ON SEPTEMBER 20, 2005, the Judicial Conference of the United States—unanimously and without objection—approved proposed amendments to the Federal Rules of Civil Procedure.1 These amendments subsequently were approved this year by the U.S. Supreme Court.2 Absent intervention by Congress, which is not expected, the amendments will become effective on December 1, 2006.3

The amendments—as embodied in Rule 26, and to a lesser extent Rules 16, 34, 37, and 45—will clarify and alter the scope of electronic discovery in federal court. Strictly speaking, these new rules are not so much amendments as they are additions to the existing rules governing pretrial civil discovery. They are intended to fill in gaps in the existing rules so that the task of conducting (and responding to) electronic discovery is less burdensome and more cost-effective.4 Notwithstanding the pending status of the amended rules, practitioners should take the time now to familiarize themselves with the key changes,5 because there is a very strong likelihood that Congress will not object to the amended rules, and they will therefore take effect as scheduled.6

The amendments have introduced basic phraseology to ensure that the Federal Rules of Civil Procedure recognize the import of electronic information. The drafters made a basic definitional change to the rules—namely, introducing the phrase “electronically stored information”7 into the nomenclature of the rules. By doing so, the drafters have ameliorated a perceived shortcoming in the current version of the rules regarding certain types of electronic information (or data) that may not be rightfully subject to disclosure and discovery. The amendments formalize the overarching principle that all parties involved—the litigants as well as the court—need to make accommodations for the disclosure and discovery of electronically stored information. Most importantly, these accommodations need to be made at an early stage in the litigation so that the parties are spared unnecessary burdens and costs.

Rule 16(b) represents the starting point for this new dynamic regarding electronic discovery, and it begins with the court’s role. The amendment to Rule 16(b) is “designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur.”9 The drafters were cognizant of the fact that the court’s involvement early in the litigation would “help avoid difficulties that might otherwise arise.”9 The specific language added to Rule 16(b) requires the court to make “provisions for disclosure of electronically stored information.”10 This new language forces the parties to recognize the potential for the discovery of electronic information at the initial stages of pretrial planning and makes it clear that electronically stored information is an appropriate consideration for inclusion in the court’s scheduling order.

Similar changes have been added to Rule 26(f), but they are directed at the parties. The proposed amendment to Rule 26(f) requires the parties to discuss “any issues relating to preserving discoverable information” as well as “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”11 This necessarily requires parties to discuss, among other things, the preservation of discoverable information and the formulation of a proposed discovery plan that addresses issues relating to the discovery and production of electronically stored information.

Further, electronically stored information has also been added to Rule 26(a)(1)(B)’s list of items that must be included in a party’s initial disclosures.12 No longer will it be appropriate, or acceptable, to ignore the availability of electronically stored information when exchanging these initial disclosures with opposing counsel.

Reasonably Accessible and Good Cause

While the amendments recognize the propriety and need for discovery of electronically stored information, the drafters were also careful to address the burdens of producing this information. Rule

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26(b)(2)(B), as amended, contains a key provision that introduces a two-tiered approach\(^\text{13}\) to the production of electronically stored information.\(^\text{14}\) The amendment draws a distinction between information that is “reasonably accessible” and information that is not.\(^\text{15}\)

Under the proposed Rule 26(b)(2)(B), a responding party need not produce electronically stored information from sources that it identifies as not reasonably accessible “because of undue burden or cost.” If the requesting party seeks discovery of this information, the burden is on the responding party to show that the information is not reasonably accessible. At this stage, the court must decide whether the information needs to be produced. The court may order discovery of the information if the requesting party can show “good cause,” taking into consideration the limits imposed by Rule 26(b)(2)(C).\(^\text{16}\)

While in theory this two-tiered approach is analytically fair and simple, in practice it may be cumbersome to implement. The proposed amendment itself does not define what “reasonably accessible” and “good cause” mean. This is problematic for a variety of reasons—the most prominent being that the parties are left with little to no guidance on how to prepare for and conducts discovery, while courts are left with no distinct boundaries for deciding what constitutes reasonableness.

The Committee Note for the amendment to Rule 26(b)(2), however, does provide some limited guidance to parties regarding what is reasonably accessible. The drafters appear to have focused on the cost of retrieving electronically stored information as a determining factor of what is reasonably accessible. Thus, for example, the Committee Note explains that “some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.”\(^\text{17}\) Some examples provided by the drafters include backup tapes used for disaster recovery, which are often not indexed or organized; legacy data from obsolete systems; and “deleted” data that only remains in fragmented form.\(^\text{18}\) But these are only examples, and the drafters were careful to note, “It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information.”\(^\text{19}\)

In addressing an appropriate analysis of good cause, the drafters seem to intend for courts to engage in a balancing test to determine whether the burdens and costs can be “justified in the circumstances of the case.”\(^\text{20}\) According to the drafters, the factors that courts should weigh in the balancing test include:

- The specificity of the discovery request.
- The quantity of information available from other, more easily accessible, sources.
- The failure to produce relevant information that seems likely to have existed but is no longer available.
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.
- Predictions as to the importance and usefulness of the information sought.
- The importance of the issues at stake in the litigation.
- The respective resources of the parties.\(^\text{21}\)

As part of the balancing test, the Committee Note also instructs that the responding party should bear the burden to show that the identified sources are not reasonably accessible in light of the burdens and costs to retrieve the information. In turn, the requesting party must demonstrate that its need for the information outweighs the burdens and costs of retrieving the information. Notwithstanding this neat and systematic approach (at least on paper), the Committee Note concludes with this caveat:

The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation.\(^\text{22}\)

Under these circumstances, the drafters suggest that the parties and the court engage in limited, focused discovery—such as sampling a limited set of data—to learn what is relevant and the potential burdens and costs involved in full-scale electronic discovery.\(^\text{23}\)

The amendments are not clear on whether the requesting party may satisfy the good-cause determination by simply agreeing to produce the information if the requesting party can “test, or sample” any designated electronically stored information. This is not a matter of right for the requesting party but merely an option in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.\(^\text{24}\)

Thus, whether cost-shifting alone, or a blanket agreement by the requesting party to bear the costs of production, can satisfy the good-cause determination will mostly remain within the province of the court to decide, using factors such as the ones discussed in the oft-cited and seminal Zubulake v. UBS Warburg LLC opinions\(^\text{25}\) as guidance.

The wrinkles to this two-tiered approach have yet to be ironed out. However, this approach—determining whether desired information is reasonably accessible and for good cause—does provide a balanced and fair system for solving the unique problems created by electronic discovery. The responding party is provided the initial opportunity to identify certain sources of information that are not reasonably accessible, which affords it protection from having to search and retrieve information from hard-to-access sources. The requesting party benefits from the flexibility and a safe harbor

The proposed amendment to Rule 34(a) formalizes what most practitioners have informally understood to be true—namely, that the current rules for discovery are broad enough to include electronically stored information.\(^\text{26}\) Indeed, the term “documents” found in the current version of Rule 34 includes electronic data and other types of non tangible information. To avoid any further ambiguity, the amendment makes this understanding official. The drafters of the amendment to Rule 34(a) include the term “electronically stored information” as a third category of discoverable information, in addition to the original two categories of “documents” and “things.”\(^\text{27}\)

Another important change to Rule 34(a) allows the requesting party to “test, or sample” any designated electronically stored information. This is not a matter of right for the requesting party but merely an option...
that is available to all parties. As with any other form of discovery, if there are objections to a request to test or sample, the appropriateness of the request is decided by motion practice, in accordance with Rules 26(b)(2) and 26(c). As the Committee Note makes clear, “Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.”

Nonetheless, sampling may be one way for the court (and the litigants) to determine whether good cause exists for the production of the requested information.

Rule 34(b) also has been amended to allow the responding party flexibility in producing electronically stored information. The format in which electronically stored information is produced is almost always of particular interest to litigants. Under the proposed amendment, while the requesting party “may specify the form or forms in which electronically stored information is to be produced,” the default form of production is to be “in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.” Notably, the amendment provides that “a party need not produce the same electronically stored information in more than one form.” If the parties cannot come to an agreement on the form (or forms) of production, then the requesting party can file a motion to compel under Rule 37.

An entirely new subdivision has been added to the current Rule 37:

(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 37(f) is essentially a safe harbor provision for the responding party. It is a recognition by the drafters that electronically stored information is by nature fluid and dynamic, and may be stored, accessed, or deleted by multiple users simultaneously. With this in mind, the Committee Note to Rule 37(f) explicitly states that the Rule 37(f) safe harbor provision applies to “information lost due to the routine operation of an information system only if the operation was in good faith.”

What this means, ostensibly, is that a party may not exploit the routine operation of an information system to thwart discovery, and conversely a party is not necessarily at risk simply because data is lost due to the normal operations of an electronic information system, such as routine backup procedures.

As part of the amendments, the drafters also revised Rule 26(b)(5) to provide a scheme for the retrieval of privileged or work product material that is inadvertently produced.

While the amendment to Rule 26(b)(5) does not specifically reference “electronically stored information” in the actual text, the drafters nevertheless had this type of information in mind when making the changes, as they note in their accompanying report: “The volume of electronically stored information responsive to discovery and the varying ways such information is stored and displayed make it more difficult to review for privilege than paper.”

The amendment is silent on whether inadvertent production by the responding party constitutes a waiver (or whether a waiver should be construed). Instead, the amendment merely sets up a specific procedure to allow the responding party to assert a claim of privilege or work product protection after the inadvertent production: “It is a nod to the pressures of litigating with the amount and nature of electronically stored information available in the present age, a procedural device for addressing the increasingly costly and time-consuming efforts to reduce the number of inevitable blunders.”

These are the major changes contemplated by the amendments approved in September 2005 by the Judicial Conference and transmitted to Congress. If these amendments take effect as expected, practitioners will have a more fully delineated set of rules on which to rely when conducting electronic discovery. More importantly, the amendments encourage—and to some extent require—the parties to engage in early-stage planning in order to mitigate the burdens and costs of complying with, responding to, and ultimately litigating electronic discovery.

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2 The proposed amendments were transmitted to the Supreme Court on November 29, 2005, with a recommendation that they be approved by May 1, 2006. On Wednesday, April 12, as expected, the Supreme Court approved (without comment or dissent) the amendments and thereafter transmitted them to Congress. See U.S. Courts, Federal Rulemaking, available at http://www.uscourts.gov/rules/index.html#supreme0406 (noting approval of amendments to Rules 16, 26, 34, and 37, among others, by the Supreme Court). A full explanation of the federal rulemaking process can be found on the U.S. Courts Web site. See U.S. Courts, Federal Rulemaking, The Rulemaking Process, available at http://www.uscourts.gov/rules/proceduresum.htm and http://www.uscourts.gov/rules/newrules6.html#c0804 (setting forth the amendments as approved by the Supreme Court).

3 The amendments do not contradict the current rules;
rather, they fill a void in them that was created by advances in technology. The vast amount of research, scholarly discourse, and professional compromise that buttress these amendments makes them a rich and powerful resource. Despite the pending status of the amended rules, lawyers (and their clients) should become familiar with their content now.

4 Ken Withers, a senior judicial education attorney at the Federal Judicial Center in Washington, D.C., has provided a succinct synopsis of the early proposed changes to the rules, prior to their publication for public comment. Not all of these early changes were incorporated in the final draft of the proposed amendments, but they do shed light on the underlying principles guiding the drafters. See Ken Withers, Two Tiers and a Safe Harbor, FEDERAL LAWYER, Sept. 2004, available at http://www.kenwithers.com/articles/tiers0904.pdf.

5 Aside from the major changes embodied in the amendments to Rules 16, 26, 34, and 37, the proposed amendments also address the scope of production regarding interrogatories pursuant to Rule 33 and under the subpoena powers as outlined in Rule 45. Most of these changes are analogous to the significant revisions found in Rule 26.


8 Id. at Rules App. C-27.

9 Id. at Rules App. C-26.


11 According to the Committee Note accompanying the proposed amendment to Rule 26(f), “When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties’ information system.” Id. at Rules App. C-33.


13 The two-tiered approach adopted by the drafters is consistent with the Sedona Production Principles, which support the approach that a party, over an objection, need not produce information if it was not purposely stored for business use or is otherwise inaccessible due to its special characteristics. See Tom Allman, The Sedona Production Principles and the Proposed Federal Rules Addressing E-Discovery (memorandum to the Sedona Conference Working Group on Electronic Document Retention and Production) (Oct. 6, 2004), available at http://www.kenwithers.com/articles/allman100604.doc.


17 Id. at Rules App. C-47 (Committee Note).

18 Id. at Rules App. C-42 (Introduction).

19 Id. at Rules App. C-47 (Committee Note).

20 Id. at Rules App. C-49 (Committee Note).

21 Id.

22 Id.

23 Id. at Rules App. C-49 to Rules App. C-50 (Committee Note); see also Martha K. Gooding, Electronic Discovery: Change Is in the Wind (Apr. 2006) (“The court may order discovery of the inaccessible data for good cause shown, and it also may impose conditions on such discovery, including the familiar condition of allocating the costs of the discovery between the parties.”), available at http://howrey.com/docs/E-discovery.pdf.
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