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E-Discovery Rules Take Effect in U.S. Courts

By Mary Pat Gallagher

Electronic discovery rules that take effect Friday clarify how federal courts and litigants deal with digital data.

"It's a brave new world," says Jeffrey Greenbaum, one of the instructors at an Institute for Continuing Legal Education seminar on the amendments to the Federal Rules of Civil Procedure.

Among other things, the changes:

• Refer to a new category of "electronically stored information."

• Require parties to address issues involving electronic discovery at the start of the case.

• Provide a framework for resolving disputes about what electronically stored information is produced, the form of production and who pays for it.

• Set up a safe harbor, under some circumstances, when electronic evidence is destroyed.

• Allow retrieval of privileged information that was inadvertently disclosed.

At the heart of the amendments are the revised provisions to Rules 26 and 34, which govern what must be produced and create a two-tiered discovery process.

Rule 34 now explicitly refers to production of "electronically stored information" — a deliberately vague term that covers e-mail, voicemail, text messages and other information on a variety of devices, including cell phones, laptop computers, Blackberries and other existing and yet-to-be-developed technologies.

The rule allows the party requesting electronic discovery to specify the form in which it is to be produced. The possibilities might include paper, some type of electronic format, and, if electronic, whether it is searchable or not, says Greenbaum, of Newark's Sills Cummis Epstein & Gross.

In responding, the other side can object to the requested form. Where no form is specified, the responding party must produce the information in the form in which it is usually maintained or in another reasonably usable form. Only one form need be used, however, and the response must identify that form, giving the requester a chance to object to it.

The two tiers come into play under Rule 26(b)(2) when there is an objection that the requested information is not reasonably accessible because of undue burden or cost, as might be the case, for example, with computer backup tapes.

The requester might start with reasonably accessible stuff and decide whether it needs more, says Greenbaum.

If there is a motion to compel or for a protective order, the party resisting discovery will have to show the information is not reasonably accessible, though the court can order discovery anyway, for "good cause."

Safe Harbor

Probably the most controversial aspect of the new rules is the safe harbor provision of Rule 37(f), which bars sanctions for "failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system," absent "exceptional circumstances."

The provision reflects the reality that many, if not most, computer systems automatically alter, delete and overwrite information as part of the normal course of managing e-mails and other data.

The "good faith" requirement, however, means that even where such a system is in place, a litigant might have to take action to prevent loss of information by a litigation hold or other means. A litigant might also have to show the litigation hold was disseminated to the right people, Greenbaum notes.

The privilege waiver provisions of Rule 26(b)(5) take into account another problem more prone to arise with electronically stored information because it can be so massive and more difficult to review — the greater likelihood that privileged or protected material will inadvertently be turned over.

Under the rule, the party that made the mistake can notify the recipient of it, specifying the basis for the claimed protection. The recipient must return, sequester or destroy the information and any copies and cannot make use of it until the claim is resolved.

The rule covers only the procedure for dealing with privilege waiver, leaving it with the court to decide whether waiver did, in fact, occur.

E-discovery means more attention will have to be paid to records retention and management policies before a lawsuit starts and to placing a litigation hold at the first whiff of legal action.

The parties' initial disclosures under Rule 26 must include a description of all electronically stored information that may be used to support a claim or defense.

During the first meeting, prior to the Rule 16 conference, they must discuss any issues relating to discovery of electronically stored information.

That aspect of the rules should not require a major adjustment for lawyers practicing in the federal court in New Jersey, which adopted local e-discovery rules in October 2003.

Greenbaum says the rules will bring uniform treatment to e-discovery issues, where previously, "we were getting different readings from magistrate judges on what was required in particular cases."

The rules, published for comment in 2004 and approved by the U.S. Supreme Court in April, automatically went into effect Dec. 1 in the absence of action by Congress to reject, modify or defer them.

The state courts already operate under electronic discovery rules, closely modeled on the new federal rules, which took effect on Sept. 1. ■