NEW FEDERAL RULES OF CIVIL PROCEDURE

Fios White Paper

Working Through the Practical Implications of the Amended Federal Rules of Civil Procedure

After more than five years of discussion and public comment, new amendments to the Federal Rules of Civil Procedure (FRCP) are scheduled to take effect on December 1, 2006. New language in six Federal Rules—rules 16, 26, 33, 34, 37 and 45—requires attorneys to pay specific attention to electronic discovery issues—or, in the vocabulary of the new rules, "discovery of electronically stored information (ESI)." The exact language of these amended rules has been widely broadcast through lectures, articles and outreach efforts by the Federal Judicial Committee itself, but the precise practical impact of these rules are just beginning to be tested as judges are already beginning to apply these new standards. Even without a history of opinions and orders, the plain language of the amended rules suggests that a number of common discovery practices and strategies need to be reviewed and updated in light of the new standards.

Talk Is Cheap...And Is Now Required

In public comments regarding the initial revisions to the Federal Rules that were drafted, members of the Civil Rules Advisory Committee repeatedly stated that they were frustrated by counsel's inability to discuss electronic discovery issues, much less agree on any logistical details, absent affirmative intervention by the courts. One intentional result of amended language in FRCP Rules 16 and 26 is to force counsel to raise the topic of ESI and its potential relevance in "meet and confer" sessions in advance of a scheduling conference with the court. Discussing ESI does not mean that it will always be relevant to a dispute—it remains possible that some disputes may involve little if any ESI. However, to the extent that counsel can agree on ESI and the repositories in which it is stored that may be relevant—or irrelevant—to the dispute, parties will have a clearer, common understanding as to their respective preservation obligations.

Given the contentious nature of litigation, it remains likely that opposing parties will still have difficulty reaching an agreement on some (or many) details about the production of ESI. For example, practitioners and judges alike have commented that many litigants are unlikely to agree on the format in which ESI is produced, at least initially. While a large body of commentary has suggested that ESI should be produced in its "native format" to provide the most complete evidence, current technology doesn't effectively allow for the redaction of privileged or confidential information without changing the native files and the underlying metadata. Somewhat similarly, native files cannot be effectively Bates-numbered at the page level, since the same file may display different page breaks depending on the hardware and software used to review or print it out. These and other difficulties associated with managing native files persuaded the Advisory Committee to avoid requiring native file production. Instead, Rules 34 and 45 acknowledge the potential value of producing files in native format but require only that ESI be produced in a format that is "reasonably usable."

Past experience has shown that the "reasonably usable" standard can vary significantly depending on the specific matter. The amended rules seek to reduce the number of disputes that necessitate judicial intervention by requiring parties to specify their positions early in the process as adjusting collection, production, and review procedures can become increasingly difficult as time passes.

FRCP Rule 26(f) will now require parties to discuss all electronic discovery issues prior to the scheduling conference (which must take place 120 days after the litigation action is filed). This initial "meet and confer" must take place at least 21 days prior to the scheduling conference. Ideally, an agreement on all of the issues, including production format, can be memorialized as

part of the Court's FRCP Rule 16 scheduling order. In addition to these initial ground rules, FRCP Rules 34 and 45 both strongly suggest that the requesting party specify the format in which it would like to receive ESI. To the extent that the requesting party does not specify a preferred format, or if the producing party disagrees with the request, the producing party must explicitly state in its response how it proposes to produce the ESI. The net result is that more information regarding ESI issues must be discussed early in the case, so parties can resolve production format issues directly—or so the court can quickly appraise the situation and provide a ruling.

Know What You Have, Know What You Want

Recent cases have highlighted the serious consequences of mishandling ESI in civil litigation. The *Morgan Stanley* decision (*Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005)), in which ESI issues led to a record $1.45 billion jury verdict, is only one of several high-visibility cases where ESI mismanagement caused great damage to a litigant's case. The amended rules have addressed this demonstrable lack of understanding on the part of outside counsel as to their client's ESI and its relevance to specific litigation matters. The rules have been amended, in part, to avoid *Morgan Stanley*-like situations, where the case was decided without fully reaching its merits. The Federal Rules will now require greater due diligence in preparing initial disclosures and in responding to interrogatories and requests for production. ESI will need to be discussed as part of party disclosures or responses made pursuant to amended FRCP Rules 26, 33 and 34.

Under the amended Federal Rules, counsel will have an obligation to begin due diligence regarding a client's ESI early in the case. Initial disclosures pursuant to Rule 26 will be required to explicitly reference any sources of ESI that a client may use in support of its claims or defenses. While this certainly does not approach a requirement that a client must disclose *all* its ESI, the net effect remains quite powerful. If a company is reliant on internal e-mail messages to demonstrate it was acting appropriately, a company's e-mail repositories and any associated e-mail archiving systems will need to be disclosed. If the company also relied on internal documents or a customer relationship management (CRM) database to explain its action, the client's files and database servers will also need to be disclosed. Ultimately, it is entirely likely that most corporate data repositories will need to be listed in the initial disclosures. Why? Parties may not be able to complete the detailed analysis, required so early on in the case, as to the specific workstations, servers and archived media that contain all potentially relevant ESI. Should the initial disclosure fail to include a repository that emerges later in the process, a party could face severe sanctions.

The initial disclosure of potential persons (custodians) with discoverable information must include substantive fact witnesses, as well as IT directors and records managers who control how corporate ESI is stored, accessed and deleted. While no specific language in the amended rules speaks to this point, it seems likely that courts will encourage this practice as the fastest way to share information about ESI and to demonstrate that good faith measures are taken to preserve potentially relevant ESI pursuant to the case. In addition, counsel may want to take proactive measures to ensure that their organization can authenticate the ESI, so it can be used as substantive evidence in court.

Burden Remains a Crucial Part of Assessing E-Discovery Requests

Corporations and supporting outside counsel have resisted discovery requests for decades, if not centuries, on grounds that the material sought by the requesting party is irrelevant or unduly burdensome with limited benefit to the requesting party. Discovery of ESI has been a major battleground for undue burden arguments, with mixed results. Different judges—in the same jurisdiction—have looked at similar fact patterns and have reached seemingly contradictory conclusions about the true effort required to obtain certain types of ESI.

The primary challenge in consistently measuring burden lies in the fact that ESI comes in many formats and is not typically centrally managed. ESI can be found on a variety of repositories and data stores throughout a global company, such as workstations, file servers, back-up tapes, e-mail archiving systems, content management systems, and personal storage devices, such as PDAs, personal laptops and voice mail systems. Additionally, companies normally have closets full of old or broken computer equipment, leftover backup tapes from earlier systems that can no longer be read, and any number of employee-created CDs, floppy disks and flash drives. The effort required to harvest usable ESI from each of these types of media can vary dramatically.

A second challenge in measuring burden is that parties may be situated very differently though possess roughly the same amount of ESI. For example, a small company being sued for $100,000 in damages may be forced to spend upwards of $250,000 to restore ESI and have its attorneys review the contents for privilege or relevance. Most would agree that such a company should be entitled to seek relief from this type of request. However, if the producing party is a large, global company facing a $100 million lawsuit, courts may be more inclined to view this discovery request as appropriate to the scope of the case, even if the producing party i able to demonstrate why the discovery sought is irrelevant to the matter at hand.

Amended FRCP Rule 26 (as well as the parallel provisions to Rule 45 that governs subpoenas) seeks to provide more specific guidance regarding "undue burden" to both courts and litigants. FRCP Rule 26(b)(2)(B) will now permit a party to resist a request for ESI by demonstrating that it is "not reasonably accessible." With this argument, a party may not have to produce the electronic evidence; however it does not relieve its obligation to preserve this material. Potentially relevant ESI must be preserved until the requesting party releases its interest or some other event releases this material from litigation hold status. In addition, a requesting party is entitled to challenge a "non-accessible" classification and move for its production in a motion to compel.

Courts and commentators alike have reached a number of preliminary conclusions about FRCP Rule 26's new "not reasonably accessible" language. Active data, such as e-mail messages presently stored on mail servers, seems to be generally regarded as presumptively accessible. ESI that is stored offline, particularly materials stored on backup tapes or on obsolete media, is likely to qualify as "not reasonably accessible" in many cases. In addition to this new standard, a party can still resist the production of accessible data by arguing why the requested data is not relevant to the matter or is unduly burdensome to produce. These and other traditional criteria for relief remain available under FRCP Rule 26, as well as within the inherent power and discretion of the courts.

Can You Dock In The Safe Harbor?

Another trend that is becoming increasingly common is for requesting parties to try and determine how quickly litigation hold procedures were initiated once litigation was either reasonably anticipated or initiated. By doing so, the requesting party can try to ascertain whether the defendant failed to preserve relevant ESI before it was altered, overwritten or otherwise destroyed. Often, this effort is designed to reveal the gaps between when a company received the notice of litigation and when preservation notices were distributed throughout the organization. Requesting parties can try and use this gap analysis—which may be as little as a few days or as long as several months—as the factual predicate for spoliation of evidence motions and requests for sanctions.

Newly added FRCP Rule 37(f) seeks to provide important guidance regarding the destruction of ESI. Large quantities of corporate data is overwritten or destroyed every day in the ordinary course of business. Users routinely delete e-mail messages to reclaim space in overflowing in-

boxes. Reports and memos are updated as new information is received. Voice mail messages expire after a fixed number of days. Employee data directories are purged from corporate networks after individuals leave the company. Virtually all companies reuse backup media on a scheduled basis to ensure the most recent snapshot from which systems can be restored in the event of a catastrophic failure. Each of these activities designed to preserve or destroy corporate data, in the absence of a legal requirement (*e.g.*, litigation hold), is completely legitimate and are appropriate business functions. Companies should not be penalized for engaging in good-faith business practices.

FRCP Rule 37(f) states, very simply, "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as the result of routine, good-faith operation of an electronic information system."

At first blush, this direct language appears to significantly limit the circumstances in which a spoliation motion will be able to be brought. However, in the real world, many mid-size and large companies are often named as parties in multiple, overlapping lawsuits. As a result, these organizations may be limited in the extent to which they are eligible for the new "safe harbor" rule, as some of the data repositories (such as backup tapes) will constantly be subject to litigation holds. New technology, such as e-mail archiving and document management systems, may make it possible to exert greater control over ESI, opening greater possibility of automated electronic document management and deletion. Present opinion of many commentators and scholars is that FRCP Rule 37(f) is likely to provide only limited protection to most companies that might seek to invoke it. Litigation and corporate attorneys, as well as judges, will carefully be watching opinions that define the standard around Rule 37(f).

Judges Still Control the Discovery Process

It's certainly possible to imagine that electronic discovery practices will be transformed as a result of the increased communication requirements and new burdensomeness tests in the amended Federal Rules. However, it's also important to remember that the rules do not carry the weight of law, and no amendment to the rules will change the substantive law of a jurisdiction. Questions of legal privilege, for example, will remain controlled by local jurisprudence. Even though the amendments to FRCP Rules 16 and 26 encourage parties to discuss non-traditional ways of preserving privilege as one way of reducing the transactional cost of collecting and reviewing ESI, opening the door to alternatives is not the same as requiring litigants to walk through it.

Even more important, the Federal Rules remain guidelines—but only guidelines—that can be applied with great discretion by trial courts. Trial courts, so long as they have a reasonable basis for their decisions, retain considerable power to manage the discovery process as is most appropriate to a matter. If the court finds that the ESI is relevant, it can order its production even if it is admittedly "not reasonably accessible" and expensive to collect and process. Similarly, courts will have the last word as to whether a contested production of ESI is being made in a "reasonably useful" format. In addition, the official commentary to FRCP Rule 37(f) makes it clear that courts are entitled to vigorously examine the "good faith" nature of any destruction of ESI and whether organizations can take advantage of any safe harbor protection. In the end, amended Federal Rules of Civil Procedure or not, practitioners will still have to persuade a court as to the reasonableness of their positions.

APPENDIX A:

Federal Rules of Civil Procedure
Amended Rules & Realities

Rule	Description	Purpose	Reality
Rule 16 (b)	Allows the court to establish rules around disclosure, privilege, methods and work product prior to electronic discovery commencing	Save court and attorney time by pre-establishing rules & process for managing discovery	Legal must understand IT environment for all federal cases within first 120 days, more motion practice around ED very early in case; court order higher stakes than party agreement
Rule 26 (a)	Adds "electronically stored information" (ESI) as own category	Remove ambiguity around the words "document" and "data compilations"	No more wriggle room for instant messaging, voice over IP, databases, PDA's
Rule 26 (b)(2)	Sets up two-tier discovery for accessible and inaccessible data; provides procedures for cost shifting on inaccessible data	Remove uncertainty about who pays for requests for restoring backup tapes, forensics; make sure Zubulake remains a one-circuit precedent	Will require more work and costs for defendants very early in a case to account for the backups and what data is on them; codifies Zubulake for entire US
Rule 26 (b)(5)	Clarifies procedures when privileged ESI is inadvertently sent over to the requesting party (retrieval of that information)	To allow "clawback" of privileged information; allow parties to push the cost of review to the requestor	Still huge risks involved; will not be able to capture/ retrieve all sensitive data (e.g. trade secrets and other IP), embarrassing emails, waiver of privilege for other cases
Rule 26 (f)	Requires all parties to sit down together before discovery begins to agree on some form of protocol	Rule encourages uniformity, structure and more predictable motion practice	Opportunity to shift preservation costs if prepared for these discussions; otherwise opportunity to get painted into a corner
Rule 33 (d)	Includes ESI as part of the business records related to interrogatories	To reduce time spent gathering and analyzing data to answer interrogatories	Can provide transaction detail in electronic form in answer to interrogatories; may need to provide direct access or decent tools
Rule 34 (b)	Establishes protocols for how documents are produced to requesting parties	Stop arguments about the form of production, decide early to save costs	Requesting party gets to choose form of production; most advantageous form is native files which are more difficult to review and have potentially damaging metadata or track changes
Rule 37 (j)	Provides "safe harbor" when electronic evidence is lost and unrecoverable as a matter of regular business processes	Help calm fears (and avoid sanctions) when data is lost or overwritten in the normal course of business (gut Zubulake)	Puts GC on notice to ensure litigation holds and data destruction policies are legally defensible; hard to prove without third-party validation (codifies Zubulake)
Rule 45	Subpoenas to produce documents includes ESI	Clarifies rules for subpoenas to ensure consistency	No more arguing whether ESI is a "document"
Form 35	Standardizes discovery agreements	Avoid downstream delays and motion practice around discovery	Automatic reminder to include ESI where it is often overlooked

APPENDIX B:

Meet & Confer Checklist

Following are steps designed to help counsel more effectively negotiate the scope of electronic discovery at an FRCP Rule 26(f) Meet & Confer conference:

Step #1: Complaint Served

- ❑ Document date complaint was received
- ❑ Identify potentially relevant custodians

Step #2: Litigation Hold/Preservation Process

- ❑ IT, legal & records management meet and confer on litigation hold strategy
- ❑ Issue litigation hold order to all custodians
- ❑ Re-confirm that all appropriate destruction policies have been suspended
- ❑ Identify IT owner for evidence preservation effort ("most knowledgeable" person)
- ❑ Meet with key custodians to ensure compliance with legal hold
- ❑ Collect & preserve potentially relevant evidence (in place or in secure evidence repository)

Step #3: Early Case Planning

- ❑ Gather existing documentation & assign tasks for mandatory disclosure
- ❑ Collect & review subset of key custodians/tapes
- ❑ Test search term, sampling and other culling strategies
- ❑ Extrapolate findings to determine potential costs and timeline implications of your own strategies and for those requests that may be presented at the Meet and Confer

Step #4: Early Discussions

- ❑ Formulate a cost-effective yet fair scope of discovery:
  - o # of relevant custodians
  - o File types & locations
  - o Accessible vs. inaccessible ESI
  - o Format of production
  - o Reasonable timeframe
- ❑ Create a record of good faith and cooperation
- ❑ Maximize cost shifting opportunities
- ❑ Solidify preservation, privilege and reduction strategies

Step #5: The Initial Meeting

- ❑ Bring with you:
  - o Content map
  - o Budgeting information
  - o All back-up documentation
  - o Expert who is knowledgeable about the entire electronic discovery process
  - o Blank calendar for on-site planning
- ❑ Have some low exposure, low cost items to use during the negotiation
- ❑ Control your own destiny, if you can, by coming to an agreement
- ❑ Promise only what you are certain you can deliver