



Client Alert

New Issues Raised by Amended Federal Rules on E-Discovery

Major amendments to the Federal Rules of Civil Procedure have ushered in a new era in litigation discovery and corporate electronic data management—creating new litigation pitfalls for the unprepared and unwary. The amendments—effective December 1, 2006—track a series of federal court decisions in placing increased emphasis on the preservation and production of electronically stored information (“ESI”) in litigation. As a result, every aspect of a company’s electronic data management has the potential to affect current and future discovery efforts in litigation or in response to subpoenas.¹

The new Rules provide only broad guidelines, leaving implementation and interpretation to the federal courts. While a flurry of recent articles have described the new Rules themselves, we offer the following as a brief primer on the new Rules with a focus, instead, on the key issues now facing companies confronting these new Rules in practice.

Brief Summary of Significant Amendments

The amended rules mandate early attention to electronic discovery in litigation, which, in turn, places a premium on a company’s understanding of its electronic data systems and its readiness to consult with outside counsel and experienced vendors about electronic data issues. Among other things, the amendments require litigants to discuss ESI before discovery begins, provide a safe harbor from sanctions for destruction of electronic data through routine, good faith operations, and preserve privilege claims for ESI that is inadvertently produced.

Initial Conference: At the mandatory initial discovery conference, litigants are now required to discuss (i) issues relating to “preserving discoverable information” and discovery of ESI, “including the form or forms in which it should be produced;” and (ii) issues relating to documents protected by privilege. Federal Rule of Civil Procedure 26(f). The parties’ initial disclosures following the discovery conference must now include descriptions of ESI, by category and location. Rule 26(a). The results of the conference are to be reported to court for incorporation in the scheduling order, which must now address electronic discovery issues. Rule 16(b).

Form of Production: The amended rules pay particular attention to the forms in which ESI is produced. If the parties cannot agree on form, the amended rules allow parties to specify forms of ESI production in their document requests and subpoenas. Rule 34(b); 45(a), (d). This new emphasis on the form in which ESI is produced requires a clear understanding of a company’s electronic data

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¹ The increased emphasis on ESI is not limited to federal litigation. In August 2006, the Conference of Chief Justices approved *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*. The guidelines recognize the growing importance of electronic data in state court litigation and generally are similar to the amendments to the Federal Rules of Civil Procedure.

Commercial Litigation Client Alert

systems. There is no question that companies will face increased demands for ESI to be produced in “native format,” with metadata included (i.e., information not typically visible when documents are printed, including records of additions or deletions).

Undue Burden and Cost: The amended rules mandate a balancing test as to ESI that is difficult or costly to locate or produce, such as data stored on computer backup tapes. Rule 26(b)(2); 45(d)(1)(D). This rule basically divides ESI into two categories for discovery purposes: (i) relevant active files which are discoverable without a showing of good cause; and (ii) relevant files that are “not reasonably accessible.” The new rules do not define the circumstances in which ESI is “not reasonably accessible,” so it will be up to the courts to determine when a party’s ESI is sufficiently inaccessible for that party to avoid the need to search for and produce it.

Privileged and Otherwise Protected Information: The amended rules address a preexisting issue that is exacerbated by the typically voluminous scope of electronic discovery: the inadvertent production of privileged or otherwise protected information. The amended rules provide a rudimentary clawback procedure to address the increased risk of inadvertent transmission of privileged and protected materials. The procedure imposes data sequestration and preservation requirements on the parties in cases where claims of inadvertent production are challenged. Rule 26(b)(5); 45(d)(2)(B).

Safe Harbor: The amended rules create a safe harbor from sanctions for loss of electronically stored data “as a result of the routine, good-faith operation of an electronic information system.” Rule 37(f). The amended rules do not define “good faith” or “routine,” and litigants should not expect broad protection in this provision, given the generally accepted requirement for document preservation once litigation or subpoenas are imminent or received.

Key Electronic Discovery Issues

By presuming that ESI will be searched and produced in litigation, the amended Federal Rules will place more time pressure on companies to produce ESI promptly and will make it less likely that courts easily will forgive discovery missteps involving ESI.

Under the front-loaded discovery regime of the amended Federal Rules, reaction time is more important than ever in corporate litigation. Litigation counsel may now be required to provide undertakings, as early as three weeks after appearing in an action, regarding the form and scope of electronic evidence that may be produced, and disputes over form and scope may end up before the court even before discovery begins, such as at the initial scheduling conference. As a result, the amended Rules place a premium on having document control and retention policies in place, and on having officers and employees who understand the company’s electronic document systems and can address discovery issues with outside counsel and electronic evidence vendors.² Specifically:

- Data retention policies and procedures, including “litigation hold” provisions, should be inventoried, monitored, and kept current, and electronic information systems should be evaluated to ensure they are operated in compliance with those policies. In some courts, the failure to suspend a document destruction policy when litigation is anticipated may constitute spoliation. *See, e.g., Rambus v. Infineon Technologies, Inc.*, 220 F.R.D. 264 (E.D. Va. 2004).
- Companies must take steps to understand and be able to describe their various ESI systems, including email, word processing, accounting, compliance, etc. Disaster recovery systems and backup systems also will be relevant as adversaries look for ways to find deleted or lost data.
- Companies must consider who will speak for them in explaining ESI policies and systems in litigation. Companies will need employees who can sign affidavits and testify at depositions

² Many companies do not appear to be prepared for the amended Federal Rules. In response to one recent survey, 32 percent of the information technology managers and staffers polled said they were not prepared to meet the requirements of the amended Federal Rules, and 11 percent said they were only somewhat prepared.

to explain what they have, what they don't have, and how difficult or costly it would be to locate data that is not readily accessible.

- Companies must consider whether ESI located outside the United States will be in issue, and if so, to what extent foreign information privacy laws will have to be navigated as part of US discovery. For example, the European Union has very strict rules regarding the movement of electronic data containing any personal information.
- Companies and their counsel must be mindful of what has been said in discovery and depositions about the companies' ESI systems to ensure consistency (and to avoid sanctions for inconsistency). Failure to do so could have severe consequences. For example, in *z4 Technologies, Inc v. Microsoft Corp.*, 2006 WL 2401099 (E.D. Tex. Aug. 18, 2006), Microsoft was assessed \$27 million in damages and attorney's fees for, among other things, failing to correct erroneous deposition testimony stating that a certain Microsoft database did not exist, even though it had been produced to the plaintiff.
- Companies and their litigation counsel must plan beforehand to deal with the cost of gathering and searching ESI early in cases—especially regarding work that must be performed within the first 120 days after a lawsuit is filed.

The new Rules raise additional issues that remain subject to judicial interpretation and which will be the subject of intense motion practice:

Privileged & Confidential Information: The new Rules dramatically increase the risk that privileged or confidential documents will be produced inadvertently because screening voluminous electronic files can be very difficult. Companies should consider instituting computer macros or other automated programs to make it easier to mark emails and other ESI for confidentiality or attorney-client privilege.

Cost Shifting: It remains an open issue how much cost shifting will be allowed under the new Rules for the costs of searching for and producing hard-to-retrieve electronic data. The benchmark so far has been set in the *Zubulake* line of decisions, which state that cost shifting is appropriate only where inaccessible data are sought; and only for the additional costs of retrieving such data—not for the normal costs of production in litigation. See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

"Litigation Holds": The courts have not yet determined the extent to which the "safe harbor" provision of the new Rules will relieve litigants of their obligation to suspend the routine deletion of electronic data. Although most of the federal circuits do not appear to limit the "litigation hold" that is required upon the start or reasonable anticipation of litigation, at least one court has ruled some data was exempt from the "litigation hold" to the extent it was "inaccessible," e.g., data stored on certain backup tapes that were subject to routine recycling. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

Sanctions: It is unclear how understanding the courts will be to discovery missteps now that the amended Rules have taken effect. Sanctions are a real threat in electronic discovery—even where noncompliance with discovery obligations is unintentional—and the penalties can be harsh and costly in both federal and state litigation. For example, in 2005, evidentiary and other sanctions imposed against Morgan Stanley & Co. for failing to preserve electronic information played a part in a \$1.4 billion jury verdict against the company. See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 674885 (Fla. Cir. Ct., March 23, 2005).

White & Case has a team of attorneys and other professionals who have dealt with electronic discovery issues for years, and who have been actively preparing for the new electronic discovery environment imposed by the amended Rules. We are available to provide additional information and consult with you about your obligations under the amended Rules.

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