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SPECIAL
REPORT

MAJOR CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE INCREASE THE EMPHASIS ON DISCOVERY OF ELECTRONICALLY STORED INFORMATION IN U.S. LITIGATION

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I. Introduction

The revolution in electronic data creation, modification and storage has greatly expanded the potential discovery in U.S. litigation of electronically stored information ("ESI"), so-called "e-discovery," while at the same time presenting significant challenges to preserving, finding and producing such information. On December 1, 2006, absent Congressional action to the contrary, the Federal Rules of Civil Procedure, applicable to civil actions in U.S. District Courts, will be amended to more specifically address such discovery.

The changes to the rules are intended to facilitate e-discovery by requiring consideration of e-discovery issues early in litigation, establishing procedures for expediting such discovery, and providing standards for allocating costs. However, given the intensely adversarial nature of U.S. litigation, the changes are likely to substantially increase the burden and cost of litigation in many cases. Moreover, the increased emphasis on e-discovery resulting from the rule changes will be subject to possible discovery abuse, make it more difficult to protect privileged, confidential, and even personal information, and increase the burden and expense for non-parties responding to subpoenas.

This Special Report summarizes the key rule changes that will occur, discusses potential impacts of those rule changes, and provides some recommendations for dealing with them.

II. Overview Of Rule Changes

The amended rules include Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 16, 26, 33, 34, 37 and 45. Because Rules 34 and 26 best exemplify the nature and scope of the rule changes, those two rules are discussed first below, followed by the other rules.

A. Rule 34: Production of Documents, ESI and Things

Rule 34(a) -- "Scope" -- and Rule 34(b) -- "Procedure" -- are amended to:

- provide for inspection, copying, testing or sampling of any designated documents or ESI, including any data or data compilations stored in any medium from which information can be obtained;
- permit a requesting party to specify the form or forms in which ESI is to be produced;
- permit a responding party to object to the requested form or forms for producing ESI and state the form or forms the responding party intends to use (which form or forms must be those in which the ESI is ordinarily maintained or that are reasonably usable); and
- state that a party need not produce the same ESI in more than one form.

The comments of the rules committee that proposed the amendments ("Committee Notes") indicate that (1) the amendments to Rule 34 are intended to confirm that discovery of ESI stands on equal footing with discovery of paper documents, and (2) a request for production of "documents" should ordinarily be understood to encompass ESI. If the parties ultimately do not agree upon the form or forms in which ESI will be produced, they must meet and confer in an effort to resolve the matter before the requesting party files a motion to compel. Moreover, if the responding party ordinarily maintains the ESI in a way that makes it searchable by electronic means, the information should be produced in a form having that same capability.

B. Rule 26: Scope and Forms of Discovery

1. Initial Disclosures and Conference of Parties

Rule 26(a)(1) -- "Initial Disclosures" -- is amended to provide that a party must, without awaiting a discovery request, provide to other parties a copy of, or a description by category and location of, ESI that the disclosing party may use to support its claims or defenses. Rule 26(f) -- "Conference of Parties; Planning for Discovery" -- is amended to provide that parties must, at the conference of the parties required by the existing rules (prior to a Rule 16(b) scheduling conference or order), "discuss any issues relating to preserving discoverable information." Rule 26(f) is further amended to provide that the parties' proposed discovery plan (also required by the existing rules) must indicate the parties' views and proposals concerning:

- any issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced; and

- any issues relating to claims of privilege or "protection as trial preparation material" (i.e., work-product protection), including -- if the parties agree on a procedure to assert such claims after production -- whether to ask the court to include their agreement in an order.

The Committee Notes recognize the need for parties to (1) consider and discuss e-discovery issues early in litigation because of the "volume and dynamic nature of electronically stored information [that] may complicate preservation obligations" (e.g., the obligation due to pending litigation to prevent ESI from being overwritten or otherwise lost), and (2) "pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities" (e.g., to find reasonable ways to preserve ESI without having to suspend critical business activities). In order to carry out the requirements of amended Rule 26(f), the Committee Notes also state that it may be important for the parties to discuss their information systems at the parties' conference and, accordingly, important for counsel to become familiar with those systems before the conference.

2. ESI That is Not Reasonably Accessible

Rule 26(b)(2) -- "Limitations" -- is amended to state that a party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless (1) order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C), and (2) specify conditions for the discovery.

The Committee Notes indicate that "[t]he parties must confer before bringing either motion" (to compel or for a protective order), and that some sampling of information or other discovery may be needed in the context of either motion in order for the requesting party to be able to test the assertion that ESI is not reasonably accessible. The limitations of Rule 26(b)(2)(C) referenced in the rule amendment generally relate to balancing the costs and potential benefits of the discovery in question. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003). The court-ordered conditions for the discovery may include, *e.g.*, limits on the amount, types or sources of information required to be accessed and produced, and/or payment by the requesting party of part or all of the reasonable costs of obtaining the information.

3. Post-Production Privilege And Work-Product Claims

Rule 26(b)(5) -- "Claims of Privilege or Protection of Trial Preparation Materials" -- is amended to provide that, if information is produced in discovery that is subject to a claim of privilege or work-product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being so notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

The Committee Notes reflect that this amendment to Rule 26 is designed to reduce costs and delay of discovery by protecting against waiver of privilege or work-product immunity. However, the rule amendment does not address whether a waiver will be found in a given circumstance, but rather leaves that issue to the courts to decide on a case-by-case basis.

C. Rule 16: Scheduling

Rule 16(b) -- "Scheduling and Planning" -- is amended to provide that a court's scheduling order may include:

- provisions for disclosure or discovery of ESI; and
- any agreements the parties reach for asserting, after production, claims of privilege or work-product protection.

The Committee Notes indicate that Rule 16 was amended "to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation," and "to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection." The changes to Rule 16 dovetail with changes to the other rules in these respects.

D. Rule 33: Written Interrogatories

Rule 33(d) -- "Option to Produce Business Records" -- is amended to provide that, where the answer to an interrogatory may be derived or ascertained from a party's business records in the form of ESI, it is, under appropriate circumstances, a sufficient answer to the interrogatory to specify the ESI from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine the ESI. Appropriate circumstances are where the burden of deriving the answer from the ESI is substantially the same for the requesting party as for the responding party.

The Committee Notes indicate that "reasonable opportunity" may require the responding party to provide some combination of technical support, information on application software, or other assistance so as to enable the requesting party to derive the interrogatory answer from the ESI as readily as the responding party. In some circumstances, this may require a responding party to provide direct access to its electronic information system, which, of course, can be avoided by answering the interrogatory rather than invoking Rule 33(d).

E. Rule 37: Failure to Cooperate in Discovery; Sanctions

New Rule 37(f) -- "Electronically stored information" -- states that, absent exceptional circumstances, a court may not impose sanctions on a party under the civil rules for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.

As indicated in the Committee Notes, new Rule 37(f) "focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use." However, the existence of the requisite good faith may depend upon a party's efforts to prevent loss of information that the party is obligated to preserve because the information is pertinent to pending or reasonably anticipated litigation. Also, new Rule 37(f) does not affect other sources of authority for imposing sanctions and does not prevent a court from ordering a responding party to produce an additional witness for deposition, respond to additional interrogatories, or otherwise provide substitutes or alternatives for some or all of the lost information.

F. Rule 45: Subpoenas

Rule 45 provides procedures for issuing, serving and responding to subpoenas, including subpoenas to persons and companies that are not parties to a litigation. Rule 45 is amended throughout to include the same or similar changes as made to the other rules discussed above, including references to, *e.g*., ESI, the form or forms in which ESI is to be produced, refusal to provide discovery of ESI that is not reasonably accessible, and post-production notification of a claim of privilege or work-product protection. The Committee Notes explain that Rule 45 "is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information."

III. Potential Impacts Of The Rule Changes

Viewed favorably, the concept of e-discovery is not new, and the rule changes are simply designed to facilitate that discovery. However, from our personal experience, and that of various other members of the bar and members of the judiciary as expressed in recent seminars on e-discovery, we expect that the rule changes will nonetheless have a number of significant impacts. Some of the potential impacts are:

- The cost, time and resources necessary for litigation are likely to significantly increase. This is because of the high volume of ESI, the emphasis that will be given to preserving, finding and producing ESI, and the attention that will be needed to continue normal business operations while nonetheless preserving ESI, particularly transient ESI. *See, e.g., Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 651-52 (D. Kan. 2005) (ordering production of electronic documents with metadata intact).
- Courts are likely to become more strict with respect to the imposition of ESI preservation obligations and sanctions for spoliation of ESI. Many courts have already held companies and their attorneys responsible for preserving and producing ESI, and have sanctioned them for failing to do so. *See, e.g., Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413 at *4-9 (S.D.N.Y. 2006); *Zubulake v. UBS Warburg* LLC, 229 F.R.D. 422, 431-40 (S.D.N.Y. 2004); *Rambus, Inc. v. Infineon Techs. AG,* 220 F.R.D. 264, 281-88 (E.D. Va. 2004).
- The amended rules could be subject to abusive discovery tactics. Because of the inherently burdensome and costly nature of e-discovery, and the ease with which ESI can be lost, an opposing party may use e-discovery to drive up costs or argue intentional spoliation of evidence in the hope of achieving an advantage in litigation or a favorable settlement. Such tactics may be used, for example, by aggressive law firms against parties deemed to be weak or under-prepared or against large corporations perceived not to have "the stomach" for protracted litigation.
- It will be increasingly difficult to review all ESI before it is produced so as to withhold information that is privileged and/or work-product protected. Even if by agreement or court order a party is permitted to claim privilege and/or work-product protection after information is produced, some harm will inevitably result from an opposing party's learning of such information even if it is not directly usable in a given case.
- There will likely be some invasion of "privacy" and "confidentiality" resulting from the increased emphasis on e-discovery. Because of the way in which people use their computers and other digital devices, opposing parties undoubtedly will uncover personal information that may be embarrassing and/or harmful to a person's credibility. Also, opposing parties are likely to uncover large quantities of confidential business information that is not even relevant to a particular litigation.
- There will likely be increased burdens on non-party recipients of subpoenas. As noted above, even though not directly involved in a particular litigation, such recipients nonetheless will be subject to requests for inspection, copying, testing and sampling of ESI.

IV. Recommendations

In view of the rule changes and their potential impacts, we suggest the following:

- To the extent possible, endeavor to avoid U.S. litigation, consistent with your company's or client's business goals. If litigation in the United States is necessary or unavoidable, take steps to deal with

potential e-discovery at the earliest possible time, as discussed below.

- Establish and strictly follow routine business practices designed to minimize cost and burden in the event of litigation. For example, establish and enforce policies restricting the use of business computers, cell phones, PDAs and other digital equipment to business purposes only. Recycle backup tapes so as to achieve your goals of system backup without creating an unnecessarily large quantity of archived information. Develop and follow a strict retention/destruction policy for both paper documents and ESI.
- Take steps before bringing suit to protect your company or client. For example, ensure that your company's or client's pertinent documents and ESI are preserved. Additionally, search those documents and ESI for damaging admissions and statements so that you will not be surprised by them later and will thus be better prepared to deal with them.
- Take steps at the outset of litigation to minimize burden and expense and maximize likelihood of success. In this regard, you and/or your U.S. attorney should:
  - •• Consider retaining an e-discovery technical expert in appropriate cases to help cost-effectively collect your ESI, obtain and search your opponent's ESI, and determine where ESI will be stored and who will have access to it. To the extent possible, prevent such expert from having direct access to your electronic information systems to avoid arguable waiver of privilege.
  - •• Ensure that your company's or client's pertinent documents and ESI are preserved (which may in some cases require at least temporary lockdown of the computers/digital devices of involved persons).
  - •• Notify your opponent of the need to preserve its pertinent documents and ESI.
  - •• Prepare for the parties' Rule 26(f) conference (*e.g.*, by knowing your electronic information systems and the form(s) of ESI to request from your opponent), negotiate an optimal Rule 26(f) report (*e.g.*, including agreements with respect to discovery of ESI, handling of privilege and confidentiality issues, etc.), and seek a favorable court scheduling order.
  - •• Ensure voluntary disclosure of any and all documents and ESI that may be necessary to support your claims and defenses.
  - •• Consider the need for and usefulness of an early deposition of an opposing party to learn about its electronic information systems.
  - •• Serve reasonable, focused requests for documents and ESI (*i.e.*, avoid overly broad requests that may not be well-received by a court and/or may cause an opponent to reciprocate/retaliate).
  - •• Determine the most cost-effective ways to respond to requests for documents and ESI. In this regard, consider the reasonableness of any objections with respect to discovery of ESI that you believe is not reasonably accessible because of undue burden and cost. Do not under any circumstances permit your opponent to have direct access to your electronic information systems.

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