

Client Bulletin

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E-Discovery In The Future: Impending Changes To The Federal Rules Of Civil Procedure

The U.S. Supreme Court approved amendments to the Federal Rules of Civil Procedure on April 12, 2006 that address “electronically stored information.” If Congress does not take steps to reject, modify or defer the amendments, they will go into effect on December 1, 2006. Companies therefore should begin to take steps to minimize both the costs likely to be associated with the discovery of electronically stored information and the risk of sanctions resulting from the destruction of potentially relevant electronically stored data.

The approved amendments to the Federal Rules of Civil Procedure include Rules 16, 26, 33, 34, 37, 45 and Form 35. For purposes of this Bulletin, the most relevant are the amendments to Rules 26, 33, 34 and 37. Proposed Rule 26(a)(1)(B), the mandatory disclosure provision, requires that a party disclose “all documents, electronically stored information, and tangible things” that it may use to support its claims or defenses without awaiting a discovery request. Furthermore, under the proposed amendments to Rules 33 and 34, a party can be required to produce electronically stored information in response to discovery requests.

Electronically stored information is defined expansively and includes “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained...” According to the Advisory Committee of the Federal Rules of Civil Procedure, this definition is intended to be “broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.”

Thus, for example, electronically stored information would include electronic documents, metadata, e-mails, corporate instant messaging, text messaging, voicemail and Blackberry PIN-to-PIN communications. Discoverable information is not limited to “current” data, but also includes archived data, deleted data, disaster recovery data and legacy data (*i.e.*, data that can be used only by superseded systems). The sources of current and non-current data include the company network (*e.g.*, e-mail and file servers, backup servers and document management systems) and individual hard drives of laptop and desktop computers (including personal computers), personal digital assistants and wireless communication devices (*e.g.*, Palm and Blackberry devices), personal e-mail accounts, portable storage media (*e.g.*, floppy disks, CDs, DVDs, USB drives and external hard drives), Internet repositories and electronic information storage systems (*e.g.*, optical disk and backup tape).

Under Proposed Rule 26(b)(2), a party does not have to provide discovery of electronically stored information from sources it identifies as “not reasonably accessible because of undue burden or cost” unless the requesting party shows “good cause.” The decision whether to require a responding party to search and produce information that is not reasonably accessible may be based on the following considerations: “(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.”

The volume of information created and stored by companies electronically, and the potential costs associated with the discovery of that information, can be staggering. For example, if relevant electronic information is only accessible by restoring 100 backup tapes, which can cost from \$300 to \$5,000 per tape to restore, a company could incur a cost of \$500,000 simply to restore the tapes – without considering the costs associated with processing the data into a standardized, fully searchable format and review by company personnel (or outside counsel). The court decision in *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005), provides a more dramatic example where Morgan Stanley was required to locate and have an outside vendor process over 2,000 backup tapes.

Even if a company is not required to search or produce potentially responsive information, it must identify the sources of such information. In addition, it may be required to preserve such information depending on the “circumstances of each case.” Accordingly, as before and certainly after the amendment of the rules, the deletion of electronic information – even if carried out pursuant to standard company policy – can carry significant risks. As a general matter, a party has a duty to preserve evidence when it has notice that the evidence is relevant to litigation or when it should have known that the evidence may be relevant to future litigation. If a party fails to preserve such evidence, it can be subject to sanctions varying in severity from a monetary fine to the outright dismissal of its case (or the entry of a default judgment against it).

To address concerns about the preservation of electronic data, the proposed amendment to Rule 37 provides limited protection against sanctions where a party loses electronically stored information as a result of the “routine, good-faith operation of an electronic information system.” The proposed amendment does not, however, permit a party to allow routine operations of its information system to continue to destroy information that it is required to preserve. Furthermore, even where electronically stored information is lost due to the good faith operation of the party’s electronic information system, it still can be subject to sanctions in “exceptional circumstances.” In addition, the proposed amendment does not prevent a court from

imposing sanctions for the destruction of electronically stored information pursuant to its inherent authority.

In light of the impending changes to discovery, it is essential that companies assess their electronic information retention policies prior to December 1, 2006, including evaluating policies and procedures relating to:

- Data retention architecture;
- Backup rotation schedules and tracking;
- The identification of sources of potentially relevant information when litigation is anticipated; and
- Litigation holds – the suspension of a document and data retention policy when litigation is anticipated.



If you have any questions or would like any further information about how to prepare your company for the discoverability of electronically stored information, please contact:

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