

THE NEW RULES OF CIVIL PROCEDURE E-Discovery and Records Management

OVERVIEW

- The New Federal Rules of Civil Procedure
- Duty to Preserve versus Duty to Produce
- Impact on Role of Outside Counsel
- State of Records Management Compliance
- A Few Practical Considerations
- Questions and Wrap-up

❖ **Key Amendments To The Federal Rules Of Civil Practice**

○ Rule 26(a); 34(a) – Initial disclosures

- Rule 26(a) clarifies a party’s duty to include in its disclosures electronically stored information by substitute “electronically stored information” for “data compilations.”

- Rule 34(a) distinguishes between “documents” and “electronically stored information.” Furthermore, the Rule also includes a provision allowing the requesting party to specify in which form or forms the electronically stored information is to be produced. If no 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.¹ Unless the parties otherwise agree or the court orders otherwise, the requested party must produce the information in the form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.² The Rule also explicitly states that a party is not required to produce the same electronically stored information in more than one form.

○ Rule 26(b)(2)- Document Production

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¹ Id at p. 79.

² Id at p. 80.

- The change to Rule 26(b)(2)(B) was designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information by offering guidance on a party's obligation to produce stored information in situations where access to such information may be difficult. Additional language to this Rule provides that the discovery of electronically stored evidence need not be provided if the producing party identifies such evidence as "not reasonably accessible because of undue burden or cost." On motion of the requesting party to compel discovery or for a protective order based upon good cause in such discoverable information, the responding party must show that the information is "not reasonably accessible because of undue burden or cost." If such a showing is made, the court may still order discovery of the information for good cause, considering the limitations of Rule 26(b)(2)(C), but also impose terms and conditions for this discovery, such as full or partial cost-shifting or orders to sample discoverable sources to discern more about the costs and burdens.

- Rule 26(b)(5)- Claw-back agreements

- Rule 26(b)(5)(B) provides for a notification procedure to address this concern. Under this subsection, when a party produces information that is subject to a claim of privilege or of protection as trial preparation material, it may notify the recipient of its claim and the basis for it. After receiving notification, the receiving party must "promptly return, sequester, or destroy the specified information and any copies and may not use or disclose the information until the claim is resolved." Furthermore, a receiving party may "promptly present the information to the court under seal for a determination of the claim." Finally, if the recipient of the information disclosed the information before being notified, it is required to take "reasonable steps to retrieve it."

- Rule 16(b); 26(f) – Interrogatory Responses

- Rule 16(b) relates to scheduling and planning and general provisions governing discovery and duty of disclosure. Under Rule 16(b), the court's scheduling order may include "provisions for disclosure of electronically stored information" and "any agreements that parties reach for asserting claims of privilege or protection as trial-preparation material after production." This is in addition to the existing items that may compose the scheduling order (i.e. modifications of the times of disclosures and of the extent of discovery permitted, the dates for pretrial and trial conferences and any other matters appropriate under the circumstances).



- The additions to Rule 26(f) function most closely with Rule 16. Specifically, Rule 26(f) requires the parties to discuss the additional topic of “any issues relating to preserving discoverable information,” as well as address the parties’ views regarding “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced” and “any issues relating to claims of privilege or protection as trial preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order.” In addition, Form 35, the Report of the Parties’ Planning Meeting, was amended by incorporating appropriate language into the form to reflect the changes in Rule 26(f)

- Rule 33(d)– Interrogatory Responses

- Under the amendment to Rules 33(d), explicit language in the Rule ensures that where an answer to an interrogatory may be derived from business records, electronically stored information is included under business records. Rule 33(d) is designed to parallel Rule 34(a) by “recognizing the importance of electronically stored information.”

- Rule 45– Subpoenas

- Rule 45 conforms to provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Additionally, the Rule provides greater detail for the production of electronically stored information. In short, the Rule makes clear that the electronically stored information also can be obtained by subpoena.

- ❖ **New Procedures For Privileged Information**

- Rule 26(b)(5)(B)--o Recovery of privileged data inadvertently produced

- ❖ **Proposed New Federal Rules Of Evidence 502(b)**

- Advisory Committee on Evidence Rules, Hearings
- Public Written Comments
- Substantive, Not Procedural, Requiring Congressional Approval

- ❖ **“Reasonably Accessible” Factors To Consider**



Parties must hold early discussions regarding any anticipated e-discovery issues, including form and preservation of e-discovery. Such requirements are intended to facilitate e-discovery and ease whatever related issues may arise in a particular case, and allow the parties and/or the court to develop creative solutions to solve such issues.

For example, to avoid the risk of inadvertent disclosure, the responding party may authorize a "quick peek" whereby the requesting party views and designates what electronically stored information it wants produced, while the responding party preserves the right to withhold privileged material.

If anticipated, the parties should also discuss what form e-discovery is sought and retrieved; why certain forms of e-discovery are too burdensome to retrieve and/or access; and concerns about inadvertent disclosure of privileged information.

❖ **New Rule 37 (f) - Implied Duty to Preserve**
Think Twice Before Seeking Protective Orders

- Rule 37 (f) helps to protect a party from sanctions for not providing electronically stored information that has been lost as a result of the routine, good-faith operation of an electronic information system, absent exceptional circumstances. Rule 37(f) is effectively a response to a distinctive feature of electronic information systems and the routine modification, overwriting, and deletion of information that attends normal use.



- ❖ **Importance of Record Management Policy Compliance**
Critical Interrelationships with New Federal Rules

- ❖ **Preparing for a “Meet and Confer”**
 - Consult Manager
 - RM and Preservation Policy
 - Understand IT Data Map and Archive Inventories
 - Understand ESI Accessibility History
 - Search Terms
 - Consider Claw-Back and Confidentiality Agreements

- ❖ **A Steep Learning Curve**
Impact on Outside Counsel
 - In the Dark: Preservation Obligations?
 - Translating IT Infrastructure Maze Into Cogent Legal Arguments
 - Compliance Counsel or Litigation Counsel?
 - Outside Counsel’s Exposure to Sanctions?

- ❖ **Is Record Management Important to the Staff?**

- ❖ **Is Record Management Important to the General Counsel?**

- ❖ **A Road to E-Discovery Management**

- ❖ **Model Policy Deployment Timeline**

- ❖ **General Counsel Top Objectives for 2007**



OUTSOURCING DATA PROCESSING IN THE NEW ELECTRONIC DISCOVERY AGE

Some Key Considerations in the Vendor Selection Process

Due diligence has become, more or less, mandatory, requiring attorneys to take a careful and proactive role in the vendor selection process. From a customer perspective, its reputation is often at stake because breaches of privacy or noncompliance with applicable law can lead to bad press and loss of good will, especially when customers are required to disclose a breach.

The use of a due diligence checklist often will assist in providing a broader understanding of the outsourcing transaction and help in the data processing vendor selection process. Some key items that might appear on a checklist include:

- What is the customer's business (financial institution, insurance provider, manufacturer) and what specific market does it serve?
- How much of its business involves data processing services?
- To what type of data will the service provider need access?
- Are there subsidiaries involved and, if so, how is the data organized and coordinated among them?
- Where and how is the data to be located or stored?
- What are the procedures and costs for company to retrieve the data?
- What are the procedures for destruction of data?
- What formats are available in a vendor's archiving storage services?

Vendor Compliance and Data Retention

Under the new Rules, all relevant electronic information may be discoverable and this, in turn, affects data processing vendors in the outsourcing context. The obligations required under the new Rules are important to all companies and especially to those that lack IT infrastructure and expertise to properly manage electronic data, both archival and current. Such companies must often rely on data processing vendors to fulfill this role.

Life cycle planning is important to data retention and destruction because, among other things documents that destroyed as part of a lawful document retention policy are not discoverable. Accordingly, companies and their counsel, along with their data processing vendors need to work together to initiate and ensure that the proper technology and system is used to comply with the new Rules.

Litigation Holds and Effective Communication



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Communication between attorney and client is critical to foster compliance with a litigation hold. To open the lines of communication, attorneys are encouraged to draft a “litigation hold memo,” detailing the types of data to be preserved and how to do so, to be issued to all employees, as well as vendors, who may have pertinent information.

It also is important that the attorney communicate directly with the key players in the litigation who are likely to have relevant information (e.g., executives or employees who were involved in the matter at issue) as well as with information technology personnel and outside vendors who are likely to know about where evidence may potentially be stored. Further, the attorney’s duties may obligate him to clearly instruct employees and vendors to produce electronic copies of relevant active files.

Case law requires counsel to take the necessary steps to guarantee that the client retains and produces relevant information in response to any discovery requests. This duty arises from the Federal Rules of Civil Procedure, which stipulates that discovery responses be supplemented and imposes a continuing burden upon the attorney to periodically recheck all interrogatories and canvass all new information and ensure that discoverable information is not lost.

While it is true that an attorney need not supervise every step of the document production process and may rely on clients to some degree to perform this task, the attorney is ultimately responsible for coordinating his client’s discovery efforts and has a duty to effectively communicate discovery obligations to his client so that all relevant information is discovered, retained, and produced.

