

ADVISORY

SULLIVAN & WORCESTER LITIGATION ADVISORY

What Every Company Needs to Know About the New Amendments to the Federal Rules of Civil Procedure

In an effort to regulate electronic discovery in federal litigation, the United States Supreme Court approved a number of significant amendments to the Federal Rules of Civil Procedure.¹ These amendments greatly expand a litigant's obligations to identify, preserve and collect electronically stored information. The amendments go into effect on December 1, 2006. The rule changes affect all individuals and companies who (1) use computers and (2) are currently in litigation in federal court or may be in the future. Over time, we expect these amendments will also be adopted by state courts and federal and state agencies. The amendments are intended to provide a framework for conducting electronic discovery so that litigants, their counsel and the courts know very early in a case what is expected for retention and production of electronically stored information. Even prior to the enactment of the new rules, many litigants suffered severe sanctions for failing to preserve and produce electronically stored information. Now, with the more rigorous and demanding legal framework of the new rules, companies who do not prospectively manage their retention and destruction of electronically stored information face even greater risks and uncertainties. In light of the rule changes, companies may need to institute now, standard operating procedures for document retention, proper deletion of electronic records and the electronic dissemination of confidential or sensitive material.

CHALLENGES IN STORING AND PRODUCING E-DOCUMENTS

Disclosure of electronically stored records is complicated due to the many ways electronic information is generated, including emails, voicemails, instant messages, text messages, spreadsheets, Word documents and proprietary databases, and due to the numerous ways such data is stored, including on hard drives, personal computers, handheld devices and backup tapes. Given the dynamic nature of electronically stored information, it is all too easy to change or destroy data during the very act of gathering the data. Even the production of electronically stored information is complicated by the numerous formats, each with its own benefits and detriments, in which the information can be produced, including hard copy, native application or tiff images.

The rules seek to address these issues by compelling the parties to prepare for and to conduct very early discussions to develop a discovery plan suitable to the specific parties and specific litigation.

¹ Rules 16, 26, 33, 34, 37, 45 and Form 35 are amended.

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MEET AND CONFER

The amendments to Rule 26(f) require parties to meet and confer concerning discoverable electronically stored information very early in the litigation process. The amendments apply to all types of discovery, but in particular to electronic discovery. During the "meet and confer" session, parties will discuss a discovery plan, including: (1) how the parties' electronic information is stored, (2) in what form the information will be produced, (3) the accessibility of information, (4) issues related to privilege, and (5) what electronically stored information the litigants will rely upon.

At the conference, counsel to the litigants will be responsible for knowing details of their clients' information technology systems, their clients' retention policies, and, most importantly, what electronically stored information the litigants will rely upon as a basis for proving their claims or defenses in the action. The litigant should identify a person with knowledge about the company's information technology system and electronic data storage. The litigant should also be prepared to discuss the scope of the electronic discovery and the sources and reasonableness of accessing the information. The cost of accessing and producing the information is an important factor in considering whether producing the information is unduly burdensome. Parties may consider discussing cost sharing strategies. Concerns about privilege should also be addressed at this time. The litigants should be prepared to agree upon whether documents will be produced in native format, and other related issues.

PRIVILEGE

Due to the volume of information that is electronically stored, the new rules may make the protection of privileged and confidential information more difficult. The amended rules instruct the parties to discuss privilege issues at the initial Rule 26(f) conference, and the parties may want to agree that either side may continue to assert privilege after the information has been produced, particularly where the anticipated production of information is extensive. Such privilege agreements may include a "quick peek" or "clawback" provision. Such a provision permits the litigant to produce a large volume of

documents quickly, but to get back and protect as privileged documents inadvertently included in the production. A court may still decide that the disclosure of a privileged document constituted a waiver of privilege, but the court may consider the parties' agreements in its decision. The effectiveness of such agreements as to third-parties is uncertain.

In an effort to address these concerns, the amendments to Rule 26(b)(5)(B) address inadvertent production of privileged information. The producing party must immediately notify the receiving party of the inadvertent disclosure of privileged information, and the receiving party "must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved." The receiving party may provide a copy of the privileged information to the court under seal to determine whether or not the information can be used. Although creating a procedure for the treatment of claims of inadvertent disclosure of privileged information, Rule 26(b)(5)(B) does not change the substantive law concerning waiver of privilege and, therefore, the new rules may make protection of privileged information more difficult and provide less protection than expected.

REASONABLY ACCESSIBLE INFORMATION

The amendments to Rule 26(b)(2) allow parties to avoid discovery of electronically stored information if the information is not reasonably accessible due to undue burden or cost. "Reasonably accessible" is not defined in the rules, but recent cases shed light on the distinction between what is reasonable to produce and what is not. Information in readily usable formats, whether on-line, near-line, or off-line, will be deemed reasonably accessible. On-line data includes the information on active hard drives and servers. Near-line data is readily accessible data stored on discs. Off-line data is typically back-up tapes or discs, systematically organized. Data that is not reasonably accessible includes electronic information that has to be converted or recovered in order to be usable. Typically, such inaccessible data includes deleted, damaged or fragmented data.

The party requesting the information that the responding party designated as not reasonably

accessible is permitted to seek discovery to evaluate the claim of inaccessibility. If challenged by the requesting party in a motion to compel production, the responding party has the burden of establishing that the data is not reasonably accessible. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause and is willing, among other possible conditions, to bear the cost of accessing the data.

DOCUMENT PRODUCTION

The amendments to Rule 34(a) and (b) require parties to produce electronically stored information, and the requesting party may specify the form or forms in which the electronically stored information is to be produced. Generally, the documents need to be produced in only one form. Parties may request to have documents produced in their native applications. The producing party has the option to object to the requested form and propose its own form in which the electronically stored information is to be produced.

The key factor in proposing an appropriate form is that the proposed form must not reduce the usability of the data (i.e., data searchable in its native format must be produced in a searchable file form) or reduce the amount of information produced (e.g. chosen production form must not destroy metadata present in the native format).

SANCTIONS AND THE SAFE HARBOR

The amended rules create a safe harbor for the "routine, good faith" destruction of electronically stored information. If a party destroys electronically stored information as part of its "routine, good-faith" operations, the court may not impose sanctions against that party for failure to produce the information. The party who destroys the document will be able to show that the destruction of the information was in good-faith more easily if that company has a written records retention policy, which it regularly follows, and the documents were destroyed during those regular procedures. This safe harbor provision will not protect a party if the documents were destroyed in anticipation of litigation and it was reasonable to assume that the information could be relevant to the prospective action. Due to the uncertainty as to when a party will be deemed to have been in

anticipation of litigation, the safe harbor provision in the amended rules will be, in practice, deceptively shallow.

PRACTICAL ADVICE FOR COMPLIANCE

In order to comply with the amended rules, companies should examine and improve their records retention and litigation hold procedures. An effective litigation hold procedure will provide all the relevant people in an organization with notice and specific information as to what must be retained and for how long. Notices should be re-circulated periodically to remind people of the hold and to notify them of any changes to the hold. The procedures should also allow the company to confirm compliance with the hold. To ensure that the correct people are notified and all relevant documents are being retained, a company should have a map of data sources and responsible individuals. The map should include how data is being generated and retained throughout all sections of an organization. Compliance with the new Federal Rules of Civil Procedure starts with establishing sound records retention and litigation hold procedures and by establishing committees within an organization empowered to ensure actual compliance with these procedures.

Sullivan & Worcester will be hosting interactive seminars on this topic in Boston, New York and Washington D.C. in January 2007. Invitations and details to follow.

Sullivan & Worcester attorneys and information technology professionals are also available to provide tailored on-site workshops for clients. Please contact Tisha Blair at tblair@sandw.com to request information and secure dates.