

April 21, 2006

## Supreme Court Approves Amendments to Rules Concerning E-Discovery

The Supreme Court has approved proposed amendments to the Federal Rules of Civil Procedure relating to electronic discovery. Barring Congressional intervention, the amendments will become effective on December 1, 2006. The new rules will be of particular interest to large entities for whom the gathering of electronic evidence can be costly and burdensome. Between now and the effective date, it would be prudent for such entities to determine how they can best position themselves to comply with these amendments.

- ***Early Attention to E-Discovery.*** The amendments will require parties to give early attention to e-discovery issues, beginning with the Rule 26(f) discovery planning conference. Rule 26(f) discovery plans will need to address how electronic information is to be preserved and produced, as well as privilege issues.
- ***Requests for Electronic Data.*** Amended Rule 34(a) will authorize requests for “electronically stored information” as a category distinct from “documents” and “things.”
- ***Production Formats for Electronic Information.*** Amended Rule 34(b) will permit a requesting party to specify the format in which electronic information should be produced. Absent a specification, the responding party may decide the form of production. If the parties cannot agree on a format, the information will need to be produced “in the form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.”
- ***Inadvertently Produced Privileged Material.*** Amended Rule 26(b)(5) will establish a procedure for privilege claims with respect to inadvertently produced electronic material. In response to a post-production privilege assertion, the receiving party will need: (a) to “return, sequester, or destroy” the material; (b) to take reasonable steps to retrieve the material from third parties; and (c) to refrain from using or disclosing the material further until the privilege claim is resolved.
- ***Data That is Not Readily Accessible.*** Responding parties will be allowed to object to requests for data “from sources that the party identifies as not reasonably accessible because of undue burden or cost.” The responding party will bear the burden of demonstrating to the court that the material is not reasonably accessible. If the court agrees, it will nonetheless be able to compel production if the requesting party shows good cause. Orders compelling production will be able to include conditions such as limits on the scope of production or provisions for cost-shifting.
- ***Spoliation Safe Harbor.*** Absent exceptional circumstances, a party will not be subject to sanctions for failing to produce electronically-stored information that has been destroyed pursuant to the routine, good faith operations of an information system before the party was on notice of preservation obligations.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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