

THE IMPORTANT ROLE OF RECORD RETENTION POLICIES IN THE UPCOMING CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE

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Records Managers Take Heed!!!! Changes are coming soon to the Federal Rules and records retention policies will be the focus of attention!!!

The current rules of civil procedure were crafted in an age of paper records and as a result, they do not properly address electronic information. 730 PLI/Lit 175 *Electronic Discovery—The Current Legal Landscape*, September-November 2005. “Among the difficult topics raised when discovery of electronic data is at issue are the appropriate standards for retention of electronic information, the most efficient means for determining the appropriate scope of discoverable information and, of obvious importance, which party should bear the substantial costs of retention, retrieval and review of electronic data.” Id.

Beginning in 1999, the Committee on Rules of Practice and Procedure of the Federal Rules began addressing these issues by considering ways to amend the current rules to better address a party’s needs for the discovery of electronic information. Now, finally, there is a light at the end of the tunnel. In August 2004, the Judicial Conference Committee on Rules of Practice and Procedure (the “Committee”) proposed amendments to the Federal Rules of Civil Procedure (the “Rules”) to address the unique issues associated with electronically stored information (“ESI”) (in particular, Rules 16, 26, 33, 34, 37, and 45). These amendments address a number of important areas including: (1) early focus on issues regarding the existence, form of production and the preservation of ESI; (2) restricting the scope of initial discovery of ESI by categorizing information as either “reasonably accessible” or “not reasonably accessible”; and (3) limiting the penalties for the loss of ESI as a result of routine good faith operation of computer systems. These amendments have been approved by the U.S. Supreme Court and, unless Congress passes legislation against them, the amendments will take effect on December 1, 2006.

I. Early Focus on ESI Starts with Records Retention Program

Record retention programs will play a critical role in the implementation of the proposed changes to the Rules in a few key areas because of the need for the company to quickly and accurately access ESI. First, the parties will be required to discuss issues relating to the retention and preservation of discoverable information at the Rule 16 and Rule 26(f) conference (within the first four months of the case). Second, discovery will be separated into two tiers – the first tier will be limited to discovery of what the producing party designates as “reasonably accessible” data. Any request by an opposing party for discovery of ESI that that producing party designates as “not reasonably accessible” will not be permitted at this time without a specific showing of need. Given the challenges inherent in these proposed amendments and the developing case law, companies need to be prepared before litigation arises and that means records management will be a top priority!

What Is “Reasonably Accessible”?

To limit the scope and breadth of the discovery regarding ESI, the Committee proposed amending Rule 26(b)(2)(B) to provide that “a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” Rule 26 is being amended to addresses the difficulties in locating, retrieving, and

providing discovery of ESI. Also, the Rule is being changed to focus the party's attention at the Rule 26 conference on the nature and extent of the contemplated discovery regarding ESI as well as the source and descriptions of the parties' computer systems. The Court wants the parties and their counsel to understand and be able to explain where the information is stored and how the systems function. In some cases, ESI can be accessed only with substantial burden and cost. If that is the case, these burdens may make the information on such sources not readily accessible.

Therefore, under the proposed changes to Rule 26, a responding party is only required to produce ESI that is relevant, not privileged, and "reasonably accessible."¹ The responding party must also identify, by category type, the sources containing potential responsive information that it is neither searching nor producing. In addition, the responding party will be required to provide sufficient information to enable the requesting party to evaluate the burdens and costs of providing the information and the likelihood of finding responsive information on the identified sources. If the requesting party continues to seek discovery of the information from the sources identified as "not being reasonably accessible", the parties will be required to meet and confer about the burdens and costs of accessing and retrieving the information, the need for requiring all or part of the requested discovery, and conditions on obtaining and producing the information that may be appropriate. If the parties still cannot reach an agreement, the requesting party can raise the issue with the Court either by a motion to compel or by a motion for a protective order.

Who Has the Burden?

The burden of establishing what is "not reasonably accessible" is on the responding party. On a Motion to Compel or a Request for a Protective Order, the responding party has the burden of showing that the information is "not reasonably accessible" because of undue burden or cost. If, however, that showing is made, the burden shifts to the requesting party to show that the need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. The court may order discovery of the information for good cause and may specify the terms and conditions² for such discovery. It is important to note that a party's identification of sources of ESI as "not reasonably accessible" does not relieve the party of its duties to preserve relevant information.

Interrogatories, Document Requests, and Subpoenas

Interrogatories (Rule 33). The proposed changes expand Rule 33(d) to allow "a responding party to substitute access to documents or electronically stored information for an answer only where the burden of deriving the answer will be substantially the same for either party." The rule will still require the responding party to "specify" the records, and the "specification shall be in sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records for which the answer may be ascertained."

Rule 33(d) already contemplates affording the requesting party a reasonable opportunity to "examine, audit or inspect" data that have been identified as relevant to the case. As a result,

¹ While the proposed rule does not define "reasonably accessible," the Committee explains that "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."

² The conditions may take the form of limits on the amount, type or sources of information required to be accessed and produced. The conditions may also include cost sharing.

when a responding party wishes to invoke Rule 33(d), it may “be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.” In situations where direct access is permitted, the producing party should take whatever steps are necessary to ensure that the authenticity of all ESI is preserved.

Document Requests (Rule 34). The proposed changes to Rule 34(a)(1) make clear that requesting parties, in addition to “inspecting and copying,” may ask for an opportunity to “test or sample” information sought Rule 34(b). The proposed changes to Rule 34(b) will also allow the requesting party to specify one-time the form of production and if no form is specified, the responding party will be required to produce the information in the form that it is “ordinarily maintained” or in a form that is “reasonably usable.” The responding party is entitled to object to that request. Finally, the proposed changes provide that a responding party need not produce the same ESI in more than one form.

Third Party Subpoenas (Rule 45). The same changes that are proposed for Rule 34 will apply to Rule 45 and third-party subpoenas. The proposed “testing and sampling” language from Rule 34(a)(1) will also be included here. The requesting party will be permitted to specify one-time the form of production as provided in Rule 34 and the “accessible/not accessible” limits to the scope of discovery will also be included in this Rule.

“Safe Harbor” provision for “Good Faith” Use of Electronic Information

The proposed changes also include a new Rule 37(f) providing some protection for the routine alteration and deletion of information that attends ordinary use. Referred to as the “safe harbor” provision, it states that, “absent exceptional circumstances,” where ESI is destroyed in the routine “good faith” use of an electronic information system, the parties are exempt from sanctions “under these rules.” The term “good faith” is not defined in the rules, but the committee notes that “good faith” means “that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.” The committee further defined the “routine operation” of computer systems as “the alteration and overwriting of information, often without the operator’s specific direction or awareness...” The Committee also noted that “good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information if that information is subject to a preservation obligation.” However, once a party has received notice of litigation or anticipated litigation, the party must take affirmative steps to prevent the loss or future loss of relevant data that can result from routine computer functions. The protection afforded by the new Rule 37(f) applies only to sanctions “under these rules.” It does not affect other sources of authority to impose sanctions (such as the inherent authority of the courts) or the rules of professional responsibility.