

# Don't Let the Terabyte You: New E-Discovery Amendments to the Federal Rules of Civil Procedure

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A TERABYTE is unit of measurement for data storage capacity that is roughly equivalent to 50,000 trees made into paper and printed;<sup>1</sup> it is 500 million typewritten pages of plain text;<sup>2</sup> it is enough words that it would take every adult in America speaking at the same time five minutes to say them all,<sup>3</sup> and it is the amount of data that can be stored on only two to three commercially available hard disk drives, or on a single network server.

Electronic discovery is now a fact of life for companies, litigators and courts. The proliferation of computer usage, inexpensive data storage, and developments in communication technology have changed modern discovery practice tremendously over the past several years. Courts around the country have been promulgating *ad hoc* case law, rules, and procedures to deal with electronic discovery.<sup>4</sup> The United States Judicial Conference Committee on Rules of

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Practice and Procedure voiced concern about the effect this patchwork of rules will have on companies and individual litigants:

Developing case law on discovery into electronically stored information under the current rules is not consistent and is necessarily limited to the specific facts involved. Disparate local rules have emerged to fill this gap between the existing discovery rules and practice, and more courts are considering local rules. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop. While such inconsistencies are particularly confusing and debilitating to large public and private organizations, the uncertainty, expense, delays, and burdens of such discovery also affect small organizations and even individual litigants.<sup>5</sup>

To address the gap between the current Federal Rules of Civil Procedure and modern discovery practice, the Judicial Conference proposed amendments to Federal Rules of Civil Procedure 16, 26, 33, 34, 37, 45, and Form 35. The United States Supreme Court approved the amendments

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<sup>1</sup> <http://www.sims.berkeley.edu/research/projects/how-much-info/datapowers.html> (last visited August 21, 2006).

<sup>2</sup> See Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23 (Sept. 2005) <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

<sup>3</sup> [http://searchstorage.techtarget.com/ateQuestionNResponse/0,289625,sid5\\_cid446744\\_tax286190,00.html](http://searchstorage.techtarget.com/ateQuestionNResponse/0,289625,sid5_cid446744_tax286190,00.html) (last visited August 21, 2006).

<sup>4</sup> The federal district courts in Arkansas, Delaware, Kansas, New Jersey, Pennsylvania, and Wyoming have already established local rules or other requirements that obligate parties to address e-discovery issues. The state courts in Maryland, Mississippi, New Jersey, New York, and Texas also have rules requiring early disclosure of electronically stored information. Groups including the Conference of Chief Justices and the National Conference of Commissioners on Uniform Laws are making strides at creating some uniformity of rules at the state court level.

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<sup>5</sup> Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23 (Sept. 2005) <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

and, absent unexpected congressional intervention, the changes will take effect on December 1, 2006.<sup>6</sup> Although the amendments are still a few months away, courts have already started looking to the proposed rules for guidance.<sup>7</sup>

Perhaps the most significant change effected by the new amendments will be the imposition of obligations on the parties to address issues relating to the discovery of electronic information very early in litigation. Meeting those obligations and the other requirements set forth in the new amendments will call for some new and creative approaches to discovery. Staying ahead of the terabytes of information that are accumulating in companies' computer systems and managing that information for discovery will require a great deal of cooperation and communication between companies and their counsel. Indeed, there is already a growing expectation by the judiciary that counsel will be familiar with their client's electronic information systems.

### Brief Summary of the Amendments

The proposed rules do not dramatically change e-discovery practices that have developed over the years in many jurisdictions. The proposed rules will specifically empower courts to adopt the

<sup>6</sup> Copies of the proposed rules are available at [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Note\\_s.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Note_s.pdf) (last visited August 21, 2006). For a discussion of the evolution and basis of the amendments, see generally Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 13 (2006); Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171 (2006).

<sup>7</sup> See, e.g., *Turner v. Resort Condos. Int'l, LLC.*, 2006 U.S. Dist. LEXIS 48561 (D. Ind. July 13, 2006) (Rule 37 (f)); *Williams v. Sprint/United Mgmt. Co.*, 2006 U.S. Dist. LEXIS 47853 (D. Kan. July 1, 2006) (Rule 26(f)); *Diepenhorst v. City of Battle Creek*, 2006 U.S. Dist. LEXIS 48551 (D. Mich. June 30, 2006) (Rule 34); *Phoenix Four, Inc. v. Strategic Res. Corp.*, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 23, 2006) (Rule 26); In re: *Priceline.com Inc. Sec. Litig.*, 233 F.R.D. 88, 91 (D. Conn. 2005).

parties' agreements regarding e-discovery into pretrial case management and scheduling orders. The new rules will allow a requesting party to test or sample electronically stored information and specify the format in which it wants electronic information produced. The rules also establish a two-tiered process for production whereby easily obtained information can be produced first, and less accessible data can be produced later, if necessary. The new rules envision a safe harbor from sanctions for the loss of electronically stored information, provided the loss is occasioned by the good-faith, routine operation of computer equipment. Finally, the rules introduce formal procedures regarding the inadvertent production of privileged or protected documents or electronic information. Many of the proposed amendments simply conform the rules to practices that have developed by courts and practitioners over the past several years.

### New Terminology

The proposed rules recognize that electronic information can not always be neatly categorized under the current terminology: "documents" and "data compilations." For instance, relational databases are not simply documents, and they are more than just data compilations. Similarly, multimedia files such as video or sound files do not fit the traditional definition of "documents." Accordingly, the phrase "electronically stored information" is introduced to describe discoverable information that is recorded or stored on any electronic medium.

Federal Rule of Civil Procedure 34 lists examples of "documents" and "electronically stored information," and it has been updated to include:

writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which

information can be obtained translated, if necessary, by the respondent into reasonably usable form.<sup>8</sup>

The term “phonorecords” has been eliminated from the list, and the terms “sound recordings,” “images,” and “data” have been added. It is important to point out that some of the new rules treat electronically stored information as separate and distinct from documents. Therefore, in order to avoid ambiguity, definitions in boilerplate document requests and interrogatories may need to be updated to address this distinction and to include the new terms to avoid ambiguity.

### **Early Attention to Electronic Discovery**

The proposed amendments to Federal Rules of Civil Procedure 16, 26(a), and 26(f) seek to impose obligations on the parties and the court to address electronic discovery early in the litigation process. Under the new Federal Rule of Civil Procedure Rule 16(b)(5), courts will be authorized to include in scheduling orders “provisions for disclosure of electronically stored information.” Courts will also have the discretion to enter into scheduling and case management orders “any agreement the parties reach for asserting claims of privilege or protections after production.” Although nothing in the old rules prevented a court from entering such an order, the new rules increase awareness of the court’s ability to address e-discovery early in the case.

Under the proposed Rule 26, parties will be required to disclose “a copy of, or a description by category and location of . . . electronically stored information” as part of their initial disclosures. Four new topics will be added to the list of issues that parties are expected to discuss at a pre-trial conference: (i) the preservation of discoverable evidence; (ii) issues relating to

the disclosure or discovery of electronically stored information; (iii) the form or forms in which electronically stored information will be produced; (iv) and issues regarding privilege and work product protections. For the reasons discussed below, counsel and their clients would be well advised to discuss these issues in advance of the Rule 26(f) conference. It might also be helpful to have a member of the client’s information system personnel either on call or present at the conference.

### **Preservation of Evidence**

While the amendment to Federal Rule of Civil Procedure 26 that requires parties to discuss preservation of discoverable evidence applies to both hard-copy and electronically stored information, it was likely proposed due to the nature of computer-based information. Lawyers know that they must preserve relevant documents, but the simple act of turning on a computer can cause data to be modified, deleted, and overwritten. It is important, therefore, to focus early in the litigation on the balance between the parties’ business needs of using computers and the need to preserve relevant information. Blanket preservation is probably not required, but the parties should seek to set in place reasonable steps to achieve these competing goals.

Early agreements regarding preservation of evidence may prove to be very important later in the litigation. For instance, changes to Federal Rule of Civil Procedure 37 allow for a safe harbor from sanctions for the loss of data resulting from a party’s “routine, good-faith operation of an electronic information system.” In the event that data is not preserved, it is likely that a party’s compliance or non-compliance with any preservation agreement reached by the parties at the 26(f) conference will be considered by a court that is asked to consider sanctions.

Even before the Rule 26 conference, companies can do a great deal to protect themselves from preservation problems.

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<sup>8</sup> FED. R. CIV. P. 34.

The United States Supreme Court recently recognized that “document retention policies’ which are created in part to keep certain information from getting into the hands of others . . . are common in business. . . . [i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”<sup>9</sup> However, when litigation is reasonably anticipated, the document retention/destruction policy must be suspended, and reasonable steps must be taken to preserve and collect relevant information.<sup>10</sup> Counsel should be prepared to explain and defend the reasonableness of their clients’ document retention policies and the scope of any litigation hold. If appropriate, consider using Federal Rule of Civil Procedure 26(f) as a forum for discussion about whether it is possible to modify or relax the litigation hold.

### **Discovery of Electronically Stored Information**

As described more fully below, the amendments to Federal Rule of Civil Procedure 26 allow for a two-tiered process for producing electronically stored information. The proposed rules will permit a party to produce information that is reasonably accessible, and then address whether there is relevant information that is on media that is not reasonably accessible. Thus, it will be important for attorneys to know, before the conference and before a discovery plan is submitted to the court, whether any of the electronically stored information that was described by category and location in the party’s initial disclosures is on the sources that will be unreasonably costly or burdensome to access. If it appears

that two-tiered discovery is likely, it will be important to build in sufficient time to conduct the second tier discovery.

### **Form of Production of Electronically Stored Information**

Early discussion and agreement regarding the form in which electronically stored information will be produced is important due to the changes in Federal Rule of Civil Procedure 34 that allow the requesting party to choose the form in which electronically stored information will be produced. Again, counsel and their clients should confer prior to the conference so that counsel is familiar with the clients’ data systems so as to avoid entering into agreements that will tax or exceed the capabilities of the information systems or the information technology personnel employed by the client and the attorneys.

### **Privilege and Work Product**

Finally, the proposed amendment to Rule 26(f) will require parties to discuss issues relating to claims of privilege and work product protections. Like the requirement to discuss preservation of evidence, the requirement to discuss privilege and protection issues is not limited to electronically stored information, but it was likely proposed due to the fact that the volume of information that is involved in many e-discovery productions causes traditional privilege reviews and logs to be extraordinarily costly and time-consuming. Courts and parties have been becoming more innovative in developing ways to minimize the cost and effort of privilege reviews. For instance, the parties might agree to “quick peeks” where a party produces documents under an agreement that no privilege or protections are waived. The requesting party reviews the produced documents and designates only those documents that it wants. The producing party then reviews only the designated documents for privilege.

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<sup>9</sup> Arthur Andersen LLP v. United States, 125 S. Ct. 2129, 2135 (2005) (citation omitted).

<sup>10</sup> Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001); Broccoli v. Echostar Comm. Corp., 229 F.R.D. 506 (D. Md. 2005); Zubulake v. UBS Warburg LLC, 220 F.R.D. 216-217 (S.D.N.Y. 2003).

Clawback agreements are also becoming more prevalent.<sup>11</sup> Under a clawback agreement, the parties agree that documents will be produced without any intent to waive privilege or other protections. If a privileged or protected document is inadvertently produced, the producing party informs the receiving party, who is obliged to return the document and not use it in the litigation. It is a good practice to get some kind of agreement early on about privilege issues and present it to the court for incorporation into a case-management order.

Traditional privilege logs for large electronic document productions can run into the thousands of pages. If it appears that logging every privileged or protected document will result in a costly and burdensome exercise, the parties should consider agreeing to a privilege log that lists categories of withheld documents rather than each and every withheld document.<sup>12</sup> In the event that the requesting party wants a particular category of documents, then a document-by-document review can take place.

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<sup>11</sup> A clawback or “nonwaiver agreement” can “protect responding parties from the most dire consequences of inadvertent waiver by allowing them to ‘take back’ inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.” MANUAL FOR COMPLEX LITIGATION, FOURTH §11.446; *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (“Indeed, many parties to document-intensive litigation enter into so-called “claw-back” agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents.”); *but see* *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005) (“Absent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule[s]”).

<sup>12</sup> See The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* at 20 (July 2005), available at <http://www.thosedonaconference.org>.

## Requests for Production: Inspections and Sampling

Federal Rule of Civil Procedure 34 has allowed parties to “test, or sample any tangible things” since it was amended in 1970. The rule is ambiguous, however, as to whether a party could sample or test documents. Proposed Rule 34(a) makes clear that a party may specifically request tests or samples of documents or electronically stored information. According to the Committee Note, the ability to request testing and sampling is not meant to create a routine right of direct access to a party’s electronic information systems.<sup>13</sup>

It is not likely that testing and sampling data will be a very effective tool for discovery. A party seeking to sample or test another party’s data will normally be unfamiliar with the responding computer systems and recordkeeping. Testing and sampling can also be disruptive to the responding party’s day-to-day business and without strict protocols might encroach on privileged information, trade secrets, and private employee information.<sup>14</sup> A party can raise any issues relating to the burden or intrusiveness of a request to test or sample data or documents under Federal Rules of Civil Procedure 26(b)(2) and 26(c). The Committee Note advises that courts should protect parties from “undue intrusiveness” that might arise from sampling or testing.

## Form of Production

The amendments to Federal Rule of Civil Procedure 34(b) will allow a requesting party to specify the “form or forms in which

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<sup>13</sup> See *In re: Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) (vacating order permitting direct access to defendant’s computer systems).

<sup>14</sup> See MANUAL FOR COMPLEX LITIGATION, FOURTH §11.446 (“Allowing requesting parties access to the responding parties’ computer systems to conduct their own searches . . . would compromise legally recognized privileges, trade secrets, and often the personal privacy of employees and customers.”).

electronically stored information is to be produced.” The producing party can object to the requested form, but must specify the form or forms it intends to use. If the requesting party objects to the form specified by the producing party, it may move for an order under Federal Rule of Civil Procedure 37(a). As noted above, the parties can avoid court intervention by agreeing to the form of production early in the litigation.

Production in a searchable imaged format, such as Tagged Image File Format (TIFF) or Portable Document Format (PDF), will be sufficient in most instances. Producing parties will likely object to any requests for production in “native” format (i.e. copies of files in the form in which it resides on the computer system). Producing in native format presents a multitude of problems including an inability to redact and bates-stamp. Native files can be manipulated, overwritten, or deleted (either accidentally or intentionally) so that the file produced may not contain the same information as the file that is used later in the litigation or at trial. Additionally, the receiving party may not have the software needed to view the information in a coherent form.<sup>15</sup>

In the event that a request does not specify a form of production, the producing party “must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonable usable . . . .”<sup>16</sup> A producing party who unilaterally decides to produce documents in a certain format, however, runs the risk of having to produce the documents again in a different format if the requesting party successfully objects that the production is not reasonably usable.

It could be argued that the phrase “reasonably usable” would permit a party to

produce hard copies of electronically stored information, since paper documents have always been deemed “reasonably usable.” Or, a party could produce non-searchable PDF or TIFF documents (the electronic equivalent of a paper document). Such reasoning may comply with the letter, but not the spirit, of the law. The sheer volume of most electronic document productions would make it costly and very cumbersome to produce hard copies of the electronically stored information. Moreover, if the information is kept in the ordinary course of business in a format in which it is electronically searchable, a party should not be allowed to remove the search capability before producing the document.

While proposed Federal Rule of Civil Procedure 34(b)(iii) states that “a party need not produce the same electronically stored information in more than one form,” a party could reasonably request that different types of electronically stored information be produced in different formats. For instance, a party might want e-mail and word processing documents in searchable TIFF format, and voice mail on magnetic audio cassette tape.

## **Two Tiered Process of Production**

Recognizing that some electronically stored information is accessible only at great cost and burden, the amendment to Federal Rule of Civil Procedure 26(b)(2)(B) would allow a party to withhold electronically stored information that it identifies as “not reasonably accessible because of undue burden or cost.” Examples include legacy data (data stored on obsolete or replaced hardware) and disaster recovery back up tapes. If it is possible that information responsive to a document request resides on such sources, the sources should be disclosed in sufficient detail that the requesting party and the court can evaluate the burden of production and the likelihood of finding responsive information on the sources. Moreover, someone from the client’s information

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<sup>15</sup> Under some circumstances, the responding party may need to produce in native format and provide some level of technical support, software, or other reasonable assistance to enable the requesting party to use the information produced.

<sup>16</sup> Proposed Amendments to FED. R. CIV. P. 34(b)(ii).

technology staff should be prepared to justify the decision to withhold production, because upon a motion to compel production, or upon a request for a protective order, the party withholding production has the burden to show that the information is not reasonably accessible.

Even if the showing is made, however, the court may still order discovery if the requesting party can show that the benefit of discovery outweighs the burden and cost imposed by requiring production of the information. In making such a determination, the court must consider the limitations of Federal Rule of Civil Procedure 26(b)(2)(C), and it may consider other appropriate factors such as: (i) the specificity of the discovery request; (ii) the quantity of information available from other and more easily accessed sources; (iii) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (iv) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (v) predictions as to the importance and usefulness of further information; (vi) the importance of the issues at stake in the litigation; and (vii) the parties' resources.

Courts will likely consider shifting costs to the requesting party if seemingly responsive information is contained on a source that is not reasonably accessible. The cost shifting tests set forth in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,<sup>17</sup> and *Zubulake v. UBS Warburg LLC*<sup>18</sup> have become widely accepted. Indeed, a requesting party's willingness to share costs or bear costs may influence a court to order disclosure. Arguing against production, on the other hand, parties should not overlook the additional cost and burden of reviewing for relevance, responsiveness, and privilege information extracted from a source that is not reasonably accessible.

### Privilege and Work Product Issues

Proposed Federal Rule of Civil Procedure 26(b)(5)(B) is added to formalize procedures regarding the inadvertent production of privileged or protected materials. It is not limited to electronically stored information, and it also does not address whether a privilege or protection has been waived by the inadvertent production. Waiver will still be governed by the substantive law of the jurisdiction, any agreements the parties reached at the Rule 26(f) conference, or any agreements incorporated into the court's case management order.<sup>19</sup>

Under proposed Federal Rule of Civil Procedure 26(b)(5)(B), if a party discovers that it has produced privileged or protected material, it must notify the receiving party and assert the basis for the claim of privilege or protection. After notification, the receiving party "must promptly return, sequester, or destroy" the information and may not use or disclose the information until the claim is resolved. The receiving party may present the information under seal to the court for a determination of the claim. If the receiving party disclosed the information before being notified, the party must take reasonable steps to retrieve it. The producing party must preserve the information in its possession until the claim is resolved.

Notice to a receiving party should be in writing and should be as specific as possible in identifying the purportedly privileged or protected information. The notice should also state the basis of the claim in sufficient detail for the receiving party and the court so that the court can understand the basis and make a determination as to whether privilege has been waived. The rule is silent as to when notice must be sent. Thus, the timeliness of the notice will continue to be

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<sup>17</sup> 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

<sup>18</sup> 217 F.R.D. 309 (S.D.N.Y. 2003).

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<sup>19</sup> The Advisory Committee on the Federal Rules of Evidence is currently considering Proposed Federal Rule of Evidence 502 which addresses waiver of attorney work product protection and attorney-client privilege.

governed by the substantive law of the jurisdiction.

### **Safe Harbor from Sanctions**

Electronically stored information is routinely modified, overwritten, and deleted in the regular course of business. Simply turning on a computer will cause data to change. Proposed Federal Rule of Civil Procedure 37(f) creates a safe harbor from sanctions for spoliation if electronic information is lost in the regular course of business. The proposed rule provides that, “[a]bsent 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.”<sup>20</sup>

The “routine, good-faith operation of an electronic information system” applies to both the alteration and overwriting of data that occurs simply because of the inner-workings of the computers, and the way in which computers are programmed, designed, and implemented to meet the party’s technical and business needs. Thus, a party should not be sanctioned for its good faith implementation of a stringent data management policy. Obviously, once a preservation obligation is triggered, the party must suspend or modify the document management policy.

Federal Rule of Civil Procedure 37 only prevents sanctions under the Rules. A court is not precluded from using other sources of authority to impose sanctions. It also does not prevent the court from requiring additional discovery into other sources for the information or additional witnesses who may have knowledge about the information that was lost.

### **Conclusion**

The changes to the Federal Rules of Civil Procedure will very likely occur on

December 1, 2006. Counsel and their clients should begin to become familiar with the anticipated amendments and start to think of innovative and creative ways to manage the terabytes of information that will continue to grow exponentially on companies’ computers.

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<sup>20</sup> Proposed Amendments to FED. R. CIV. P. 37(f).