

- Review of the 2006 E-Discovery Federal Rule Changes
  - Rebecca Levy-Sachs<sup>1</sup>
    - Robinson & Cole

- On April 12, 2006, the Supreme Court of the United States approved the entire package of pending amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information (“ESI”). The amendments have been transmitted to Congress and will take effect on December 1, 2006, absent congressional action to the contrary, which is unlikely.

- The goal of the amendments is to modify existing discovery rules to better accommodate discovery directed at information generated by computers. Discovery related to ESI and litigation about its existence, production, destruction, form of production, burdensomeness of production, and inadvertent disclosure has spawned a lucrative cottage industry for consultants, attorneys, and CLE purveyors, creating a major headache for courts and exponentially increasing the expense of litigation. The Advisory Committee on the Federal Rules of Civil Procedure has been studying the impact of ESI on litigation for years and has conducted hearings, heard testimony, and consulted with experts, attorneys, and lobbying groups. Finally, in 2005 the Advisory Committee unanimously approved the proposed amendments that will affect Rules 16(b), 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34(a), 34(b), 37(f) and 45, as well as Form 35.

This article will briefly address the changes to each rule.<sup>2</sup> The rules are geared toward recognition that ESI should be addressed early in a litigation by the parties, in order to promote fair and efficient discovery and to avoid heated battles, escalating discovery costs, and expensive side litigation.

### **Rule 16. Pretrial Conferences; Scheduling; Management<sup>3</sup>**

The body of Rule 16 now requires that the parties add a discussion of e-discovery to their pretrial conferences, scheduling, and management conferences and orders by including in the initial scheduling conference at **2 (b) (5) “provisions for disclosure or discovery of electronically**

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<sup>1</sup> Rebecca Levy-Sachs opened the Sarasota office of Robinson & Cole, a firm with eight offices throughout the Northeast, in 2002. She was previously a partner at Podvey Sachs in New Jersey, where she practiced for 25 years prior to her relocation to Florida. Rebecca was an earlier editor in chief of the *Rutgers Journal of Computers and the Law*, in 1978, and has been involved in litigation involving technology, e-discovery battles, and e-commerce.

<sup>2</sup> This is a summary of the changes only. The legal CLE world has been flooded with programs, books, courses, and video or web conferencing (all at a cost) that discuss in depth the report of the Advisory Committee on the Federal Rules of Civil Procedure and include historical analysis, description of the efforts to amend the rules, red-line version of changes, and explanatory notes in much more detail. E-discovery professionals who conduct computer forensics maintain numerous white papers and research articles on this subject on their Web sites as well. Look for more detailed resources and links on the FDCC Website portal “E-Discovery Bottcamp”, coming soon to [www.thefederation.org](http://www.thefederation.org). The Complete Advisory Committee Report and notes, can be found at <http://www.krollontrack.com/publications/publiccomment.pdf>. Detailed articles about the practical impact of the new rules can be found at the White Papers located at <http://www.fiosinc.com/>.

<sup>3</sup> Due to space limitations, only the revisions to the Rule are reprinted, **in bold**, while the existing rule language is not included.

**stored information” and at 2 (b) (6) “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production.”**

**Rule 26 (a) (B)** was modified by adding to the voluntary disclosure requirement of producing or identifying categories and locations of ... **“electronically stored information”** and by deleting the term “data compilations,” which was part of the initial revision to address electronic discovery made to the Rules in the 1970s.

**Rule 26 (f)** requires parties to sit down together before discovery begins to discuss the nature of the claims and defenses, and potential early settlement, and to arrange for voluntarily disclosures. The rule change will also require the parties to include a discussion of electronic discovery requirements and to agree to some form of procedure or protocol to govern the process. The new language is as follows:

**“(f) Conference of Parties; Planning for Discovery.** ...the parties must ...confer to consider” ... **“to discuss any issues relating to preserving discoverable information”**... develop a discovery plan to address...  
**“(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;**  
**(4) any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order;”**

In theory, this rule encourages uniformity and provides a structure for earlier and more predictable motion practice around electronic discovery. Discussion of electronically stored information and agreement on preservation and production, so early in a case, will require a big change in behavior. The Advisory Note warns that “it may be important for the parties to discuss those systems and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems.” The Advisory Committee Notes also warn that “the parties’ discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities.”

The Advisory Committee changes include new information to be submitted in the Form 35 Report to the Court, including the following language:

**“Disclosure or discovery of electronically stored information should be handled as follows:**  
\_\_\_\_\_ (brief description of parties’ proposals)

**The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order)”**

The changes to Rule 26 (b) disclosure provisions specifically address some of the burden issues that have arisen in electronic discovery. The new language is as follows:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(b) Discovery Scope and Limits.

...

(2) Limitations.

...

**(B) 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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.**

The Advisory Committee also addressed issues of inadvertent production in revised Rule 26(b)(5)(B), which provides a procedure for seeking the return of inadvertently produced documents, as follows:

**Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

**2 (b) Discovery Scope and Limits...**

**(5) (B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a 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. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the**

**receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.**

**The proposed amendment to Rule 33** clarifies how the option to produce business records to respond to an interrogatory operates in the information age. The rule is amended to make clear that the production of business records includes **“electronically stored information.”**

**The proposed amendment to Rule 34(a)** also adds **“electronically stored information”** as a category subject to production, in addition to “documents.” The Advisory Notes explain that Rule 34(b) is amended to add procedures for requesting and objecting to the form for producing such information and to provide “default” forms of production. Such requests and objections did not arise with paper discovery because paper can generally be produced in only one form. By contrast, electronically stored information may exist in a number of different forms, some of which may be inappropriate for the litigation or costly or burdensome for the requesting or responding party. Adding **“electronically stored information”** to Rule 34(a)’s list of what is subject to production is an obvious change. As noted, in 1970 this list was revised to add “data or data compilations.” This discovery rule revision was made to accommodate changes in technology.

**Proposed amended Rule 34(b)** provides a procedure for an issue that generally does not arise with paper discovery — electronically stored information exists and can be produced in a number of forms. The form, or forms, in which it is kept may not be a form that the requesting party can use or use efficiently or that the responding party wants to use for production. The form of producing electronically stored information is increasingly a source of dispute in discovery. As noted in the Advisory Committee Report, the proposed amendment provides a structure and procedure for the parties to identify the form or forms of production that are most useful or appropriate for the litigation; provides guidance to the responding party if no request, order, or agreement specifies the form or forms of production; and provides guidance to the court if there is a dispute. Proposed amended Rule 34(b) allows, but does not require, a requesting party to specify a form, or forms, for producing electronically stored information, and clarifies that a responding party’s objection to a request may include an objection to the specified form; requires a responding party to state the form, or forms, it intends to use for production in the written response it must file to the production request; and provides “default” forms of production to apply if the requesting party did not specify a form and there is no agreement or order requiring a particular form.

Thus, in Response to Discovery Requests the revisions to Rule 34 (a) Scope permits an objection to the following:

**“the requested form or forms for producing electronically stored information, in which event stating the reasons for the objection shall be stated.”**

...

**If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use....**

The revisions to Rule 34 (b) Procedure also adds requirements for the format of the electronic production as follows:

**... (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and  
(iii) a party need not produce the same electronically stored information in more than one form.**

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**Rule 37 (f)** has been amended to address sanctions for the failure to make electronic discovery by adding the following:

**Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions**

\* \* \* \* \*

**(f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.**

**Rule 45** has been amended to require the party to produce “**electronically stored information**” as well as traditional paper documents in response to subpoenas; however, Rule 45(d)(1)(E) adds a provision protecting against production of **electronically stored information** that is not reasonably accessible and was revised to mirror the changes made in Rule 26(b)(2)(B). Similarly, changes were made in the Rule 45(d)(2)(B) provision, which tracks the Rule 26(b)(5)(B) provision for asserting a claim of privilege after information is produced, and the Rule 45 (d) (1) (a) Duties related to responding to a subpoena were revised to include the same objections to and designations related to form of electronic discovery as the changes made to Rule 34.

**Conclusion:** The Conclusion to the Advisory Notes regarding the changes to the Federal Rules, which will be effective in December 2006, sum up the purpose, goals, and potential impact of the e-discovery changes:

The proposed rule amendments reflect and accommodate changes in discovery practice that have been in the making for years, brought about by profound changes in information technology. The proposed

amendments work in tandem. Early attention to the issues is required. The requesting party is authorized to specify the forms in which electronically stored information should be produced and a framework is established to resolve disputes over the forms of producing such information. A party need not review or provide discovery of electronically stored information that is not reasonably accessible unless the court orders such discovery, for good cause. A procedure for asserting claims of privilege or of work-product protection after production is established. Absent exceptional circumstances, a party that is unable to provide discovery of electronically stored information lost as a result of the routine operation of an electronic information system cannot be sanctioned, if that operation was in good faith. Electronically stored information has the potential to make discovery more efficient, less time consuming, and less costly, if it is properly managed and effectively supervised. The volume, the dynamic character, and the numerous forms of electronically stored information, among other qualities, also have the potential to increase discovery costs and delays, further burdening the litigation process and exacerbating problems the Advisory and Standing Committees have been grappling with for years. The proposed rules provide support for early party management and, where necessary, effective judicial supervision. Keeping discovery manageable, affordable, and fair is a problem that litigants and judges in all courts share...