree, or the court otherwise orders: (ii) **if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable**; and (iii) a party need not produce the same electronically stored information in more than one form." (emphasis added).

Under Rule 34(b), a party must produce documents as they are kept in the ordinary course of business or must organize and label them to correspond with the categories in the

discovery request. Amended Rule 34(b) requires similar production for electronically stored information.

Rule 34(b) permits (but does not require) the requesting party to designate the form in which it wants electronically stored information produced; clearly, different forms of production may be appropriate for different types of electronically stored information. For example, a party might be requested to produce word processing documents, e-mails, spreadsheets, different image or sound files, and database material. Such diverse types of information would usually need to be produced in different forms.

The responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the court will resolve the dispute.

If no form is specified by agreement or court order, the responding party must produce electronically stored information either in a form in which it is ordinarily maintained or in a form that is reasonably usable. In some situations, the responding party may need to provide some reasonable amount of technical support, information or other assistance to enable the requesting party to use the information. If the responding party ordinarily maintains the information in a way that makes it electronically searchable, the information should not be produced in a form that removes or significantly degrades this feature.

4. Rule 37(f) - Sanctions/Safe Harbors

Rule 37(f) provides:

“Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the **routine, good-faith operation** of an electronic information system.”

This is a new subdivision of Rule 37. It focuses on a unique and essential feature of computer operations, the routine alteration and deletion of information during ordinary use. For example, old e-mails may be automatically deleted after a certain amount of time or back-up

tapes may be re-used. Thus, the ordinary or “routine” operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

However, good faith may require a party’s intervention to modify or suspend certain features of the “routine” operation to prevent the loss of information, if that information is subject to a preservation obligation. This is often referred to as a “litigation hold.” If the source is one that a party believes is not reasonably accessible under Rule 26(b)(2), there is a question whether good faith would call for steps to prevent the loss of information from that source. The question might then become whether the party reasonably believes that the information on such source is likely to be discoverable and not available from reasonably accessible sources.

PRACTICAL CONSIDERATIONS

1. Know Your Information Technology - “IT”

To comply with the amended rules, a company needs to know the answers to at least the following questions:

- A. What types of electronic information are stored, and in what form(s)?
- B. Where is the electronic information stored?
- C. How is the information stored, and how can it be retrieved (and at what effort/cost)?
- D. Who in the company is most knowledgeable about the creation, storage and purging of electronic information?

The answers to these questions will help a company organize itself and prepare for the rigorous requirements of electronic discovery under the amended rules. Management and legal counsel (both inside the company and outside) need to communicate directly with those people most knowledgeable about these issues. Substantial time may be needed to adequately learn how electronic information is created, stored and purged, in order to be fully prepared for the discovery-planning conference.

2. Update Your Document Retention Policy

Review your document retention policy to make sure it addresses electronic information. Everyone within the company from top to bottom needs to be educated as to the contents of the policy. Should company information be stored on personal computers, laptops or PDA's? If not, encourage, or better yet require, storage on a central server. Make that part of the written policy and ensure compliance periodically. Make sure the policy includes provisions for litigation holds, and that the employees are instructed accordingly.

3. Be Proactive

Don't wait to address these issues until you are sued or threatened with a lawsuit, as that is likely too late. Start with small steps, if necessary, to increase everyone's awareness of the importance of adhering to the guidelines. Involve your litigation counsel at an early stage, to ensure that you will be able to readily comply with the amended rules. Counsel and management need a "hands-on" approach to dealing with these issues; they cannot be delegated to the IT staff.

Finally, if sued or threatened with a lawsuit, work closely with counsel to assess the potentially relevant electronic information, determine the key players and key IT managers and staff, communicate with the key players/managers/staff to ensure that no potentially relevant information (electronic or otherwise) is destroyed, and generally follow the guidelines/policies in place. Proper planning will make complying with the new rules less disruptive.

CONCLUSION

The amended rules encourage early discussion and agreement, with oversight by the court, as to how electronic discovery is to be conducted. Companies need to become familiar with their IT systems to ensure that they will be able to comply with the rules if sued or threatened with a lawsuit. Hopefully, at the same time, this will streamline a company's IT and make it more efficient from a business perspective.