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New Electronic Discovery Rules Should Help Solve Legal and Technical Problems

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Meaningful amendments to the Federal Rules of Civil Procedure governing discovery of electronically stored information ("ESI") were approved on September 20, 2005 by the U.S. Judicial Conference as recommended by the Conference's Standing Committee on Rules of Practice and Procedure. The amendments will next be forwarded to the U.S. Supreme Court and, if promulgated by the Court by May 1, 2006, will take effect on December 1, 2006, unless Congress intervenes.

Electronic discovery is a complex subject and certain of the amendments have drawn the opposition of some elements of the plaintiffs' bar and special interest consumer groups. However, the Judicial Conference approved the rule amendment package *in toto* by unanimous consent, perhaps recognizing that, on the whole, bench, bar, and academia have supported the amendment package because it is balanced, moderate, and will provide helpful guidance in a very difficult area.

See generally, *Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States,* Sept. 2005 ("Report") (posted at http://ddee.pf.com).

The amendments strike a careful balance among a variety of views and have captured the middle ground in many key areas. While not a panacea, this approach will help to redress the current imbalance in e-discovery and will contribute to reducing its burdens, costs, and uncertainty. Yet, notwithstanding the many compromises, the amendments should advance the essential purposes of the Federal Rules and bring e-discovery closer to the mandate of Rule 1 and within the bounds of proportionality and balance toward which discovery has been trending over the past 20 years.

The proposed amendments should discourage the tendency of some litigants to leverage the cost and volume of e-discovery to force settlements. They will also reduce unexpected and unnecessary discovery costs and burdens resulting from lack of planning, information, and management. From a technical perspective, overall, the proposed amendments should lead to faster, less expensive, and better collection of data and should help to avoid expensive problems, prevent loss of data, and ensure an efficient and sensible preservation, collection, review, and production process.

The Amendment Process

The Standing Committee and its Civil Rules Advisory Committee heard and examined viewpoints from a wide spectrum of interested parties throughout an intensive multi-year study and debate. The Standing Committee Report noted that the Advisory Committee became aware of problems with computer-based discovery in 1996.

In 1999, the then-chair laid out the Advisory Committee's daunting mission to devise "mechanisms for providing full disclosure…where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties…." The Advisory Committee began intensive work on the subject in 2000. Report at 3.

Many bar organizations, attorneys, computer specialists, and members of the public informed the rulemaking process. Study of the issues brought together lawyers, academics, judges, litigants, and experts in information technology with a variety of experiences and viewpoints. Three public hearings were held at which 74 witnesses testified and an additional 180 written comments were submitted.

The Problem

Discovery of electronically stored information ("ESI") is unique and raises markedly different issues from conventional discovery of paper records. ESI is characterized by exponentially greater volume than hard-copy documents.

Unlike paper, computer information is also dynamic; merely turning a computer on or off can change the information it stores. And, ESI, unlike words on paper, may be incomprehensible when separated from the system that created it. Moreover, technology issues are not so apparent that they lend themselves to intuitive thinking by even the best-intentioned representatives of the bench or bar. They are not inherently present awaiting right-minded counsel or judges to ferret them out. As a result, litigants have been contending with undue costs, loss of data, finding data belatedly, and impossible volumes containing largely irrelevant, redundant, or unimportant information. The proposed rule amendments address these problems.

The Rules Committee's lengthy study revealed that the discovery of ESI is becoming more time-consuming, burdensome, and costly. The Committee also recognized the inconsistencies in developing case law on e-discovery, the emergence of disparate local rules, and a growing trend toward balkanization of rules and practice. Without national rules adequate to address unique e-discovery issues, a patchwork of rules and requirements is likely to develop. While such inconsistencies are particularly confusing and debilitating to large public and private organizations, the uncertainty, expense, delays, and burdens of such discovery also affect small organizations and individual litigants.

Placing Electronic Discovery in Historical Perspective[1]

The existing discovery rules, last amended in 1970 to take into account changes in information technology, provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations. The present e-discovery proposals grew out of and share the same focus as the Rules Committee's work on the 2000 amendments, which focused on the "architecture of discovery rules" to determine whether changes could be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management when appropriate.

From a technical perspective, the ability to photocopy documents greatly influenced the availability of documents for discovery and led to what was once considered impossible volumes of documents. Today, the advent of e-mail and cheap storage, on both hard drives and backup tapes, has taken those volumes to a new level. But beyond unstructured data, the rules process has also taken into account emerging areas of electronic discovery, namely structured databases.

More than just volume and locations, electronic information is infamous for its complexity. Finding it, moving it, and understanding it may require a number of disciplines and a variety of components including operating systems, unique hardware, specific software versions, and specially configured environments.

The Proposed Amendments

The Rules Committee concluded that it would be counterproductive to delay implementing the amendments in the vain hope that amassing yet more information and testing additional formulations would result in significant improvements. Prolonged re-argument of old issues would result and delay meaningful relief for many more years. Therefore, the Committee recommended meaningful e-discovery amendments in five areas, which are summarized below in the order presented in the Report.

Discussion of E-discovery Issues in Early Discovery Planning

The proposed amendments to Rule 16, Rule 26(a) and (f), and Form 35 present a framework for the parties and the courts to give early attention to issues relating to electronic discovery, including the frequently recurring problems of the preservation of evidence and the assertion of privilege and work-product protection. See Report at 7-8. This initiative will induce litigants to examine and understand potential issues early on, setting the stage for discovery to proceed under a comprehensive plan, a key to avoiding later problems.

- Rule 16 is amended to invite the court to address the disclosure or discovery of ESI in the Rule 16 scheduling order. The amendment also gives the court discretion to enter an order adopting any agreements the parties reach for asserting claims of privilege or work-product protection after inadvertent production in discovery.
- The proposed amendment to Rule 26(a) clarifies a party's duty to include in its initial disclosures electronically stored information by substituting "electronically stored information" for "data compilations."
- Under the proposed amendment to Rule 26(f), the parties' conference is to include discussion of any issues relating to disclosure or discovery of ESI. The topics to be discussed include: the form of producing ESI, a distinctive and recurring problem in e-discovery; preservation issues, which have new importance because of the dynamic character of electronic information; and whether the parties can agree on approaches to asserting claims of privilege or work-product protection after inadvertent production.
- The proposed amendment to Rule 45 conforms the provisions for subpoenas to changes in the other e-discovery rules and Form 35 is amended to add the parties' proposals regarding disclosure or discovery of ESI to the list of topics to be included in the report to the court.

The many varieties of data and emerging assistive technologies decisions made early in the process of preservation and review can greatly affect the economics and efficiencies of the ultimate production. Decisions on the types of search technologies to use (investigative, comprehensive, Bool-

ean, linguistic, etc.), the manner of review (static versus native), even the manner of preservation (imaging, logical file copying, custodian review) can also depend strongly on the nature of decisions (or disclosures) made. The new rules should encourage litigants to address these issues in timely fashion.

Clarifying and Conforming Proposed Amendments to Rules 33 and 34

The proposed amendment to Rule 33 provides that a party may answer an interrogatory involving review of business records by providing access to ESI if the burden of finding the answer in timely fashionis substantially the same for either party.

The proposed amendment to Rule 34 explicitly recognizes ESI as a category subject to discovery that is distinct from "documents" and "things" to clarify that there are differences among them important to managing discovery. Rule 34 is also amended to authorize a requesting party to specify the form of production and for the responding party to lodge objections. Absent an order, agreement, or a request for a specific form, a party may produce responsive ESI in the form in which the party ordinarily maintains it, or in a reasonably usable form. See Report at 8-9.

Treating ESI as a separate category will become more important as electronic information becomes less and less similar to static, four-cornered documents and more like a dynamic, custom-content presentation of data keyed to an individual's settings, attributes, preferences or requests. It also clarifies that the object of the discovery is the information, not the container. This applies variously to databases, backup tapes, hard drives, etc.

Addressing Inadvertent Privilege Waiver — Proposed Amendment to Rule 26(b)(5)

The proposed amendment to Rule 26(b)(5) provides a procedure for asserting privilege after production that is parallel to the similar proposals for Rules 16 and 26(f). The volume of ESI searched and produced in response to discovery can be enormous, and certain features of the forms in which such information is stored make it more difficult to review for privilege and work-product protection than paper. Thus, the inadvertent production of privileged or protected material is a substantial risk. See Report at 10-11.

Under the proposed amendment, a producing party may notify the receiving party, within a reasonable time, of a claim that privileged material or work product was inadvertently produced. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved. If the receiving party disclosed the information before being notified, the receiving party also must take reasonable steps to retrieve the information. The receiving party has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether a waiver has occurred.

From a technological perspective, this rule recognizes that data constructs are complicated and some aspects are either difficult to review or only relevant from very specific perspectives — perspectives that may not be relevant early in litigation. It also acknowledges that the overwhelming volumes of information in some litigation almost guarantee discovery will be a product of many people rather than one. This, in turn, leads to variations in the decision making process for determining relevancy and privilege.

Two-Tier Discovery: Proposed Amendment to Rule 26(b)(2)

The proposed amendment to Rule 26(b)(2) would require a court order for production of ESI that is "not reasonably accessible because of undue burden or cost." The proposal recognizes a "distinctive, recurring problem" in e-discovery and builds on existing rules to facilitate early production of relevant and accessible ESI. And, it specifically references the 1983 proportionality amendments that first empowered judges to limit or forbid discovery where costs and burdens outweigh benefits, and were explicitly implemented in the adoption of "two-tier" discovery in the 2000 amendments. See Report at 11-13.

The amendment requires the responding party to identify, "by category or type," the sources of potentially responsive information that it has not searched or produced because of the costs and burdens of accessing the information. If the requesting party moves for production of such information, the responding party has the burden to show that the information is not reasonably accessible.

Even if the responding party makes this showing, a court may order discovery for good cause, "considering the limitations of Rule 26(b)(2)(C)," and "may specify conditions for the discovery." Such conditions "may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible." See Committee Note at 45, 48.

The proposed amendment codifies the best practices of parties and courts with experience in these issues. By creating the distinction between "not reasonably accessible" and "accessible" ESI, burdensome production that cannot be justified by the needs of the case should be reduced significantly.

It is important to note that "not reasonably accessible" does not always mean only "online" versus "offline." Even data that is online may be found to be "not reasonably accessible," depending on the specific data requested. Some examples include log files, short-lived data, and difficult-to-extract portions of extremely large database systems.

These rules seem to encourage a better understanding of the intra-workings of computer systems. Whether this results in heightened popularity of open source systems, or better documentations of existing systems, it should ultimately lead to more intelligent and better-informed utilization of advanced technology.

The requirement in this proposed rule that litigants generally identify all sources of potentially responsive information should go a long way toward avoiding discovery disputes and should be welcomed by the judiciary.

Sanctions: Proposed Amendment to Rule 37(f)

Under the addition to Rule 37, "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." Committee Note at 83.

The proposed rule recognizes that all electronic information systems are designed to recycle, overwrite, and change information in routine operation, even without "specific direction or awareness," not because of any relationship between the content of particular information and litigation, but because they are necessary functions of regular business operations. Committee Note at 84. The proposed rule also recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, again in ways that have no counterpart in managing "static" hard-copy information. Report at 13-14.

Even when litigation is anticipated, it can be very difficult to interrupt or suspend the routine operation of computer systems to isolate and preserve discrete parts of the information they overwrite, delete, or update on an ongoing basis, without creating problems for the larger system. Routine cessation or suspension of these features of computer operation is also undesirable; the result would be even greater accumulation of duplicative and irrelevant data that must be reviewed, making discovery more expensive and time-consuming. Id.

However, sanctions are not avoided simply by showing that information was lost by routine operation of an information system. A showing that the operation was executed in good faith is also required.

One factor in the good faith determination may involve intervention to modify or suspend certain features of a system's routine operation to prevent the loss of information, if that information is subject to a preservation obligation. When and if such an obligation arises depends on the substantive law and the circumstances of each case; the amendment does not create a new preservation obligation. See Report at 15-16.

The logic behind the proposal is that the cost and disruption of interrupting routine computer systems are not justified when other means for preserving necessary and relevant information exist, such as: a "litigation hold" process, early discussion of the need for such extreme preservation measures, and entry of preservation orders tailored to the specific case. The proposed rule should provide necessary guidance in a troublesome area distinctive to electronic discovery.

This rule codifies best practices that will aid in understanding in advance options available for various systems and information flows to capture, archive, monitor or suspend various operations and then, correspondingly, resume them at some future point. It should also stimulate better understanding of the settings of various systems, the extant data they contain, and the options to preserve them (user notification, contemporaneous backup, process suspension, code augmentation, etc.). Overall, this proposed amendment will work to encourage the implementation of protocols for the preservation and collection of data, a welcome change for plaintiffs and defendants alike.

Progress

The amendments strike a fine balance between a level of generality to accommodate future technological changes and sufficient specificity to provide helpful guidance. They are a well integrated and balanced rules package that will be a major step towards a more realistic approach to electronic discovery that should significantly reduce its costs and burdens and improve its effectiveness.

Anyone with a stake in a fair and efficient civil justice system should take comfort in the approval of the amendments by the Judicial Conference and the recommendation that they be adopted by the Supreme Court and transmitted to Congress.

Endnote

[1] The Report properly frames the proposals and the debate they have engendered in the appropriate historical context — a framework and architecture established by prior rule amendments over the last 20 years. Before the civil rules became effective in 1938, discovery was extremely limited. The 1938 Civil Rules provided for liberal discovery, further expanded by amendments in 1946 and 1970, the "high water mark of liberal discovery." Since then, as the Report observes, the discovery rules have been amended in 1980, 1983, 1993, and 2000 to provide more effective means for controlling overuse and occasional misuse of the discovery devices. See Report at 5-6

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