Amended Federal Rules of Civil Procedure Focus On E-Discovery

The impending changes to the Federal Rules of Civil Procedure (the "Rules") are a response to the reality that much information relevant to a lawsuit now exists in electronic form. Although the Rules long have been interpreted to encompass electronic documents, the new Rules now provide explicitly that "electronically stored information" ("ESI") is discoverable in a federal case. Accompanying the introduction of this "ESI" concept are other amendments to the Rules that attempt to create a framework for conducting e-discovery, including mechanisms for early identification of issues relating to the preservation of ESI, the development of a plan for ESI production, guidelines concerning the format of production, and provisions addressing two areas of heightened risk in e-discovery - inadvertent destruction of documents and unintentional production of privileged material. While the amendments provide a broad construct for e-discovery, the provisions include some undefined and ambiguous language and are not comprehensive. Their meaning and impact ultimately will depend upon judicial interpretation as the contours of the rules are vetted in practice.

Principal Amendments to the Rules

Consideration of Electronically Stored Information Is Front-Loaded in a Case

- **Preservation.** The Rules require parties to confer within three months after a federal lawsuit is brought to discuss the schedule for and substance of the discovery plan. Under the amendments, Rule 26(f) adds that at this conference, the parties should discuss "any issues relating to preserving discoverable information." This provision does not expand document preservation duties, but does provide parties with an early opportunity to agree on the parameters of their document preservation plans.
- **Identification.** After the parties participate in the initial conference, the Rules require them to exchange certain other information, including a description of the witnesses and documents that support each party's claims and defenses. Under the amendments, Rule 26(a)(1) adds that parties must include in these initial disclosures a copy of, or a description by category and location of, all electronically stored information that supports their claims or defenses. To comply with this initial reporting obligation, parties must start thinking early about the kinds, locations and accessibility of information kept on their systems.
- **Form.** After the parties participate in the initial conference, the Rules also require them to submit their discovery plan to the court. Under the amendments, Rule 26(f) adds that the parties should incorporate in their discovery plan "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." Rule 16(b)(5) in turn permits the court to incorporate in its scheduling order any agreements on the discovery of ESI. If no agreement on form of production is reached, Rule 34(b) permits a party to specify in its requests the form it prefers; if the responding party objects or if no form is specified, the responding party must state in its responses the form it intends to use, and produce the information in a form in which it is "ordinarily maintained" or in a form that is "reasonably usable." By placing such emphasis on form, the amendments require parties to understand early on how litigation technology tools can gather and present their ESI.

Electronically Stored Information Must Be Produced if "Reasonably Accessible," while Electronically Stored Information that is "Not Reasonably Accessible" Must Be Identified, Preserved, and Possibly Produced

The Rules currently permit parties to object to certain discovery and subpoena requests as unreasonably burdensome. Under the amendments, Rule 26(b)(2)(B) authorizes parties to respond to requests by identifying sources of ESI that may be responsive but that are "not reasonably accessible because of undue burden or cost." An example of such a source might be data that has been wiped from a former employee's hard drive - while the data possibly can be recovered, it would take time and money. If the requesting party still seeks discovery from such sources, the responding party must show that those sources are not in fact reasonably accessible. Even if that burden is met, the court nonetheless may order discovery of that information if the requesting party shows "good cause," the standard for which is not defined. This amendment has been described as creating a "two-tier" system in which "reasonably accessible" materials are produced first, and then the parties negotiate, or litigate, the production of "not reasonably accessible" materials.

The Amendments Address Some Frequent Issues Related to Electronically Stored Information - But Leave Open Significant Questions

- **Inadvertent Production.** The amendments recognize that the problems of privilege review often are more acute in the e-discovery setting and address how parties may assert privilege and work-product protection claims after production. Under the amendments, Rule 26(b)(f) requires the parties to discuss this issue in their initial conference and permits them to ask the court to include in the court's scheduling order any agreed-upon procedures for dealing with inadvertent productions of privileged material. If no agreement is reached, Rule 26(b)(5) provides a default procedure: if a party has produced information in discovery that is subject to a claim of privilege or work-product protection, it should notify the receiving party of the claim. The receiving party must then return, sequester, or destroy this information, and must take reasonable steps to retrieve any such information that it had disclosed to a third party before being notified. Thereafter, the receiving party may not use or disclose this information until the court has decided whether it is privileged or protected as claimed, and if so, whether a waiver has occurred.

  While Rule 26(f) provides a procedure for handling inadvertently produced materials, it does not address the substantive questions of whether the inadvertent production effects a waiver of the privilege or work-product protection within the case or with respect to third parties.

- **Inadvertent Destruction.** Courts have the power to sanction parties for destroying discoverable documents or ESI, even if the destruction occurred inadvertently as a result of automated records retention practices, as the notorious Zubulake line of decisions from the United States District Court for the Southern District of New York makes clear. The amendments provide limited protection against sanctions for a party's inability to produce ESI when that information has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith.

  Although many herald this new rule as a "safe harbor," the protection afforded is limited. "Good faith" likely requires a party to suspend certain features of the routine operation of an information system to prevent loss of information relevant to current or reasonably anticipated litigation. The amendment also permits sanctions in "exceptional circumstances," even when information is lost due to a party's good-faith routine operation of a computer system.

The Amendments Also Apply to Subpoena Responses

The amendments to Rule 45 capture all of the Rules' changes involving ESI, expressly making such materials responsive to subpoena requests and providing procedures for inadvertent production of privileged or trial preparation materials.

Impacts of the Amendments and Recommended Practices

- **Know Your Information Systems**

  The amendments to the Rules assume that a company has a complete understanding of its information systems, including the kinds of systems it has, the types of information kept on those systems, and the policies related to keeping that information on its systems. To develop this understanding, the company's in-house counsel must work together with its information technology specialists. Because this critical task needs to be done accurately and will be time-consuming, it is advisable to conduct an ESI inventory today -- even before the company is involved in litigation.

- **Be Poised to Educate Outside Counsel About Your Information Systems**

  Because the amendments require early and express discussions of the location, accessibility, and preservation of ESI, in-house counsel and the company's information technology specialists must be able to educate outside counsel about those systems. Outside counsel must learn what information exists in the system, where and in what form the information is kept, how burdensome and costly it is to access, and how the company's preservation policy works to preserve such information. Notably, counsel must be able to explain to opposing counsel the subject matter of any information that is "not reasonably accessible" and how difficult and expensive it would be to access that information.

- **Consider Designating A "Litigation Response Contact"**

  To give outside counsel the necessary knowledge about their information systems, companies should consider designating one or more knowledgeable individuals within the information technology group as "litigation response contacts." At the outset - and preferably even before litigation begins - these contacts can help in-house counsel and/or outside counsel become familiar with the location, accessibility, and retention of ESI. Throughout the case, they may assist counsel in crafting the discovery plan, and drafting and responding to discovery requests. In particular, they may be called upon to "translate" data for opposing counsel, or to assist opposing counsel with "sampling" or "testing" data (all discovery techniques approved by the amended Rules). If the opposing party seeks to take the deposition of a person knowledgeable about the company's information systems, the litigation response contact will be familiar with the rules, the company's systems, and the "inaccessibility" of ESI, and will be well prepared to testify. On a long-term basis, they should keep counsel apprised of the accessibility and preservation impacts of system upgrades.

- **Develop and Implement ESI Preservation Policies**

  Having a retention policy governing ESI in place before litigation ensues affords a measure of protection under the new e-discovery framework. The process of creating the policy can help the company develop the necessary understanding of its IT systems and compliance with the policy may reduce the volume of material that needs to be searched in responding to discovery requests or a subpoena. The policy should be developed independent of litigation and should include good faith and reasonable retention requirements for all forms of ESI, including back up tapes, archives, and email. Once promulgated, it is essential that the policy be consistently followed. The policy will serve as a starting point for the discussion with the opposing party's counsel about ESI, and may assist in demonstrating whether ESI data is "reasonably accessible," and the burden, and expense involved in searching it.

- **Direct the Agreement on Production Form**

  The form in which ESI is provided can impact the amount of information communicated and the burden and expense involved in producing and reviewing it. For example, documents and data produced exactly as kept in a party's system, often called "native" format, usually have embedded data and metadata, and impede a party's ability

to make necessary changes to the documents and data through redactions, bates-stamping, or confidential markings. At the same time, however, responsive ESI that is "ordinarily maintained" in a way that makes it searchable by electronic means should not be produced in a form that removes or significantly degrades this feature. With the right technology, it may be possible to produce documents in a non-native format that remains searchable. Counsel, together with the company's litigation response contacts, should develop appropriate forms for production that can be justified to opposing counsel, based on burden, expense, and accessibility.

Unanswered Questions?

We have a team of lawyers and information technology specialists that can provide additional information about the amendments, answer your questions, or work with your information technology specialists to prepare for the new environment. If we can be of any assistance, please contact:

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