

Getting Ahead Of The Federal Rules Changes

Are You Ready For Dec. 1? e-Discovery Law & Strategy Offers Another Primer On The Pending Changes

By Stacy Jackson

On December 1, the long-discussed amendments to the Federal Rules of Civil Procedure are likely to take effect. It seems a long way off, but in the legal world, it's right around the corner. The new rules, if finally approved, don't have to be bad for business.

First of all, it helps to know the reasoning behind the change. Currently, the only mention of electronic data is in the Committee Notes to the 1970 Amendment. The note made it clear that Rule 34 applies to electronic-data compilations from which "information can be obtained only with the use of detection devices." From there, all litigators could do was extrapolate and analogize between paper and plastic discovery.

The rules needed to at least acknowledge that electronic data exists and provide some parameters for managing the discovery process as it relates to electronic data. Electronic-data discovery used to be an aberration — but, as you know, it has quickly become the norm. Also, the costs associated with collecting, restoring and reviewing the data have become astronomical. Back in the day, litigators used to settle cases to save expert-witness fees, but now those costs are miniscule compared to e-discovery fees.

While the proposed rule changes

Stacy Jackson is corporate counsel at IE Discovery, a provider of comprehensive discovery-management solutions. She manages IE Discovery's Legal Services team of more than 50 attorneys and paralegals, working directly with client attorneys in charge of cases and coordinating project-management to ensure quality deliverables. Jackson can be reached at sjackson@iediscovery.com.

are bad for procrastinators, for forward-thinkers they provide an opportunity to properly handle serious discovery-management issues in advance — or at least early on — in the case.

The following six steps, if assessed either long before the complaint lands on your desk or immediately afterward, can help you turn the new rules into an advantage for your client.

Step 1: Acknowledge that e-discovery issues exist in your case — early on. Changes to FRCP 16(b), 26(f) and Form 35 — individually and collectively — force us to pay attention to e-discovery issues early in the case. We can no longer pretend to be ostriches and stick our heads in the sand regarding electronic data.

Proposed changes to Rule 16(b) constitute an attempt to:

- Alert the court to the possible need to address electronic data early in the pre-trial conference stage;
- Avoid delay by acknowledging the existence of electronic data early on; and
- Avoid excessive discovery costs.

The proposed amendments allow for the scheduling order to address provisions for disclosure of electronic data and any agreements for asserting privileges after production.

The proposed change to Rule 26(f) will require the parties to discuss any issues, as soon as practical, relating to preserving discoverable material and to develop a discovery plan that addresses the form of production and agreements regarding privilege waiver.

Form 35, if amended, will allow the parties to wrap up all of their initial discussions with a report to the court that addresses how to handle discovery of electronic data and privilege waiver.

Step 2: Investigate what type of electronic data you have — early on. I suggest that you do it before you are sued. Electronic data has been categorized two ways — either accessible or inaccessible. Accessible data is broken down into three categories:

1. Online data is easily accessible, *eg*, information on your hard drive;
2. Near-line data is a little less accessible than online data, *eg*, data currently stored on a CD; and
3. Offline data is a little less accessible than near-line data, *eg*, disks and tapes that are labeled.

Inaccessible data comprises backup tapes that are not organized for the retrieval of individual documents, and erased, fragmented or damaged data.

The proposed amendment to FRCP 26(b)(2) would require the disclosure of electronic data that is relevant, not privileged, and reasonably accessible. With electronic data, however, there is a sliding scale of accessibility. Data becomes inaccessible with:

- Time, depending on method of creation;
- Storage type; and
- Disposal method.

So, what was once easily accessible may become inaccessible over time, which will require a one-time upfront assessment of your electronic data, but constant follow-up will also be necessary. Moreover, the proposed amendment to FRCP 26(b)(2) institutes a two-tiered approach designed to change the presumption of discoverability and trigger the resolution of cost-shifting issues. To access inaccessible data, opposing counsel must show good cause. So, you must be able to readily ascertain the accessibility of your electronic data. And remember, just because it's not

readily accessible does not mean you don't have to preserve the data.

Step 3: Assess your document-retention policy. As discussed above, the proposed change to Rule 26(f) will require the parties to discuss any issues relating to preserving discoverable material. Keep in mind that preservation is an issue with *day-back* material, electronic data generated before the suit was instituted, and *day-forward* material, electronic data generated while the suit is pending. Assess your client's, or your company's, document-retention policy for what it covers — and, more important — what it doesn't. Determine whether the mechanisms of enforcing a litigation hold are adequate. Once the litigation hold is in effect, monitor compliance with the hold and continue to educate clients and staff about the importance of compliance, and the ramifications of failure to comply.

The proposed changes to FRCP 37(f) state that, absent exceptional circumstances, a party will not be sanctioned for the destruction of electronic data that results from the routine, good-faith operation of a computer system. Simply turning a computer on and off, which one could easily argue is one of the most routine operations of a computer system, can alter data. You must be able to demonstrate that the document-retention policy was followed in good faith and that you made a good-faith effort to enforce the litigation hold. You should also be able to document all of the steps you took to assess your document-retention policy, as well as to enforce and monitor the litigation hold.

Step 4: Investigate the amount and the cost of preserving, restoring, processing and reviewing your electronic data. The cost of preservation can come in two forms — a business cost and an actual cost. If your opponent wants a mirror image of the hard drives in the case and you cannot turn on the computers, this will have an impact on your client's or company's business operations. If you have to stop recycling backup tapes, you will have to buy more tapes. Even if your client is a small company, if the case drags on for a year or two, just the purchase and storage of backup tapes will begin to pinch the company. It behooves you, then, to find out:

- Exactly what your client or company's backup schedule is, *ie*, how does it

back up information?;

- How often is information backed up?; and
- What are the current costs — in manpower, hardware, software and peripheral devices — of backing up the computer system?

Should your client or company ever have to restore a backup tape — in a normal business setting — have the client capture the cost of the restoration. This will give a good starting point if you ever have to ascertain what the restoration of backup tapes for litigation will cost you. It has been estimated that the cost of restoring, processing and reviewing one e-mail message can cost between \$2 and \$5. This includes the cost of attorneys to review the message for privilege. There are many factors that will drive up these costs, such as amount of time, volume of data, complexity of the issues, and the complexity of retrieving the data. A party is always responsible for the monetary costs of reviewing its data; that cost will never be shifted to the opposing side.

Step 5: Assess the form of production that is right for you. There are several ways to produce your electronic — and paper — data:

- Paper;
- .TIFF or .PDF images;
- Native files;
- Mirrored hard drives; or
- Direct access to systems.

Make sure the form of production from opposing counsel captures what you need. Consider this situation, for instance: You don't know if you want .TIFF images or native files; if all you want to see is what is on the face of the document, then take the images, but if you need to see what is behind the document, *ie*, track changes, the document's creator or when it was last edited, or the Excel cell formula — then take the native files. Keep in mind that some things were never meant to be printed, *ie*, database or Excel spreadsheets could print out into thousands of pages. Because you are only technically entitled to one form of production, you should assess this situation with opposing counsel to see whether a small percentage of the documents needs to be produced in an alternative method. This may also help to reduce the costs of production.

Step 6: Determine a protocol for privilege waiver that best suits

your circumstances. The proposed amendment to FRCP 26(b)(5)(b) provides a framework for handling an inadvertent disclosure. The Rules Committee has acknowledged that paper and plastic productions are different animals. Due to the high volume of information and the multi-faceted reviews that must be performed (you must look at the face of the document, plus the metadata), the cost of productions has risen and the time to perform the reviews has increased. To curtail time and cost issues, the Rules Committee has provided a few rules for an inadvertent disclosure. Until now, counsel across the country has been using clawback and quick-peek agreements to try to reduce costs and time. These types of agreements would control the situation in the event of a disclosure, even with the new rule amendment. So, if you have a particular procedure that works for you now that is slightly different from the amended rule, then you may still use it. If you have not been using a particular procedure, then now is the time to start thinking about what procedure would best serve your cases, clients and company.

CONCLUSION

For large parts of the legal community, these changes might be bitter pills to swallow. We don't want to talk to opposing counsel, because we despise them, and because we don't have the foggiest idea what a server or backup tape is and we don't want to know, we see nothing wrong with producing in good old-fashioned paper — *hey, the trees will grow back*. But at the end of the day, this change is good, because it forces us to acknowledge that electronic data discovery exists, to talk to opposing counsel and the court about our discovery-management issues and costs, and to generally deal with our e-discovery management issues up front. The changes are a push in the right direction.



ABOUT IE DISCOVERY

IE Discovery is the first legal services provider offering comprehensive Discovery Management, litigation, and regulatory compliance services and support to agency counsel and program staff.

IE Discovery has worked with government attorneys and program staff for 12 years providing a broad range of services. Our seasoned legal professionals, industry specialists, and technologists support you with any aspect of your case.

- Manage document and electronic data collections including acquisition/collection
- Convert and index paper and electronic data
- Review documents for relevancy, responsiveness, and privilege
- Analyze, review and code issues
- Design, load, host repositories
- Provide subject matter expertise in class actions, employment, contracts and environmental matters
- Support interrogatories, interviews, depositions, expert witnesses, hearings and trials

Continuing Legal Education Series

IE Discovery offers complimentary seminars certified for CLE credit on a variety of topics. See www.iediscovery.com/cle. Click on CLE Offerings for a complete list.

- The Discovery Game: How to Play and How to Win
- Anticipating the Federal Rules Amendments for E-discovery
- The Natives are Restless! Managing Review of Native Files Effectively

Government Clients

Department of Defense: U.S. Navy, U.S. Air Force
Department of Interior: Bureau of Reclamation
Department of Justice: U.S. Attorney's Offices,
Commercial Litigation Section
U.S. Postal Service Postal Rate Commission



www.iediscovery.com

GSA Schedule GS-25F-0004P

Government Programs Office
1101 Wilson Boulevard, Suite 1450
Arlington, VA 22209
703-527-2700 x 3035
Government-Info@iediscovery.com

Corporate Headquarters
13640 Briarwick Drive, Suite 250
Austin, TX 78729
512-498-7400
sales@iediscovery.com

Los Angeles Office
5816 Corporate Avenue
Suite 140
Cypress, CA 90630
714-821-8776