Six Advantages of the Amended Federal Rules of Civil Procedure
Tips for the Well-Prepared Corporation
Now that the Federal Rules of Civil Procedure, amended to address electronically stored information, are in effect, many law firm and in-house lawyers are scrambling to comply. Many corporations fear that the new rules will cause opposing parties to use discovery as a side issue to leverage settlement, particularly in cases where discovery of electronically stored information would be cost prohibitive. Although this may be true, the reality is that for many corporations the amended rules provide many more advantages than disadvantages.

The purpose for the amendments is to reconcile the need for “just, speedy, and inexpensive” discovery as required by Rule 1 with the fact that corporations are creating and storing electronic information in unprecedented volumes. This capacity to generate and maintain information has, in turn, created new burdens in the discovery process. Among these burdens are 1) the need for corporations to continue their business practices while preserving material relevant for anticipated litigation, and 2) the costs associated with identifying, locating, preserving, reviewing and producing relevant information. A close look at the new rules reveals that a corporation may reduce, or eliminate these burdens if it takes the right steps to prepare.

Advantage Number 1: The Opportunity to Take Stock of Corporate Information Management Systems

Rule 26(a) provides that initial disclosures must describe a party’s electronically stored information. By requiring early attention to electronic discovery issues, the rules mandate that corporations assess their litigation preparedness. Although this will take initial time, money and effort, this assessment and the resulting plan can effectively be used as a roadmap for all future litigation. The rules require corporations to look at their information management policies, connect with the people responsible for these processes, and make changes that can benefit the corporation as a whole. Many corporations that have already made this assessment in light of the rule changes have found that taking stock has been a positive experience. Many have also found that implementing subtle changes—such as data mapping or relying upon document repositories—has not only prepared their company for litigation, but has also streamlined their overall business practices.

The key outcome of any litigation preparedness audit is a document or records retention policy that includes the information necessary for Rule 26 disclosures. Not only will such a policy reduce the time and effort required to locate information each time litigation ensues, but it can also be an invaluable resource should the company need to seek the protection of Rule 37 (discussed below).

Advantage Number 2: Recognition of Normal Business Operations

Rule 26(f) requires the parties to discuss e-discovery issues early in a case. Judges are going to rely much more heavily on the parties to work out discovery issues and will have little patience for parties that do not cooperate. Although it pains many litigators that they can no longer “hide the ball” in litigation, the advantages of this open book policy far outweigh the burdens. For example, if parties can agree on the preservation parameters and methods for a given case, there can be no later accusations of spoliation. Moreover, participation in a frank conversation with opposing counsel will allow a company to negotiate the ability to continue its business operations in light of preservation and discovery obligations. The Committee Notes1 state that during these discussions, the parties “should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities” and that “complete or broad cessation of a party’s routine computer operations could paralyze the parties’ activities.” Thus, should the parties not agree, the rules appear to favor an approach that considers the burdens faced by today’s corporation.

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Advantage Number 3: Cost Savings

Under Rule 26(f), the parties are required to discuss waiver of privilege and form of production. Consideration of these issues pre-discovery can result in tremendous cost savings. Corporate lawyers know that the single most expensive aspect of any discovery project is the attorney review time. If the parties enter into “claw back,” “quick peek,” or other non-waiver agreements, the reviewing party can evaluate its material in a much more efficient and less expensive manner. The other party also reaps the benefit of receiving discovery responses on an expedited basis. An additional advantage of these agreements is protection from subject matter waiver which could cost corporations the case—or worse, multiple cases if related litigation requires production of the same or similar documents. The caveat here is that parties should have these agreements entered into an order by the court, due to the split in courts on the substantive law of waiver. If agreements are not blessed by the court, the risk of subject matter waiver becomes a real danger should a party back out of the agreement. Another caveat is that non-waiver agreements may not bind third parties.

Efficiencies and cost savings can also flow from up-front discussions related to form of production. If parties can agree on how each will produce information, document review projects can be planned with those goals in mind. Moreover, the parties can discuss whether metadata has to be produced. If both parties can agree that metadata are not relevant in the case, there will be no need to review those data for privilege, dramatically cutting down on the litigation costs associated with privilege review.

All of the required discussions under Rule 26(f) will help a corporation identify any potential problems and pitfalls which, if addressed early in litigation, can prevent larger, more complicated and more expensive problems during the discovery process. Costs may also be mitigated through the lack of motions practice that often accompanies discovery disputes.

Advantage Number 4: Control of Accessible Information

Rule 26(b)(2) provides that information that is “not reasonably accessible due to undue burden or cost” need not be produced in discovery. This is a radical departure from the old rules, where everything had to be searched and produced if relevant. Although “accessibility” is not defined in the new rules, corporations have a tremendous opportunity to define accessibility for themselves, shaping their information retrieval systems to provide maximum efficiency for their business. As long as these systems and their purpose are documented in a policy that insures preservation if necessary, corporations will be well-protected under the rules.

Corporations that have a clear archiving and backup tape policy will fare the best under the new rules. Archiving can be used to store day-to-day and historical information, while backup tapes can be used for their intended purpose of disaster recovery. Extraneous information that never needs to be retrieved can—and should—be circulated through the regular records retention program. If litigation ensues, all information relevant to the business of the company and therefore relevant to litigation is in the archive system, accessible and easy to retrieve with minimal cost. Because the corporation does not use backup tapes in its day-to-day business operations, does not access them for business purposes, and because any relevant information captured on those tapes would be available elsewhere, i.e. in the archiving system, that information would most likely be deemed inaccessible. Thus, corporations will not need to spend money on expensive restoration and retrieval.

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2 A “quick peek” agreement is one where the producing party provides requested responses without waiving any privileges. The requesting party then requests certain designated documents it wants produced. A “claw back” agreement provides that documents inadvertently produced do not waive privilege as long as the producing party identifies the document inadvertently produced.
By contrast, a corporation that does not have an archiving system, but rather relies solely on backup tapes and individual users to capture important business material, may not be as well-protected. Although backup tapes were contemplated under the rules as “inaccessible” material, courts that have relied on the proposed rules in their analyses of inaccessible data have been willing to allow discovery of backup tapes if the material is relevant, if the corporation does not have a records retention policy, and if the information is not available anywhere else.

Legacy data will likely always be considered inaccessible and a party need only identify—not search and retrieve—information that must be restored to a reasonably usable format. Although a court can order production of this material for “good cause shown,” that will require an analysis of whether the burdens and costs of production can be justified in the circumstances of the case. Access to these resources will only be allowed with judicial oversight, including possible cost-shifting, which could relieve the cost burdens that accompany restoration. Even if a court orders sampling of the data, which has been a typical compromise under current case law and will likely continue to act as a solution under the rules, such an approach will still cost much less than full restoration and retrieval.

Preservation should also be a much easier endeavor under Rule 26. The rules contemplate that corporations that have not reached an agreement in the Rule 26(f) conference file a protective order to resolve whether certain data need to be preserved.

**Advantage Number 5: Protection of Privileged Material**

It is to be hoped that the parties will have agreed upon a procedure for the return of inadvertently produced documents in a 26(f) conference. Such agreements, if entered into by the court, can offer corporations the best safeguard from disclosure of privileged information. If the parties do not or cannot agree, however, the new rules do offer some protections.

The new rules recognize that privilege review has become costly and burdensome in the electronic era due to both the tremendous volumes of information that must be reviewed and the issue of metadata, which adds a layer of information that could make an otherwise discoverable document privileged. The costs of all of this review can be exorbitant and even the most thorough of reviews still do not guarantee that privileged information won’t be inadvertently produced. Under Rule 26(b)(5), the rules provide a mechanism whereby privileged information inadvertently produced cannot be used or disclosed pending court determination of privilege. If the receiving party already disclosed the information to third parties, they must take reasonable steps to retrieve the information. The caveat here is that depending on the jurisdiction, the privilege may still be waived, but at least a court can decide the issue without the other party using the information it inadvertently received, and corporations and their attorneys will have time to frame an argument that privilege has not been waived.

**Advantage Number 6: A Safe Harbor for the Prepared**

Much has been written about the “safe-harbor” provision of Rule 37. Some think that it is not a safe harbor at all, but rather a trap for those who rely upon its protections. But because one purpose of the rule is to benefit corporations—by recognizing that the suspension of electronic information systems can cripple business operations—reliance is not misplaced for the corporation that comes to the rule prepared.

The rule states that “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. There are therefore two requirements here: the system must be “routine” and the party must act in good faith.

Routine means that the system acts automatically or in a methodical way. For example, backup tapes that are recycled on a regular basis and in accordance with a records retention program would fall under this category because they change information without direction or input from users. If a party is prepared to go to court with a full understanding of the system and how it works, and can show that the system is part of a company-wide policy, then routine is likely shown. “Good faith,” however, may still require that companies have litigation hold procedures in place and a plan for preservation if necessary. The rule protects those who have made reasonable and good faith efforts to comply with their obligations under the rules but inadvertently lost information nonetheless.

**Conclusion**

While only a few courts have analyzed the amended rules, it is only a matter of time before judges begin to interpret their provisions. Although it is fair to say that not all courts will agree with a singular methodology or explanation of the rules, one constant is abundantly clear: Corporations that embrace the rules, act reasonably and in good faith will enjoy tremendous advantages and benefits not previously available.
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