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Practice Tip

Proposed Changes to the FRCP Regarding Discovery Of Electronically Stored Information

By Jennifer Smith Finnegan and Aviva Wein

Part One of a Two-Part Series, published in the November 2006 issue

On Dec. 1, 2006, new amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information will take effect unless Congress enacts legislation to reject, modify, or defer the amendments. The amendments to Rules 16, 26, 33, 34, 37, and 45, which were approved by the U.S. Supreme Court on April 12, 2006, attempt to bring the discovery rules up-to-date in an Information Age where the majority of new communication and information is now created, disseminated, and stored in electronic media.

These new rules will be of particular significance in product liability litigation, where potentially relevant electronic data relating to the design, development, manufacturing, marketing, distribution, and sale of a single product may be contained in multiple information systems, in different proprietary programs, in different formats, and subject to different protocols, retention policies, and maintenance schedules throughout various divisions, branches, or facilities of a single company.

For example, the company's corporate offices may use an entirely separate operating system from that used by its research labs or its manufacturing facilities. Each plant, in its own right, may have separate or proprietary data systems that vary from other plants. Thus, the task of identifying, preserving, and producing electronic information can be particularly daunting. The new rules will require that the task be faced head-on in an attempt to bring clarity to the process.

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Early Attention to Electronic Discovery Issues

The proposed amendments will require the parties and the court to pay early attention to electronic discovery issues:

- Rule 26(f) will require parties "as soon as practicable" (but in no event later than 21 days prior to the Rule 16 initial scheduling conference) to meet and confer regarding preservation of discoverable information and the discovery of electronically stored information, including the form(s) in which it should be produced and issues relating to claims of privilege or work product. These issues must be in the parties' proposed discovery plan to the court (per amended Form 35 of the Rules).
- Rule 26(a)(1)(B) will require a party to include in its initial written disclosures a description of electronic information, by category and location that may be used to support its claims or defenses.
- Rule 16(b) will provide that the Rule 16 scheduling order for the case may include provisions relating to the discovery of electronically stored information and "any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production." Rule 26(b)(5)(B), in turn, addresses inadvertent production of privileged or work product information, by providing a mechanism for return of the information to the producing party and continued protection of such information.

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intended end-result is a streamlined and open approach to the electronic discovery process, the immediate effect of these amendments may require a company and its legal counsel to engage in additional work at the front-end — most likely *before* any specific litigation is actually commenced — to identify, catalog, and keep a running tab of a company's electronic information systems in all of its corporate offices and manufacturing facilities.

The necessity of such an exercise is evidenced by the new rules' requirement that parties *must* be prepared to identify, locate, and describe the electronically stored information that may be relevant to the claims at hand at the outset of the litigation. Indeed, the time frame within which Rule 26 initial disclosures and the required meet and confer regarding electronic discovery must occur is decidedly tight — within a few weeks or months after litigation is commenced.

This suggests that it would be prudent, either before litigation is pending or immediately upon receiving notice of litigation, for a company and its in-house legal department to take inventory of all of its electronic information systems, the kind of information created and stored, where and how it is stored, how long it is stored, and how it is destroyed or overwritten during the normal course of business. The systems should also be assessed in conjunction with the company's document retention policies to ensure that the management and operation of the electronic information systems are consistent with — and do not violate — those policies. Likewise, the company's document retention policies, including its "litigation hold" provisions, should be inventoried, monitored, and kept up-to-date. Finally, when litigation does arise, it would be helpful to designate an IT officer or employee, or other consultant, to serve as a liaison to in-house and outside counsel to help address electronic discovery questions. The good news is: Once this initial work is done and routinely kept up-to-date, the company will not have to repeat the entire exercise each time it is faced with new federal litigation.

When litigation in federal court does arise, the company will be in the position to draw on these resources and learn relatively quickly (as the rules now require) the nature, categories, and location of electronically stored information that is potentially relevant to a product at issue and that the company will use to support its defenses or claims. The company will also be in the position to articulate the basis for any objections to onerous electronic discovery demands, and to advance its positions regarding the scope and form of electronic discovery for purposes of the initial scheduling order.

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Discovery of Electronically Stored Information That Is Not Reasonably Accessible

The proposed amendments ad-dress the preservation and production of electronic information that is not reasonably accessible. Proposed Rule 26(b)(2)(B) provides, in part, 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."

The new rule does not define the term "not reasonably accessible." However, in its September 2005 report on the proposed amendments, the Judicial Conference of the United States provided some examples of difficult-to-access sources that may not be searchable without "considerable effort" or "substantial burden or cost," including:

- backup tapes intended for disaster recovery purposes that are often not indexed, organized or susceptible to electronic searching;
- legacy data that remain from obsolete systems and are unintelligible on successors systems; and
- data that were "deleted" but remain in fragmented form, requiring a modern version of forensics to restore and retrieve.

The sooner a party is able to designate, by category and type (and with enough detail to enable the requesting party to evaluate the burdens and costs of producing such discovery) those sources of electronic information that would be particularly costly or burdensome to access, the sooner the parties may engage in any necessary motion practice to resolve the issue — either by motion to compel by the requesting party or by motion for a protective order by the responding party. The court can then determine, among other things: 1) whether the "not reasonably accessible" information must continue to be preserved; 2) if it must be preserved and produced, who will bear the costs of locating, retrieving, and converting the information to an accessible format; and 3) the format in which the information must be produced. The proposed Committee Note makes it clear that the new rule does not relieve a party of its common law or statutory duties to preserve evidence and that "[w]hether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends upon the circumstances of each case."

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Sanctions and Safe Harbor

New Rule 37(f) provides that, absent exceptional circumstance, "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." The Committee Note explains that this "safe harbor" rule only applies to information lost due to "routine operation" of an electronic information system, that, by the very nature of its design, "includes the alteration and overwriting of information, often without the operator's specific direction or awareness."

While the Rule and Committee Note do not provide any specific examples of such "routine operations," the Judicial Conference's report provides some specific examples of routine practices that may come within the scope of new Rule 37(f), including:

- Programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations;
- Automatic overwriting of information that has been "deleted";
- Programs that change metadata to reflect the latest access to particular electronically stored information;
- Programs that automatically discard information that has not been accessed within a defined period without an affirmative effort to store it for a longer period; and
- Database programs that automatically manipulate information without the user being aware.

Rule 37(f) recognizes that the suspension or interruption of these features can be prohibitively expensive and burdensome in ways that have no counterpart in managing hard-copy information. For example, an attempt to shut down a particular overwriting function in part of a computer system could create problems for the larger system as a whole and potentially shut down the routine operation of the company's information systems.

The Committee Note to Rule 37(f) emphasizes that the safe harbor requires the "good faith" operation of the system, which may "involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation" arising from common law, statutes, regulations, or a court order. In other words, the rule does not excuse a party from instituting "litigation holds" and otherwise placing a stop on the routine destruction of information that could be relevant to pending or reasonably anticipated litigation. Indeed, the Committee Note specifically references as "among the factors" that bear on a party's good faith in the routine operation of an information system, the "steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information."

[T]he rule does not excuse a party from instituting 'litigation holds' and otherwise placing a stop on the routine destruction of information that could be relevant to pending or reasonably anticipated litigation.

The question remains as to whether "good faith" requires a party to preserve even information that the party believes is "not reasonably accessible" under the provisions of amended Rule 26(b)(2). The Committee Note advises that in such a situation, "good faith" depends upon the circumstance of the case, with one determinative factor being whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from other, reasonably accessible sources.

Interrogatories and Requests For Production

Finally, the amendments also address production of electronic information in response to Interrogatories and Requests for Production. Rule 33(d) is amended to provide that where an answer to an interrogatory may be derived from electronically stored information, and the burden of deriving the answer would be substantially the same for the responding and requesting parties, it is sufficient to answer the interrogatory by referring to the records from which the answer can be derived.

Rule 34, which relates to requests for production (and similarly, Rule 45 with regard to subpoenas for production of documents), is amended to permit requests to produce electronically stored information and production of such information in any medium (translated, if necessary, by the responding party into a reasonably usable form). It also provides a mechanism for requesting and objecting to the specific form(s) of production. If an objection is made "to the form of production — or if no specific form was requested — the responding party is required to state in its response the form it intends to use to produce the electronically stored data. If a request does not specify the form of production, a responding party will be required to produce the information in a form "in which it is ordinarily maintained" or in a form that is reasonably usable (unless the parties otherwise agree or the court otherwise orders).

The amendments to Rules 34 and 45 further demonstrate the need for counsel to have the resources available, as soon as possible in the discovery process, to identify and locate responsive electronic information throughout the company and to consult with IT staff to determine the most suitable, usable, and cost-effective form or forms for producing the information. Without this knowledge, it will be difficult for counsel to object effectively to requests for production in certain formats or to support its arguments for the form of production that it favors.

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