PUBLICATION

The E-Discovery Amendments to the Federal Rules of Civil Procedure

Authors: Donald J. Nettles
January 17, 2007

The amendments to the Federal Rules of Civil Procedure regarding the discovery and retention of "electronically stored information" have gone into effect.

The e-discovery amendments cover six related areas:

1. electronically stored information (ESI);
2. early attention to issues relating to electronic discovery;
3. format of production;
4. discovery of ESI from sources that are reasonably accessible versus not reasonably accessible;
5. the procedure for asserting claim of privilege or work product protection after production; and
6. a "safe harbor" provision.

ESI

The amendments introduce the phrase ESI to Rules 26(a)(1), 33, and 34, to acknowledge that ESI is discoverable. As the Advisory Comments make clear, the definition of ESI is "intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments." (2006 Advisory Comments to Rule 34).

Early Attention to Electronic Discovery Issues

The amendments generally require parties to address ESI early in the discovery process, recognizing that such early attention is crucial in order to control the scope and expense of electronic discovery, and avoid discovery disputes. Specifically, Rule 26(a)(1)(B) adds ESI to the list of items to be included in a party's initial disclosures. Additionally, Rule 26(f) expands the list of issues that must be discussed under the parties' planning meeting, and includes a requirement that parties develop a discovery plan that addresses issues relating to the discovery of ESI – including the form or forms and manner in which ESI will be produced.

Format of Production

Rule 34(b) now addresses the format of production of ESI, and permits the requesting party to designate the form or forms in which it wants ESI produced. The rule provides that if a request does not specify the form of production, or if the responding party objects to the requested form(s), the responding party must notify the requesting party of the form in which they intend to produce the ESI– with the option of producing either (1) in a form in which the information is ordinarily maintained, or (2) in a reasonably usable form.

ESI from Sources that Are Reasonably Accessible v. Not Reasonably Accessible

The Federal Rules recognize that "[a] party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost" and enumerate a procedure addressing motions to compel production of this information (Rule 26(b)(2)(B)). Specifically, Rule 26(b)(2) now creates a two-tiered approach to the production of ESI, making a distinction between that which is reasonably accessible, and that which is not reasonably accessible.

Asserting Claim of Privilege or Work Product Protection After Production

Rule 26(b)(5) sets forth a procedure wherein a party that inadvertently produces trial preparation material or privileged information may nonetheless assert a protective claim as to that material. Once the party seeking to establish the privilege or work product claim notifies the receiving parties of the claim and the grounds for it, the receiving parties must return, sequester or destroy the specified information and may not use the information until the claim is resolved.

"Safe Harbor" Provision

Rule 37(f) provides that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system. It responds to the routine modification, overwriting and deletion of information that attends the normal use of electronic information systems. However, the protection of Rule 37(f) seems to apply only to information lost due to the routine operation of an information system, and only if such operation was in good faith.