

eDISCOVERY AMENDMENTS TO FRCP MOVE CLOSER TO BECOMING A REALITY

April 17, 2006

On April 12, 2006, the U.S. Supreme Court approved, without comment or dissent, amendments to the Federal Rules of Civil Procedure (FRCP) to address some of the legal and practical issues generated by the explosion of electronic discovery (eDiscovery). According to the Judicial Conference Rules Advisory Committee (the Committee), which oversaw the lengthy drafting and review process, “the amendments are aimed at making the rules better able to accommodate the qualitative and quantitative differences between electronic discovery and conventional discovery and to provide a framework to resolve the issues electronic discovery presents.”¹ The amendments are now before Congress for review and—unless Congress takes action to reject, modify, or defer them—they will go into effect on December 1, 2006. To read about the Supreme Court’s action, see <http://www.uscourts.gov/rules/#supreme0406>.

As discussed in more detail below, the eDiscovery amendments cover five areas:

1. Parties must meet and confer early to address issues relating to eDiscovery, including the form and preservation of electronically stored information, the problems of reviewing the electronically stored information, and assertion of privilege.
2. Electronically stored information that is not “reasonably accessible” does not have to be produced, unless the requesting party can show good cause.
3. In limited circumstances, a claim of privilege may be asserted if a party inadvertently produces electronically stored information that is potentially privileged. The producing party may require the return, sequestration, or destruction of the information pending resolution of the privilege claim.
4. Any review of business records conducted in response to interrogatories must now include searches of electronically stored information. “Electronically stored information” is specifically distinguished from “documents” or “things.”
5. A safe harbor from sanctions is available when—despite reasonable steps to preserve discoverable information—electronically stored information is lost as a result of routine computer operations.

Early Meet and Confer

The amendment to Rule 16 focuses on early attention to case management of eDiscovery by including provisions for disclosure of discovery of electronically stored information in the scheduling order. This amendment formalizes what many practitioners already view as a best practice, which is to minimize the risks and costs of eDiscovery by agreeing early on ground rules for the process.

¹ See the “Report of the Rules Advisory Committee,” May 17, 2004, revised, Aug. 3, 2004, to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. For a copy of the committee’s report and analysis of the amendments, see <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>.

According to the Committee's notes, the amendment is designed to alert the court of the possible special handling of electronically stored information early in discovery, if such eDiscovery is expected to occur. In addition, the amendment focuses on the scheduling order's "adoption of the parties' agreement for protection against waiving privilege." As amended, Rules 16 and 26 require an early meet and confer to address the parties' issues relating to eDiscovery, including the form and preservation of electronically stored information, the problems of reviewing the electronically stored information and assertion of privilege.

Limited Obligation to Produce Data That is Not Reasonably Accessible

The proposed amendment to Rule 26 focuses on subdivisions 26(b) and 26(f). According to the Committee's notes, the amendment of Rule 26(b) addresses the issues related to the discovery of electronically stored information, including volume and accessibility. The amendment limits a party's obligation to produce electronically stored information that is not reasonably accessible, unless the court orders discovery for good cause. This amendment is a step forward in clarifying litigants' obligations, but still does not provide as much clarification as practitioners might like regarding the preservation of backup tapes.

Inadvertent Production of Privileged Information

In addition, the proposed amendments to Rule 26(b)(5)(B) address many a litigator's worst eDiscovery nightmare: the inadvertent production of privileged information. Changes to the Rule provide a consistent mechanism for handling this exposure if the producing party gives notice within a "reasonable time" that records are privileged despite production. In such cases, the receiving party must destroy or sequester the records until judicial disposition.

Finally, Rule 26(f) has been amended to direct the parties, under conference, to discuss any issues relating to the nature and extent of electronic disclosure and discovery, including the preservation of privilege by protecting against privilege waiver.

Search of Electronic Data for Answers to Interrogatories and Definition of "Electronically Stored Information"

As amended, Rule 33(d) expressly provides that an answer to an interrogatory involving review of business records should involve a search of electronically stored information. The Committee's note states that Rule 33(d) is amended to recognize the importance of electronically stored information.

Rule 34, as amended, distinguishes between electronically stored information and "documents," and authorizes the requesting party to specify the form of production and the responding party to object. However, absent a court order, agreement, or specific request for production, a party may produce in a manner consistent with which that responding party maintains such information.

This amendment is significant because it represents a rejection of arguments that electronic records are a subset of "documents" and substantially broadens the universe of potentially discoverable information to include such data as digitized voice mail, digitized surveillance tapes, or instant messages. The amendment does not provide a substantive definition for "electronically stored information"; it instead relies on a flexible and inclusive approach that clearly validates systems data as an additional, relevant target of discovery.

Safe Harbor for Routine Destruction of Electronic Data

As amended, Rule 37 creates a "safe harbor," protecting a party from sanctions for failure to produce electronically stored information as long as it took reasonable steps to preserve electronically stored information when it knew or should have known such information was discoverable, or the failure results from loss of information during routine operation of such party's electronic information system. This safe harbor does not apply to the failure to disclose electronically stored information under court order. According to the Committee's note, the amendment to Rule 37 adds subdivision (f) to address a distinct feature of computer operations: the routine deletion of electronic information during ordinary use without the conscious human direction to destroy that specific information.

Next Steps

For the complete text of the amendments see <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

You may also contact any of the Morgan Lewis attorneys listed below for more information about any of the issues discussed in this LawFlash.

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