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**Electronic Discovery for Employment Lawyers**

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**The Federal Rules Governing Electronic Discovery**

By

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## **THE FEDERAL RULES GOVERNING ELECTRONIC DISCOVERY<sup>1/</sup>**

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This article summarizes the December 2006 amendments to the Federal Rules of Civil Procedure dealing with discovery of electronically stored information ("ESI") ("e-discovery"), and the September 2008 enactment of Federal Rule of Evidence 502, along with some personal comments and observations.

These rules address five areas: (1) giving early attention to electronic discovery issues; (2) discovery of ESI that is not "reasonably accessible"; (3) privilege issues; (4) application of Rules 33 and 34 to ESI; and (5) a Rule 37 "safe harbor."

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

Rules 16(b)(5)-(6) and 26(f)(3)-(4) require early discussion of e-discovery issues.

Rule 26(f) requires the parties to discuss at their initial planning conference:

(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; . . .

Rule 26(f)(3)-(4). Similar changes to Rule 16 require that these issues be discussed at the initial pretrial conference with the court. While some judges' Rule 16 conference discussion of these issues will be cursory absent disputes or issues raised by the parties, it is safe to say that the judiciary expects counsel to have thoroughly discussed these subjects at the Rule 26(f) conference (and

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<sup>1/</sup> All opinions expressed herein are my own and may change when the issues are presented in a more specific factual context in litigation before me.

thereafter as further issues arise). Counsel should discuss at the Rule 26(f) conference whose electronic files should be searched and what search terms or protocols to use.

Rule 26(f) also requires counsel "to discuss any issues relating to preserving discoverable information." This is the only reference to preservation (as opposed to production) in the Rules.<sup>2/</sup> The Advisory Committee Note stresses the reasons for and importance of the direction to counsel to discuss preservation issues:

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. 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. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. . . . The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over

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<sup>2/</sup> The preservation obligation almost always will begin before litigation commences. The Federal Rules of Civil Procedure, however, only address obligations once litigation has commenced. Many large companies are implementing email archiving and indexing systems, and ESI retention practices, as a general matter, separate and apart from any specific litigation. That preparation should bring down the cost of discovery of ESI when litigation arises.

objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.<sup>3/</sup>

Where the litigation involves not just historical information but ongoing ESI and preservation might bring the client's business to a standstill, counsel may be able to discuss and agree at the Rule 26(f) conference that the client need not preserve certain ongoing ESI.

Rule 26(a)(1)(B) requires production, as part of mandatory initial disclosure, of a copy or description of not only "documents" but now also "electronically stored information." The Advisory Committee Note states: "Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses." If counsel is unable to identify all ESI at the time of the original Rule 26(a)(1) disclosure, supplementation is required thereafter (and should occur as soon as possible).

The Advisory Committee Note to Rule 26(f) emphasizes the importance of counsel becoming familiar with the client's information technology systems:

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 systems may be helpful.

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<sup>3/</sup> For a discussion of the standard for issuance of a preservation order, see Treppel v. Biovail Corp., 233 F.R.D. 363 (S.D.N.Y. 2006) (Francis, M.J.).