# Picture Changing on Rules for Use of Electronic Data

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On Dec. 1, absent intervention by Congress, several proposed changes to the Federal Rules of Civil Procedure will take effect. These rule changes specifically address the challenges posed by the discovery of electronic information.

The Federal Rules are not changed often. Why now? There are host of reasons, including the tendency of district courts to adopt their own rules regarding electronic discovery; the increase in case law related to electronic discovery; and the feeling that discovery has become electronic discovery. Days of milling through boxes of paper documents have gone by the wayside and been replaced by reviewing scanned documents, emails and other electronic files using sleek online repositories or inhouse litigation applications.

The amendments focus on issues such as initial disclosure of electronic data, the format of electronic file production, inadvertent production of privileged information, inaccessible data and the need for a "safe harbor" when data is destroyed through normal business operations.

These changes will likely have a dramatic effect even before Dec. 1, and litigators should familiarize themselves with the rules now.

**Practical changes**

Rule 34(a) adds the term "electronically stored information" (ESI) to the categories of material that can be considered discoverable information, along with documents and other tangible things. ESI can now stand on its own, free from the shackles of being included under the "documents" umbrella.

Rules 26 (f ) and 16 (b) call for parties to address issues relating to electronic discovery prior to the first pretrial conference. Those issues include the form of production, how the parties will handle inadvertent production of privileged material and preservation of data.

These changes are meant to head off any electronic-discovery issues immediately so they don't cause problems down the road. This change is relatively noncontroversial, and many courts have already adopted this practice.

**Safe harbor**

Another rule change provides a safety net for litigants.

Revised Rule 37(f ) states that "Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if: 1) The party took reasonable steps to preserve the information after it knew or should have known the information was discoverable; and 2) The failure resulted from the loss of information because of the routine operation of the party's electronic information system."

A party aware of responsive ESI cannot claim that all data has been deleted because it was in a database that is expunged every 60 days. Parties remain responsible for implementing adequate steps to identify and preserve relevant information, even if that information is stored in a system or application that is routinely purged.

This rule change is somewhat controversial, as some believe it will encourage corporations to implement policies for frequent purging of data to avoid producing that material in the event of litigation. I disagree. If corporations are under no obligation to retain ESI, whether for litigation or another business purpose, they should not be forced to retain that information in perpetuity. Having

sound retention and destruction policies is a positive. However, if a corporation is obligated to preserve data and is aware of its existence, it must take immediate steps to preserve that information or risk sanctions.

**A reasonable standard**

Rule 26(b)(2) provides that ESI that is inaccessible due to burden or cost does not need to be produced. The rules do not provide a definition for "inaccessible," but it would have been foolish to do so.

"It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information," noted a review committee. "Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs."

Just because a responding party states that data is inaccessible does not necessarily make that so. Additional notes to this rule indicate that the responding party must describe the inaccessible data by category or type. There should be enough detail provided for a determination to be made about the data's inaccessibility and the likelihood of finding responsive information. It's noteworthy that we are talking production here, not preservation. Simply because the information is stored in an inaccessible format does not mean that it does not have to be preserved. There is a difference, as evident in another snippet from the notes: "A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence."

**Protect and preserve**

During litigation, it is not reasonable to expect a party to preserve every electronic file or paper document. Due to the sheer volume of ESI created in the workplace today, halting normal computer operations for litigation purposes can wreak havoc on a company's bottom line. What to preserve must be discussed by both parties at the onset of litigation.

In its notes on Rule 26(f ), the review committee stated the following: "The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps." (See also the "Manual for Complex Litigation," 4th edition, § 11.422: "A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.")

Even a U.S. District Court, in the seminal electronic-discovery case Zubulake v. UBS Warburg, has opined on this topic. In its 2003 ruling on that case, the U.S. District Court for the Southern District of New York stated there was no obligation to "preserve every shred of paper, every e-mail or electronic document, and every backup tape…Such a rule would cripple large corporations."

Companies and their counsel should identify how and where the potentially relevant data may exist. Attorneys may have to call upon an information-technology specialist or get assistance from an electronic-discovery consultant. "In appropriate cases," state the committee notes, "identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful."

**A matter of form**

Under Rule 34(b), the requesting party may request the form in which ESI will be produced, although the responding party has the right to object. One of the goals of this change is to alleviate issues that occasionally arise with production of ESI as image files. Many parties convert ESI to image files — for example, tiff or PDF formats — prior to review for purposes of redacting privileged or confidential information.

Petrifying documents in this fashion can remove pertinent metadata elements and remove keyword-searching capabilities inherent in ESI. However, it is possible to extract text from image files through a process called optical character recognition, and it is also possible to capture file metadata before petrifaction. It is important to understand the different options available before requesting a form of production.

If no form of production is requested, producing parties must provide information as it is normally stored (that is, in its native format); in a useable format; or as an image file with extracted text, rendering it searchable in a litigation support database.

Whether to produce in native format or as an image file is a topic unto itself. There are advantages and disadvantages to both forms of production for both parties.

**Summary**

If you are a litigator, these changes will affect you.

Electronic discovery is now mainstream, and you must deal with it from the onset of litigation. No more running, no more hiding. Google the terms FRCP amendments" and "electronic discovery" and learn all you can.

Ponder these statistics: In 2005, approximately 30 percent of all federal cases involved some sort of electronic discovery. It is estimated that 90 percent of all federal cases will have some electronic discovery component after the rule changes.

It is only a matter of time until these changes trickle down to the state courts. Will you be ready?

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