



**GOLDBERG SEGALLA** <sup>LLP</sup>

## **E-Discovery Update**

By [Neil A. Goldberg](#) and [John J. Jablonski](#)

### **New Electronic Discovery Amendments to the Federal Rules of Civil Procedure Took Effect on December 1, 2006**

Without much fanfare, a series of amendments to the Federal Rules of Civil Procedure became effective on December 1, 2006. The Associated Press (“AP”) reported that the new rules will “require U.S. companies to keep better track of their employees’ e-mails, instant messages and other electronic documents in the event the companies are sued...” *New E-Discovery Rules Benefit Some Firms*, AP, Rugaber, December 1, 2006. The AP article reported that the “new rules make it more important for companies to know what electronic information they have and where, especially because of a provision that requires lawyers to provide information much earlier in a lawsuit than before.” E-discovery vendors, the AP reported, “raked in approximately \$1.6 billion in 2006 [and] that figure could double in 2007.”

The report is accurate. The changes are significant. Under the new rules, opposing counsel and the court must be supplied with very specific information on how a company creates, uses, stores, preserves, and destroys electronic information within 120 days of a lawsuit being filed. Lawyers must know the answers to these questions to avoid violating the newly enacted rules. Judges and commentators have been warning that lawyers may need to bring an information technology (“IT”) person into court to discuss the architecture and function of a company’s computer system. This may include hiring an IT expert, if a company does not have someone who can speak knowledgeably with the court and opposing counsel about a company’s own computer system architecture.

Even for small companies, the amount of information stored by a few computers and a basic network can be staggering. The costs to preserve, collect, review and disclose this information can be unbelievably expensive. Current case law includes numerous accounts of companies and lawyers that were sanctioned for failing to properly handle preservation and disclosure of electronically stored information. A cottage industry of over 5,000 vendors has grown to meet the ever increasing e-discovery demands placed on litigants.

We first advised our clients and friends of the pending amendments in our [Legal Update, Spring and Summer 2006](#), when the Supreme Court of the United States first proposed the new rules. There has been an increased interest in e-discovery now that the changes have been enacted. In response, we are providing our clients and friends with this *E-Discovery Update* to review the new rules.

Partner [John Jablonski](#) recently spoke on [E-discovery Pitfalls: How To Adapt Your Practice To The New Rules](#) as part of a national panel of experts. The panel was unanimous in its observation that each company *must* analyze and understand its own electronic landscape, even though it has never been involved in disclosing electronically stored information in a lawsuit before. [David Osterman](#), the managing partner of the firm's Princeton, New Jersey office, recently authored a chapter on *E-Discovery*, published in DRI's most recent [Trial Tactics Defense Litigation Manual](#). Mr. Osterman advises clients to be proactive in terms of recognizing and understanding how potential evidence is created, maintained, and in some cases, destroyed in their routine, day-to-day operations.

While the new amendments do *not* modify any substantive law, they front load the analysis needed to comply with the rules. Litigants and counsel remain charged with the duty to preserve documents that are reasonably relevant to threatened or pending litigation. This duty attaches when a litigant knows or reasonably should know of potential litigation. Despite the large volume of information, principles of privilege waiver remain unchanged. The amendments change only procedures with respect to these areas of law.

The changes in procedure are significant and affect every litigant that has a computer or other electronic device capable of storing electronic information. The below discussion is not intended as legal advice and is provided as an overview for the convenience of our friends and clients. If you would like a copy of the newly enacted rules, please e-mail your request to John Jablonski at [jjablonski@goldbergsegalla.com](mailto:jjablonski@goldbergsegalla.com). A short concise overview of the amendments authored by John Jablonski was published by DRI's online magazine *The Voice* on August 30, 2006 and is available by clicking on the title: [New Electronic Discovery Rules Proposed by the Supreme Court](#).

## **Initial Disclosures and the Discovery Conference**

### *RULE 26(a)*

#### **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

##### **(a) Required Disclosures; Methods to Discover Additional Matter.**

##### **(1) Initial Disclosures.**

**(B)** a copy of, or a description by category and location of, all documents, **electronically stored information**, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment[.]

This amendment requires the disclosure or identification of the location of *all* electronically stored information ("ESI") that a party may use to support its case. This is a significant change

and may require the collection of all relevant ESI prior to the initiation of a lawsuit or immediately after a lawsuit is initiated. The Committee Note sets forth that this rule was amended to parallel Rule 34(a) by replacing the term “data compilations” with the new term “electronically stored information.” This change, however, significantly expands the scope of the initial disclosures beyond mere “data compilations” (the old requirement). The change in language is subtle and often overlooked, although creating an expanded requirement to identify or produce electronically stored information.

*RULE 26(f)*

**Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

**(f) Conference of Parties; Planning for Discovery.** [T]he parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), **to discuss any issues relating to preserving discoverable information**, and to develop a proposed discovery plan that indicates the parties’ views and proposals concerning:

\* \* \* \*

**(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;**

**(4) any issues relating to claims of privilege or of protection as trial-preparation material, 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 timing of the Rule 26(f) “meet and confer” has not changed. Its importance, however, has been greatly increased in cases involving electronically stored information.

An important concept incorporated into the new rules is the expectation that parties and their counsel will be conversant in the complete computer architecture of a party’s electronic information system – being able to identify both relevant and non-relevant parts of the system and identify information that is both accessible and not reasonably accessible. Judges and commentators have warned that failure of parties and their counsel to understand and articulate the architecture of a party’s electronic storage system could result in the ordering of additional

“meet and confers”, hearings to determine system architecture, judicially assigned IT experts or worse – should the court lose patience with a party’s ignorance of its electronic storage system.

The Committee Note makes it clear that 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. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party’s computer system may be helpful.” Given the time constraints, it may be difficult for a party to adequately apprise its counsel of the intricacies of its computer system. Pre-litigation planning will likely be required to meet the requirements of this rule.

Another important change that has ramifications beyond electronic discovery is the new requirement that the parties “discuss any issues relating to *preserving* discoverable information” at the Rule 26(f) conference. This new requirement applies to all cases – not just those involving electronic discovery.

The Committee Note specifically acknowledges that the “volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information.” The Committee Note further advises that the parties should balance the need to preserve relevant information against the need to “continue routine operations critical to ongoing activities.” The Committee Note emphasizes the need to preserve potentially relevant evidence, but also recognizes that “[c]omplete or broad cessation of a party’s routine computer operations could paralyze the party’s activities.”

The goal of the new rule is to encourage the parties to agree on “reasonable preservation steps.” The requirement to discuss preservation “does not imply that the courts should routinely enter preservation orders.”

Rule 26(f)(3) is a new rule designed to be consistent with Rule 34(b), which is amended to address the form or forms in which electronically stored information should be produced. Rule 26(f)(4) requires the parties to discuss any issues relating to claims of privilege or work product materials. The rule attempts to facilitate discovery by lowering the burden and expense of reviewing thousands of electronically stored documents, such as e-mail, for claims of privilege or work product. Reviewing for privilege adds significant delay and expense to the production of electronically stored information. The rule is designed to encourage the parties to agree on *after* production procedures for dealing with inadvertent disclosure of privileged or work product materials. The rule allows the court to enter an order that includes any such agreements. These types of agreements are known as “claw back” agreements. The Committee Note also suggests the use of agreements permitting the disclosure of certain materials without waiving claims of privilege – sometimes known as a “quick peek.”

## The Scheduling Order

### *RULE 16*

#### **Rule 16. Pretrial Conferences; Scheduling; Management**

##### **(b) Scheduling and Planning.**

The scheduling order also may include...

##### **(5) provisions for disclosure or discovery of electronically stored information;**

##### **(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production[.]**

Rule 16(b)(5) 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. The new rule was created to facilitate a dialogue early in an effort to allow the court to identify and resolve disputes *before* costly and time-consuming production occurs.

Rule 16(b)(6) addresses agreements of the parties that are designed to avoid inadvertent waiver of privilege and to eliminate or reduce some of the costs and delays created by the need to preserve privilege or work product protection during discovery. The new rule permits the court to codify in its scheduling order the previously discussed “quick peek” and “claw back” agreements. The Committee Note, however, makes it clear that the amendment does not permit the court to codify inadvertent waiver provisions into the scheduling order without the agreement of the parties.

Although the goal of reducing risks associated with the inadvertent disclosure of privileged information is commendable, we caution against relying on such agreements. A scheduling order incorporating “claw back” provisions will not change substantive common law relating to privilege waiver issues or the effect that the inadvertent disclosure of privileged material may have in other jurisdictions. Also, such agreements may not alter ethical obligations relating to the receipt of inadvertently disclosed privileged information.

## **Two-Tiered Production**

### *RULE 26(b)(2)(B)*

#### **Rule 26(b)(2)(B):**

**A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On**

**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 order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)C). The court may specify conditions for the discovery.**

This rule is designed to address forms of computer data that can be searched or restored only with substantial burden and cost. In a particular case, the burden and cost may render the information on such sources not reasonably accessible. Examples include, but are not limited to, disaster recovery systems, legacy data that remains from obsolete systems and data that exists, but can only be retrieved using forensic recovery methods.

The new rule adopts what has frequently been referred to as a “two-tier” system. Rule 26(b)(2)(B) authorizes a party to respond to a discovery request by identifying sources of electronically stored information that are not reasonably accessible because of “undue burden or cost.” Accordingly, in response to discovery demands, litigants and their counsel must be prepared to describe which portions of a litigant’s computer system are “not reasonably accessible.” This may require investigation and analysis far beyond efforts that may have been made under the old rules. As the Committee Note cautions, keep in mind that a “party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common law or statutory duties to preserve evidence.”

If the requesting party nonetheless seeks this discovery, the responding party has the burden to show that the sources are not “reasonably accessible.” Even if that showing is made, the court may order discovery if the requesting party shows good cause. The Committee Note explains that “[a]ppropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsible information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.”

Rule 26(b)(2)(B) also permits the court to set conditions for the discovery of electronically stored information that is not reasonably accessible. The Committee Note explains that these conditions “may take the form of limits on the amount, type, or sources of information required to be accessed and produced.” The conditions may also include cost-shifting to the requesting party and “the producing party’s burden in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.”

## Asserting Privilege and Work Product After Production

### *RULE 26(b)(5)(B)*

#### **Rule 26(b)(5)(B):**

**Information Produced.** If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being 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.

This new rule applies to all information, not just the inadvertent disclosure of electronically stored information that is subject to a claim of privilege or protection as trial preparation material. The rule does not address the substantive question of whether the production of privileged documents waives the privilege.

The rule was designed, however, to specifically address the increased risk of inadvertent disclosure when thousands of files containing e-mails and other electronically stored information are disclosed. The risk of waiver can increase substantially because of the sheer volume of information that must be reviewed. Reviewing a large document production for privilege significantly increases the cost and delay of production. Even after careful review, the production of some privileged material is a substantial risk. Acknowledging this unavoidable risk, the new Rule 26(b)(5) creates a procedure for asserting privilege and work product claims after inadvertent production. The Committee Note makes it clear that an agreement of the parties, or an order of the court, ordinarily controls if the parties adopt procedures different from the rule.

## **Interrogatories**

### *RULE 33(d)*

#### **Rule 33. Interrogatories to Parties**

**(d) Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, **including electronically stored information**, of the party upon whom the interrogatory has been served[.]

This amendment permits a responding party to provide access to “electronically stored information” as a response to an interrogatory request if the burden of deriving the answer will be substantially the same for either party. The Committee Note explains that a party invoking the rule “may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.” The Committee Note suggests that “the responding party’s need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d).”

## **Requests for Production of Documents**

### *RULE 34(a)*

#### **Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes**

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor’s behalf, to inspect, copy, **test, or sample** any designated documents or **electronically stored information** – including 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, or to inspect, copy, test, or sample **any designated** tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

The Committee Note explains that not all forms of electronically stored information fit within the traditional concept of a “document.” Rule 34(a) is amended to confirm that discovery of electronically stored information “stands on equal footing with discovery of paper documents.” Nonetheless, the Committee Note explains that a Rule 34 request for production of “documents” should be understood to include electronically stored information “unless discovery in the action has clearly distinguished between documents and electronically stored information.” The rule requires the producing party, if necessary, to translate electronically stored information into a reasonably usable form. The amendment also allows the parties to “test or sample” documents or electronically stored information. The rule, however, is not intended to create a routine right of direct access to the responding party’s computer system, although such access might be justified in some cases. The Committee Note instructs courts to “guard against undue intrusiveness resulting from inspecting or testing such systems.”

## Responding to Document Requests

### *RULE 34(b)*

#### **Rule 34:**

**(b) Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. **The request may specify the form or forms in which electronically stored information is to be produced.** The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, **including an objection to the requested form or forms for producing electronically stored information**, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. **If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use[;]**

Unless the parties otherwise agree, or the court otherwise orders:

\* \* \* \*

**(ii) 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; and**

**(iii) a party need not produce the same electronically stored information in more than one form.**

Rule 34(b) is amended to permit the requesting party to designate the form or forms in which it wants electronically stored information produced. The rule, however, does not require the requesting party to choose a form or forms of production. In a written response to the production request, the responding party must state the form it intends to use for production if the requesting party has not specified its preference or if the responding party objects to a form or forms that the requesting party has specified.

If the form of production is not specified by agreement or court order, the responding party must produce electronically stored information either (1) in a form or forms in which the

information is ordinarily maintained – native format, or (2) in a form or forms that are “reasonably usable.” The rule does not require a party to produce electronically stored information in native format, as long as it is produced in a “reasonably usable form.”

The Committee Note, however, explains that the option to produce in a reasonably usable form does not allow a responding party “to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.”

Lastly, a party is not required to produce multiple forms of the same electronically stored information. In other words, a party should not be required to produce a paper and electronic copy of the same document.

### **Safe Harbor From Sanctions**

#### *RULE 37(f)*

#### **Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions**

**(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.**

Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how the information might relate to litigation. As a result, the ordinary operation of a computer system creates a risk that a party may lose potentially discoverable information without culpable conduct on its part.

The proposed rule provides some limited protection against sanctions when information has been lost as a result of the routine operation of an electronic information system, as long as that operation is in “good faith.” The Committee Note makes it clear that “good faith” means that a party is not permitted to “exploit the routine operation of an information system to thwart discovery operations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.”

The Committee Note also explains that “whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case.” One factor, in this regard, is whether the party reasonably believes that the information is likely to be discoverable and not available from reasonably accessible sources.

The Note explains that “good faith” may involve a party’s implementation of a “litigation hold.” One aspect of litigation hold may require a party to modify or suspend the routine operation of an information system to prevent the loss of information, if that information is subject to a preservation obligation.

The rule, however, does not create a preservation obligation. Rather, the duty to preserve evidence can arise from common law, statutes, regulations, an agreement of the parties, or a court order in the case.

### **Closing Comments**

We hope that you found this overview helpful. The amended rules pose new procedural, logistical and tactical hurdles. We will be happy to discuss the new rules with you and analyze their impact on existing and threatened litigation. As stated earlier, if you would like a complete copy of the Amendments and the Committee Notes, please e-mail your request to John J. Jablonski at [jjablonski@goldbergsegalla.com](mailto:jjablonski@goldbergsegalla.com).

**Goldberg Segalla LLP** is a Best Practices law firm with offices in Philadelphia, Pennsylvania; Buffalo, Syracuse, Albany, Manhattan, Rochester, White Plains, and Long Island, New York; and Princeton, New Jersey. We counsel and represent individuals and businesses in specialized areas of civil litigation, contractual and extra-contractual disputes and regulatory matters before state and federal agencies. Our E-Discovery Team consists of the following attorneys:

[Neil A. Goldberg](#), Partner  
[David S. Osterman](#), Partner  
[John J. Jablonski](#), Partner

#### **PHILADELPHIA**

United Plaza, 30 South 17th Street, Suite 1800, Philadelphia, Pennsylvania 19103-4005  
Telephone: 215.284.4501 Fax: 215.893.8719

#### **BUFFALO**

665 Main Street / Suite 400, Buffalo, New York 14203-1425  
Telephone: 716.566.5400 Fax: 716.566.5401

#### **SYRACUSE**

5789 Widewaters Parkway, Syracuse, New York 13214-1855  
Telephone: 315.413.5400 Fax: 315.413.5401

#### **ALBANY**

8 Southwoods Blvd. / Suite 300, Albany, New York 12211-2364  
Telephone: 518.463.5400 Fax: 518.463.5420

**MANHATTAN**

111 John Street / Suite 800, New York, New York 10038-3002  
Telephone: 646.253.5400 Fax: 646.253.5500

**ROCHESTER**

2 State Street / Suite 805, Rochester, New York 14614-1342  
Telephone: 585.295.5400 Fax: 585.295.8300

**WHITE PLAINS**

170 Hamilton Avenue / Suite 203, White Plains, New York 10601-1717  
Telephone: 914.798.5400 Fax: 914.798.5401

**LONG ISLAND**

333 Route 111, Smithtown, New York 11787-4759  
Telephone: 631.360.2600 Fax: 631.360.3434

**PRINCETON**

301 Carnegie Center Boulevard, Suite 101, Princeton, New Jersey 08540-6227  
Telephone: 609.986.1300 Fax: 609.986.1301

**EUROPE**

*We are affiliated with:*

*Studio Legale Casini, C.so di Porta Romana, 63 20121 Milano, Italy*  
Telephone: 011-39-02-54113609 Fax: 011-39-02-54116314

Via M. Coppino, 273, 55049 Viareggio, Italy  
Telephone: 011-39-05-84388797 Fax: 011-39-05-84388798