Note from the Field

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E-Discovery Amendments to Federal Rules of Civil Procedure Celebrate First Anniversary

For those Judge Advocates practicing civil litigation in U.S. district courts, or supporting those who do, important amendments to the Federal Rules of Civil Procedure (Rule(s)) celebrated their first anniversary on 1 December 2007.[2] Recognizing the burgeoning role of electronically stored information (ESI)[3] in daily life, the amendments implement significant changes in the area of electronic discovery. The amendments cover Rules 16, 26, 33, 34, 37, and 45.

Early in litigation, attorneys for all parties must address e-discovery issues. A new provision in Rule 16 states that the scheduling order may address "disclosure or discovery" of ESI.[4] An addition to Rule 26 also requires the parties to consider during the initial discovery conference "any issues about disclosure or discovery of [ESI], including the form or forms in which it should be produced."[5] Such early planning is not optional: Rule 26(f) directs the "parties to discuss discovery of [ESI] if such discovery is contemplated in the action."[6]

The amendments also affect the mandatory disclosure provisions of Rule 26. Rule 26(a)(1), which requires litigants to provide, "without awaiting a discovery request,"[7] notice of evidence they intend to use in prosecuting or defending their claims, now requires "a copy—or a description by category and location— of all . . . [ESI] . . . that the disclosing party has in its possession, custody, or control . . . ."[8] Considering ESI's "broad meaning,"[9] and in view of the breadth of electronically-stored documents, communications and data, this new requirement presents a daunting challenge. However, note that Rule 26(a)(1)(A)(ii) does not require production of all identified ESI; it just requires the disclosure of its existence.

The practitioner's true challenge comes in gathering and actually producing the ESI requested by opposing counsel. In this regard, the new Rule 26 provides some relief: "A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost."[10] Because "undue" is in the eye of the beholder, the Committee Note devotes nearly five pages to explaining this concept.[11] Acknowledging many differences in the volume and type of ESI held by parties, the note states that ESI "systems often make it easier to locate and retrieve information. . . . But some sources of electronically stored information can be accessed only with substantial burden and cost."[12] If the parties cannot agree on a reasonable balance between needed discovery and an undue burden, the note suggests seven factors to help a court resolve a discovery dispute:

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[2] *Amendments to the Federal Rules of Civil Procedure*, *at* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last visited Jan. 22, 2008) [hereinafter *Amendments*].

[3] ESI refers to data stored in an electronic, as opposed to a paper, format. Such electronic formats may include hard drives, disks, thumb drives, backup tapes, and even off-site electronic archiving facilities. *See generally* Craig Ball, *Hitting the High Points of the New e-Discovery Rules*, LAW PRACTICE TODAY, http://www.abanet.org/lpm/lpt/articles/tch10061.shtml (Oct. 2006). Examples of ESI include word-processing documents, spreadsheets, and e-mails. *See* Tom Mighell, *The New Federal Rules—Are You Ready?*, 69 TEX. B.J., Dec. 2006, at 1042.

[4] FED. R. CIV. P. 16(b)(3)(B)(iii).

[5] *Id.* at 26(f)(3)(C).

[6] *Amendments*, *supra* note 2, at 3 (R. 16(b)) (Comm. note).

[7] FED. R. CIV. P. 26(a)(1)(A).

[8] *Id.* at 26(a)(1)(A)(ii).

[9] *Amendments*, *supra* note 2, at 12 (R. 26(a)) (Comm. note).

[10] FED. R. CIV. P. 26(b)(2)(B).

[11] *Amendments*, *supra* note 2, at 13–17 (R. 26(b)(2)) (Comm. note).

[12] *Id.* at 13.

> (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.[13]

In developing a record to argue these factors, the parties may need to take discovery about the discovery. Such discovery may take various forms.[14] Counsel also should remember that the final production rarely will result in an all-or-nothing output: "The conditions [on production] 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 payment by the requesting party of part or all of the reasonable costs . . . ."[15]

When producing large volumes of electronic discovery, practitioners are more at risk of inadvertently disclosing material that is subject to a claim of privilege.

> [A]s the volume of information grows exponentially with the ascendancy of ESI, we are fast losing the ability to review individual items, and it's increasingly common for privileged and non-privileged content to insidiously mix, as occurs when, e.g., a privileged exchange is an embedded thread in an apparently benign e-mail.[16]

Fortunately, the amendments provide attorneys with a process for attempting to "clawback"[17] privileged information inadvertently produced. If a party accidentally produces material that it believes privileged, it may notify the opposing party of its claim.[18] Upon receipt, the opposing party "must promptly return, sequester, or destroy the specified information and any copies it has; [and] must not use or disclose the information until the claim is resolved."[19] Note that the new rule does not require the opposing party to agree to the claim of privilege, nor does the new rule address whether the inadvertent disclosure constitutes a waiver of the claimed privilege.[20]

Along with the general discovery provisions of Rule 26, the amendments also affect specific types of discovery permitted by Rules 33 and 34. Rule 33, Interrogatories to Parties, adds a reference to ESI in the production of business records.[21] Rule 34 addresses requests for production and adds a reference to ESI in its title and in its text as an example of data a party may request and must produce.[22] The new Rule 34 also addresses the form in which a party may request and produce ESI. Regarding the request, Rule 34 states that the request "may specify the form or forms in which [ESI] is to be produced."[23] Regarding production, Rule 34 states that "if a request does not specify the form or forms for producing [ESI], a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."[24] Unlike the relatively straightforward production of paper, for ESI, the Committee Note clarifies that "the responding party must state the form it intends to use for producing [ESI] if the requesting party does not specify a form or if the responding

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[13] *Id.* at 16.

[14] *Id.* at 15.

[15] *Id.* at 17.

[16] Ball, *supra* note 3.

[17] *Id.*; *Amendments*, *supra* note 2, at 25 (R. 26(f)) (Comm. note).

[18] FED. R. CIV. P. 26(b)(5)(B).

[19] *Id.*

[20] *Amendments*, *supra* note 2, at 18 (R. 26(b)(5)(B)) (Comm. note).

[21] FED. R. CIV. P. 33(d).

[22] *Id.* at 34, 34(a).

[23] *Id.* at 34(b)(1)(C).

[24] *Id.* at 34(b)(2)(E)(ii).

party objects to a form that the requesting party specifies."[25] The Note also prohibits the producing party from tampering with the ESI to render it less usable to the requesting party: "If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."[26]

Navigating these new rules can be tricky for even the most experienced litigator. Fortunately, the amendments include a "safe harbor" provision to guard practitioners from sanctions imposed by intemperate judges. Rule 37(e) provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."[27] Of course, "exceptional circumstances," "routine," and "good-faith" are in the eye of the beholder. Helpfully, the Committee Note somewhat elucidates routine and good-faith. The Note recognizes that "[m]any steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation."[28] It notes that "[t]he 'routine operation' of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness . . . ."[29] However, "[g]ood 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."[30] This is particularly true "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation . . . ."[31] Moreover, though this safe harbor protects against sanctions under Rule 37, it does not affect other sources of sanctions.[32]

The last e-discovery amendment to the Federal Rules is Rule 45, affecting subpoenas. It simply provides that a "subpoena may specify the form or forms in which [ESI] is to be produced."[33] It also contains clauses that parallel Rule 26(b)(2) in terms of producing ESI in a form in which "it is ordinarily maintained,"[34] not producing ESI in more than one form,[35] and not producing ESI that is not "reasonably accessible because of undue burden or cost."[36]

Judge Advocates engaged in civil practice in federal court must familiarize themselves with these amendments. Beyond that, though, they must master those information technology topics necessary to successfully advance their clients' interests. This is especially challenging in an area like IT that is constantly changing, yet the amendments require practitioners to recognize that such technology is not static. While "[i]t is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing [ESI],"[37] the amendments are "intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."[38] Successful representation will require familiarity with such terms as "embedded data"[39] and "metadata."[40]

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[25] *Amendments*, *supra* note 2, at 38 (R. 34(b)) (Comm. note).

[26] *Id.* at 39.

[27] FED. R. CIV. P. 37(e).

[28] *Amendments*, *supra* note 2, at 41 (R. 37(f)) (Comm. note).

[29] *Id.*

[30] *Id.* at 41–42.

[31] *Id.* at 42.

[32] *Id.* at 43.

[33] FED. R. CIV. P. 45(a)(1)(C).

[34] *Id.* at 45(d)(1)(B).

[35] *Id.* at 45(d)(1)(C).

[36] *Id.* at 45(d)(1)(D).

[37] *Amendments*, *supra* note 2, at 13 (R. 26(b)(2)) (Comm. note).

[38] *Id.* at 34 (R. 34(a)(1) Comm. note).

[39] Embedded data refers to information that is not readily apparent to a reader, but that is electronically hidden in a document. Examples include draft language, edits, and editorial comments. *Id.* at 24 (R. 26(f)) (Comm. note).

Whether propounding or answering a discovery request, attorneys should know such basics as "[b]ack-up tapes are the classic example of material that isn't reasonably accessible, while Word documents should be produced without a fight."[41]

Defensively, lawyers must learn their clients' data preservation systems so that they can better represent those clients in discovery negotiations and disputes. That means learning the clients' "back up and retention practices, customary formats and applications, [and] data location . . . ."[42] It means suggesting that your opponent sample parts of the requested data "to assess its value to the case"[43] before producing all of it, and perhaps insisting on "data filtering and keyword searches . . . to narrow the scope of review and production."[44] It may require the design of creative protocols such as "clawbacks" and "quick peeks."[45]

Offensively, litigators should remember all of the above, and also think creatively about who stores your opponent's ESI that you are seeking. For example, an attorney may want to ask opposing counsel to produce ESI from contractors, accountants, counsel and off-site data storage providers.[46] When making such requests, however, practitioners must remember that "[a] party need not produce the same [ESI] in more than one form,"[47] and that the Rules do not favor "[c]omplete or broad cessation of a party's routine computer operations [that] could paralyze the party's activities."[48]

In navigating the new amendments, Judge Advocates should refer often to the Rules themselves and the text of the Committee Notes. Two additional, very helpful, resources are web sites sponsored by Discovery Resources[49] and a Mr. Ken Withers.[50] The Discovery Resources website is especially informative as it includes not only many articles by practitioners, but also a running list of reported cases addressing e-discovery issues.

The e-discovery amendments to the Federal Rules of Civil Procedure, one-year old on 1 December 2006, require federal court litigators to understand and consider a broader range of data when formulating or answering a discovery request. Judge Advocates engaged in civil litigation would be wise to familiarize themselves with these amendments, as well as the technology that led to their implementation.

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[40] Metadata is data about data. It includes information about the "history, tracking, or management" of data, such as who received an email, who read it, and when they received and read it. *Id.*

[41] Correy E. Stephenson, *E-discovery for Everyone: The New Federal Rules of Civil Procedure*, LAW. WKLY. USA, Nov. 6, 2006, http://www.lawyersusaonline.com/subscriber/archives_FTS.cfm?page=USA/06/B06061.htm&recID=389484&QueryText=e%2Ddiscovery%20and%20everyone.

[42] Ball, *supra* note 3.

[43] *Id.*

[44] *Id.*

[45] *Id.*; *Amendments*, *supra* note 2, at 25 (R. 26(f)) (Comm. Note).

[46] Ball, *supra* note 3.

[47] FED. R. CIV. P. 34(b)(2)(E)(iii).

[48] *Amendments*, *supra* note 2, at 23 (R. 26(f)) (Comm. Note) (citation omitted).

[49] Discovery Resources, http://discoveryresources.org (last visited Jan. 22, 2008).

[50] kenwithers.com, http://www.kenwithers.com/ (last visited Jan 22, 2008) (showing Mr. Withers as a Senior Judicial Education Attorney at the Federal Judicial Center in Washington, D.C., with a professional and personal interest in e-discovery and judicial technology).