



Will You Be Ready for New Federal Rules on E-discovery?

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The U.S. Judicial Conference's Committee on Rules of Practice and Procedure (the Committee) has posted proposed rules for electronic discovery on its web site for a six-month public comment period. While this is only the beginning of a rules amendment process that could take at least two years, it seems clear that federal rules specifically addressing e-discovery are inevitable. Litigators should be aware of the Committee's proposals and might want to consider comportsing their current e-discovery practice to them. **The proposed amendments address five related areas: early attention to issues relating to electronic discovery; accessibility; privilege; the application of Rules 33 and 34 to electronically stored information; and sanctions.** In addition, amendments to Rule 45 are made to correspond to the proposed changes in Rules 26-37. The broad contours of the proposals are as follows:

- amending Rules 26(f) and 16(b) and Form 35 to prompt early discussion of issues relating to electronically stored information, including privilege issues, and to call for the reporting of such discussions to the judge;
- amending Rule 34(a) to clarify and modernize the definition of discoverable material;
- amending Rule 34(b) to authorize a party to specify the form in which electronically stored information should be produced and to authorize the responding party to object to that request;
- amending Rule 33(d) to provide a parallel option allowing a party to substitute access to electronically stored information for the production of hard copy or paper business records, if the burden of deriving the response to the request posed will be substantially the same for either party;
- amending Rule 26(b)(2) to provide that electronically stored information that is not reasonably accessible need not be produced unless a court so orders on a showing of good cause;
- amending Rule 26(b)(5) to provide a procedure that applies when a party asserts an inadvertent production of information privileged or protected from discovery;
- amending Rule 37 to create a safe harbor that would apply to information destroyed or lost as a result of the routine operation of computer systems (i.e., recycling backup tapes or automatic overwriting of "deleted" information); and
- amending Rule 45 to incorporate these changes and to

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make clear that electronically stored information may also be obtained by subpoena.

One of the biggest sea changes that the proposals portend is in timing: counsel will be required to access their electronic discovery needs and communicate them to opposing counsel early. The clear sense of the Committee is that when the parties do anticipate disclosure or discovery of electronically stored information, addressing the issues at the outset should often avoid problems that might otherwise arise later in the litigation, when they are more difficult to resolve. Some of the areas that should be discussed early are:

- the various sources of information within each party's control that should be searched for electronically stored information;
- whether the information is reasonably accessible to the party that has it;
- an estimate of the burden or cost of retrieving and reviewing the information; and
- the form or format in which the information is kept as well as the form in which it might be produced.

Of course, in order to be able to discuss these matters with the requisite degree of familiarity, **counsel will have to become knowledgeable about the nature and operation of the client's information systems as well as those of the opposing party.** At times, identifying and obtaining early discovery from individuals with special knowledge of a party's computer system may be necessary, and that might have to be accomplished even before the initial discovery conference takes place. The proposed amendments to Rule 34 expressly distinguish between electronically stored information and "documents." Accordingly, lawyers should frame discovery requests to specify whether they seek discovery of documents, electronically stored information, or both. The proposed amendment to Rule 26(f)(2) further directs the parties to discuss any issues regarding preservation of discoverable information. Read in consort with proposed Rule 37(f), it recognizes the potential tension between a party's document retention practices, which serve the corporate need to retrieve information important to operations, and its preservation duties, which require that corporations prepare for litigation by altering those practices. In this regard, the Committee admonishes parties to aim for specificity, and avoid requesting blanket preservation orders. And if the ordinary operation of the disaster-recovery systems does result in the destruction of potentially relevant information, Rule 37(f) limits the sanctions that may be levied against the producing party.

The complete committee report, along with instructions for submitting comments electronically, is available at www.uscourts.gov/rules/newrules1.html. Comments are due by February 5, 2005.

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