Proposed Federal Rules Address Electronic Discovery Issues

Electronic discovery often disproportionately burdens corporations and businesses whose use of technology is far greater and more pervasive than that of just one individual, one family, or even another business. Though it may not be extinguished, this prejudice may be limited in December 2006, when the proposed rules governing the discovery of electronic information are currently scheduled to be adopted, subject to further revisions. The proposed rules, for example, provide that a responding party need only produce "reasonably accessible" electronic information, absent a good-cause showing. While December 2006 is a year away, the proposed rules and commentary provide useful guidelines on how to handle electronic discovery issues today. This article provides a brief summary and commentary on the proposed rules and issues addressed by the drafters.

I. Recent Approval Indicates Rules Are Nearing Final Form

In August 2004, the federal judiciary published draft rules to address growing concern on how to manage the discovery of digital data. On that date, the Standing Committee on Rules of Practice and Procedure (a.k.a. "The Standing Committee"), the entity charged with developing and promulgating Federal Rules of Civil Procedure, approved for public comment proposed amendments to the Federal Rules of Civil Procedure that specifically address electronic discovery. The Civil Rules Advisory Committee (a.k.a "The Advisory Committee"), who reports to the Standing Committee, held three public hearings in 2005- in San Francisco, Dallas and Washington, D.C.- and submitted revised amendments to the Standing Committee. On June 16, 2005, the Standing Committee approved the amendments addressing the discovery of electronically stored information.

In July 2005, the Standing Committee submitted its proposed rule changes to the U.S. Judicial Conference. The U.S. Judicial Conference approved the amendments in September 2005, and transmitted them promptly to the United States Supreme Court. The Supreme Court has the authority to prescribe the federal rules, if they are not altered by Congress, subject to a statutory waiting period. 28 U.S.C. §§ 2072, 2075.

II. Proposed Rules

The proposed rules address such issues as initial disclosure of electronic information, treatment of information that is not readily accessible, inadvertent disclosure of privileged or trial-preparation protected documents, and consequences of loss or destruction of electronic data. *See* the complete rule proposals and the Advisory Committee's full commentary and analysis. Report of the Civil Rules Advisory Committee ("Rule Proposals"), (May 27, 2005); www.uscourts.gov/rules/reports.htm.

1. Parties required to discuss electronic discovery issues sooner than later

The proposed changes would require the parties to discuss during the Rule 26(f) discovery-planning conference any issues relating to preserving discoverable information:

> (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced:
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> (4) any issues relating to claims of privilege or 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.
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> Rule Proposals, p. 51-54.

The changes would require the parties to discuss, negotiate and hopefully cooperate regarding their expectations for electronic discovery on a case by case basis. Where cooperation is not possible, early judicial intervention would set expectations for the parties going forward.

The amendments also propose corresponding changes to FRCP 26(a)(1) and FRCP 16. Rule 26(a)(1)(B) would be amended to substitute the words "electronically stored information" for the words "data compilations," to assure that, consistent with amendments to Rule 34, electronic information is subject to discovery. Rule Proposals, p. 49-50. Rule 16 would be amended to require pre-discovery discussion and resolution of electronic discovery and related inadvertent disclosure issues in the pre-trial order. The proposed rule provides that the scheduling order may also include "provisions for disclosure or discovery of electronically stored information;" and "any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production." *Id.*, p. 43-45. Changes have also been proposed to the Form 35 report of the planning meeting to reflect the changes addressed in Rule 26(f).

The Rule Proposals and Committee Notes (hereinafter "Notes") contained therein provide minimal guidance with respect to what electronic discovery topics the parties should discuss. While not adopted by the Standing Committee, the Discovery Subcommittee's initial draft proposed discussions on the following topics:

> whether any party expects to [provide initial disclosure of or] seek discovery of data from electronic media, including computers and, if so, indicate the parties' agreements or proposals concerning:
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> - the steps needed to segregate and preserve from alteration or destruction any such data;
> - the anticipated scope of discovery of [e-mail messages] [data from electronic media], and the search protocol for such data, including treatment of inadvertent production of privileged materials;
> - the format, media, and procedures for the production of such data;
> - whether restoration of deleted data or examination of back-up media may be sought, and [which party should bear] [the appropriate allocation of] the resulting cost];
> - any other issue concerning the [disclosure or] discovery of such data that a party reasonably believes should be addressed in this case.

Rick Marcus, *E-Discovery Rule Discussion Proposals*, September 15, 2003, p. 8-9, fn. 2.

These proposed changes also address the increased risk of inadvertent disclosure of privileged material, which becomes more likely with increased volumes of data produced (*See also, infra,* Section 3). Addressing the risk of inadvertent disclosure early, and again, establishes the parties' expectations before the problem arises.

2. Discovery of "reasonably accessible" data

Under the proposed amendments to rule 26(b)(2)(C), the responding party need not initially produce electronically stored data that is not readily accessible because of undue burden or cost. The proposed rules do not define "reasonably accessible" data. The Note, however, suggests that the rule requires a responding party to produce information from sources that may contain responsive information and are not difficult-to-access. "Active data" - information a party

routinely accesses or uses- would ordinarily be "reasonably accessible." Examples of data that may not be readily accessible include "back-up tapes intended for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was 'deleted' but remains in fragmented form, requiring a modern version of forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds of forms of information." Rule Proposals, p. 71. Such information is not "reasonably accessible" if it typically can be located, retrieved, or reviewed only with very substantial effort or expense.

To balance this limitation, the proposed rule permits a court to order production of “inaccessible data” upon a showing of good cause. The rule recognizes that the responding party may wish to resolve the issue by moving for a protective order, or the requesting party may move for a motion to compel. The court may also, however, require the requesting party to bear some or all of the costs for extraordinary retrieval and production efforts.

The proposed amendments are not a shield to ward off any request for data that is time-consuming and costly to restore. A requesting party may move to compel discovery of such information, and the responding party must demonstrate that the information is not reasonably accessible. A party may still be ordered to produce the information, likely subject to terms and conditions, if the requesting party shows good cause.

3. Addressing privilege waiver and trial-preparation protection.

The issues of privilege waiver and trial-preparation protection in electronic discovery are distinct, because there exists such uncertainty over the forms in which electronic data can and should be produced. The question becomes how do I review and cull out privileged documents to protect their confidentiality and privileged status when the data is stored permanently in an electronic medium (i.e. hard drive, CD, or back-up tape)? Also, the sheer amount of data to review provides a greater risk of inadvertent disclosure of privileged documents following a privilege review.

As noted above, the parties must discuss privilege and protection issues in their discovery plan, as directed by FRCP 26, and must advise the court of any agreements pertaining to inadvertent disclosure of privileged or protected trial-preparation material under proposed amendments to FRCP 16. Rule 26(b)(5) takes it one step further and sets up a procedure to handle inadvertent disclosure. Under the proposed rule, when a party produces information without intending to waive a claim of privilege or protection as trial-preparation material, it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The receiving party may present the information to the court under seal for determination by the court. The producing party must comply with Rule 26(b)(5)(B) with regard to the information and preserve it pending a ruling by the court.

Under proposed Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of its claim of privilege within a "reasonable time." The Rule does not prescribe the method of the notice or what encompass a reasonable time.

Importantly, the proposed rule does not address whether privilege or work product protection has been waived or forfeited.

4. Form of production.

Since 1970, Rule 34 has stated that "documents" are "data compilations from which information can be obtained." Courts and parties have managed to operate with this description, as evidenced by the abundant case law holding that the term "documents" includes electronically stored information. The proposed amendments clarify that a requesting party may seek to inspect, copy, test or sample any "designated documents" or "electronically stored information (…stored in any medium)." Rule Proposals, p.118-124. As such, any request for production of documents will include electronically stored information unless the requestor has clearly distinguished between electronically stored information and "documents."

Proposed revisions and additions to Rule 34(b) address the form in which the producing party should produce responsive documents. The proposed changes allow, or alternatively require, the requesting party to designate the form of production in the request itself. The proposed changes also allow the producing party to object to the form requested based on undue burden and expense or irrelevance. As a default rule, under the proposed changes a producing party may produce data in the form in which it is ordinarily created and stored. Additionally, a producing party would only be required to produce data in one form, unless otherwise ordered.

As an explicit application of traditional paper-based discovery concepts, the newly proposed Rule 33(e) would provide that the producing party may produce electronically stored data or documents in lieu of a written interrogatory answer. The Committee Note, however, clarifies that the production of records to respond to an interrogatory when "the burden of deriving or ascertaining the answer" is substantially the same, also applies to electronic discovery. Rule Proposals, p. 107. Unlike traditional paper-based discovery, the Note explains that depending on the circumstances, "the responding party may be required to provide some combination of technical support, information on software application, or other assistance" so that the requesting party can locate the information. *Id.*

5. Preservation, "safe harbor," and sanctions.

The amended Rule 37(f) protects a party from sanctions under the Civil Rules for failing to provide electronically stored information lost because of the routine operation of the party's computer system, as long as that operation is in good faith:

> (f) 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.

This proposal has been nicknamed the "Safe Harbor" provision, because it provides default rules — compliance with which would supposedly avoid sanctions for spoliation. (*See also,* Thomas Y. Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 Def. Couns. J. 417 (Oct. 2003).) This new rule was drafted to address a distinctive feature of

computer systems- the automatic recycling, overwriting, and alteration of electronically stored information. Proposed Rules, p. 146.

The proposed rule limits what requesting parties and courts may reasonably expect from responding parties. For example, no pre-litigation duty to preserve back-up data would attach, unless litigation reasonably could be expected to follow from a given event. Also, the Safe Harbor provision requires culpable conduct in failing to preserve electronically stored data before sanctions could attach. These provisions assure corporations that their reasonable, ordinary procedures suffice to protect them from the cost and burden of perpetual data storage and possible sanctions stemming from a failure to preserve such data.

III. Future of E-Discovery Rules Changes

While these new rules also risk creating new problems in an already confusing area of law, the rules may prevent parties from gaining an unfair advantage over corporate litigants that have neither the time nor the resources to simultaneously run their business while responding to onerous e-discovery.

About the Author

Karen M. R. Weber
LOCKE REYNOLDS LLP
201 North Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961
Phone: (317) 237-3800
Fax: (317) 237-3900
kweber@locke.com

Karen M.R. Weber concentrates her practice on the representation of foreign and domestic clients in automotive and juvenile product litigation. Her practice also extends to toxic exposure and general tort litigation. Ms. Weber represents large corporations and small businesses in both state and federal court.

In addition to being admitted to the Indiana Bar, Ms. Weber is admitted to the West Virginia Bar and the Fourth Circuit Court of Appeals. Ms. Weber is currently a member of the Indianapolis and American Bar Associations, the Defense Trial Counsel of Indiana and the Defense Research Institute. She is a volunteer for the Protective Order Pro Bono Project and serves on the Steering Committee for Easter Seals Crossroad's Wine Cornucopia.

Ms. Weber has previously served as a presenter at the West Virginia Litigation Seminar Conference at Canaan Valley Resort on the topic of Electronic Discovery.

Ms. Weber received her B.S. with distinction in Environmental Health from Purdue University, West Lafayette, Ind., in 1993, and her J.D. from the University of Dayton School of Law, Dayton, Ohio, in 1997. In law school, she was class president, served as an intern with the United States Environmental Protection Office.