FENWICK & WEST LLP

Litigation Alert

Electronic Discovery is Focus of Pending Federal Rule Changes Approved by U.S. Supreme Court

APRIL 25, 2006

On April 12, 2006, the United States Supreme Court approved changes to the Federal Rules of Civil Procedure that will require early involvement of the court in managing electronic discovery. Among other things, the amended rules alter the mechanics of when and how federal courts make provisions for the discovery of electronically stored information with respect to scheduling, scope of discovery, preservation obligations, waiver of privilege, form of production, the burden of deriving answers to interrogatories from electronically produced materials, and modifies what burdens may be applied via subpoena. The following proposed rules have been transmitted to Congress and will take effect on December 1, 2006, unless Congress unexpectedly enacts legislation to reject, modify, or defer the amendments.

THE NEW RULES

Scheduling

Rules 16(b) and 26(f) would be amended to direct the parties to prepare a plan for electronic discovery at the first conference of the parties held pursuant to Rule 26(f). Rule 16(b) also adds electronic discovery to the list of topics which may be addressed in the scheduling order.

Significantly, these changes implicitly require the involvement of entity litigants' Information Technology (IT) leaders from the onset of a lawsuit. In particular, the proposed Advisory Committee Note for Rule 26(f) provides in pertinent part that:

> the issues to be addressed . . . depend on the . . . parties' information systems. 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. . . . . In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

In essence, the new rules foster an expectation that there will be ongoing, effective communication between counsel and IT—as required by many recent eDiscovery decisions.

Scope of Discovery

Rule 26(a)(1)(B) would be amended—as would Rule 34(a) (see below)—to recognize that, without awaiting a discovery request, a party must automatically disclose electronically stored information (ESI) that it may use to support its claims or defenses as part of its initial disclosures exchanged at the outset of the litigation. **Rule 26(b)(2)** directs the court to take into account the particular challenges and benefits eDiscovery provides, permitting an expanded scope of discovery when the mode of storage permits, as well as recognizing that some sources of electronically stored information can be accessed only with substantial burden and cost.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible. The responding party must also identify broadly sources containing potentially responsive information that it is neither searching nor producing due to relative inaccessibility. The respondent has the burden of showing that the material is not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce information. Then, the burden shifts. In other words, the responding party need not restore, let alone produce, such relatively inaccessible material absent a good-cause showing by the requesting party that that the circumstances of the case require it.

Waiver of Privilege

Rule 26(b)(5)(B) would be added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery. If the claim is contested, the rule permits any party that received the information to present the matter to the court for resolution. The rule does not address whether a party has waived privilege or protection by production,

leaving that substantive law issue to the court's traditional principles of determining whether the disclosure was intentional or inadvertent. However, the establishment of a mechanism for resolving waiver concerns is especially important in our information age. The huge volumes of data reviewed in eDiscovery render it more difficult to vet for e-mails, attachments and stand-alone files protected by privilege or work-product protection.

Interrogatories

Rule 33(d) would place an equal burden on both parties for providing interrogatory answers that may be derived from electronically produced materials. The rule provides that it is a sufficient answer to such interrogatory to specify the electronic records from which the answer may be

ascertained and to afford the party serving the interrogatory a reasonable opportunity to examine such records to derive such information.

Inspection and Form of Production of Discovery Materials

Rule 34(a) & (b) would update the language therein to provide that any party may serve on any other party a request to produce electronically stored information, rather than merely "documents." The rule would also permit the party making the request to inspect, copy, test or sample electronically stored information stored in any medium from which information can be obtained—and, if necessary, translated by the responding party into a reasonably usable form. The rule would be amended to provide that the request may specify the form or forms in which electronically stored information is to be produced.

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. Over the past few years, Fenwick & West's Electronic Information Management Group has seen a strong trend toward production in native file format and expects that trend to continue to accelerate after the FRCP changes take effect.

Failure to Make Disclosures or Cooperate in Discovery; Sanctions

Rule 37(f) would provide that, absent exceptional circumstances, a court may not impose sanctions under the 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. This rule will not obviate compliance with any requirement that documents be preserved. Nor will it eliminate the ability of a trial court to impose sanctions under its inherent powers.

However, this "safe harbor" provision would enable a party to fend off a spoliation charge by demonstrating that it only deleted potential electronic evidence pursuant to an ongoing retention/destruction policy that 1) was not instituted in response to a litigation or other dispute; 2) was consistently applied and enforced; and 3) contained a valid "litigation hold" (destruction-suspension) provision that was issued and re-issued in a timely and effective manner.

Subpoena Power

Rule 45 will be amended to add that a subpoena shall command the non-party recipient to produce and permit inspection, copying, testing, or sampling of electronically stored information. In addition, a subpoena may now specify the form or forms in which electronically stored information is to be produced. These proposed changes are consistent with the counterparts summarized above as to requests for production served on litigation parties under the proposed new version of Rule 34(a)-(b).

Practical Implications

The adoption of these rule changes gives enhanced guidance to the lower federal courts as to how they are to structure electronic discovery. In fact, at least two relatively recent federal district court decisions have, in effect, analyzed the proposed changes as if they were already in force. *See, e.g., Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 233-35, 238 (D. Md. 2005) (non-waiver stipulations risky and not necessarily determinative unless incorporated into scheduling order or protective order; quoting FED. R. CIV. P. 26(b)(5)'s proposed new Advisory Committee Note); *Williams v. Sprint/United Mgmt.*, 230 F.R.D. 640, 646 & n.25 (D. Kan. 2005) (once native production mandated, metadata not to be scrubbed from client-created Excel spreadsheets; quoting Fed. R. Civ. P. 26(f)'s proposed new Advisory Committee Note).

These changes aim to reduce uncertainty and increase conformity in the application of the FRCP to the exponentially increasing amount of discoverable data available—and the rapidly evolving processes and tools used to manage the data.

At the same time, the adoption of these rules by the Supreme Court has signaled that litigants will be held accountable for participating, early and often, in the trial court's creation of standards for data retention and production—and for ongoing compliance with those principles.

To learn more about Fenwick & West eDiscovery services, please see:

http://www.fenwick.com/services/2.3.5.asp?s=1034
http://www.fenwick.com/docstore/PressRoom/LTN_08012005.pdf
http://www.fenwick.com/services/2.3.0.asp?s=1034

For further information, please contact:

Patrick E. Premo, Litigation Partner
ppremo@fenwick.com, 650-335-7963

Robert D. Brownstone, Esq., Practice Technology Manager
rbrownstone@fenwick.com, 650-335-7912

Anthony P. Dykes, Litigation Associate
adykes@fenwick.com, 650-335-7245