New Rules for E-Discovery in Federal Courts and Changes on the Horizon in California

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If you are feeling inundated with emails, you are not alone. The average American business person now receives between 50 to 150 emails per day. While this phenomenon causes lots of issues on a daily basis, it can create major headaches when emails and other documents composed of electronically stored information are relevant documents in a case.

On December 1, 2006, amended Federal Rules that address e-discovery issues became effective, and the California courts are considering similar procedures. As anyone who has written a quick email in the heat of the moment knows, e-discovery is important because the best evidence of what was done, what was said and what was known is often contained in emails.

Federal Rules

The amended Federal Rules require the parties to discuss e-discovery issues in the beginning, and then address key electronic discovery issues with the court. New FRCP Rule 26(f)(3) requires that the parties discuss as part of their Rule 26 conference "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." As the Advisory Committee notes, "It may be important for the parties to discuss [their clients' data storage] systems, and accordingly important for the attorneys 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."

As part of this change, the Federal Rules now provide that the scheduling order that the court issues following the pretrial conference should address "disclosure or discovery of electronically stored information." FRCP Rule 16(b)(5). And, Rule 26(a)(1)(B) now requires that a party disclose electronically stored information as well as documents that it may use to support its claims or defenses.

The new rules also address the way in which the requesting party can require production of emails and other electronically stored information. Rule 33(d) now provides that electronically stored information may qualify as appropriate business records from which an answer to an interrogatory may be derived or ascertained. Under the new provision at Rule 34(b)(ii), the default form for producing electronically stored information is that "in which it is ordinarily maintained [or]

reasonably usable." Obviously, this will make the information more useful, as this data produced in the form it is ordinarily maintained means that it is generally easier to search and compile.

However, under the new Federal Rules, a responding party may object and not provide discovery of electronically stored information from sources that are identified as "not reasonably accessible because of undue burden or cost." FRCP Rule 26(b)(2)(B). Some of those sources may be back-up tapes or disks that are maintained for disaster recovery, handheld devices, etc. When such information appears to have been deleted or be unavailable, the court may require that the responding party produce the information even though it may be very expensive or condition the production by shifting some or all the costs to the party requesting production. *Id.*

In an effort to accommodate concerns about the burdens and expense of electronic discovery and the resulting risk of sanctions, the new Federal Rules create a safe-harbor provision that protects a party from sanctions if the electronically stored information is lost as a result of "the routine, good-faith operation of an electronic information system." FRCP Rule 37(f). The Advisory Committee Notes explain that the premise for this amendment is that ordinary computer use necessarily involves routine alteration and deletion of information for reasons unrelated to litigation.

Potential State Changes and the Hold-Up

A state Judicial Council committee looking at e-discovery rules shelved proposed amendments to state court rules last summer. Those amendments to California Rule of Court 212 would have required parties to meet and confer on electronic discovery issues during case management conferences. Specifically, the amendments to Rule 212 would add provisions on the management of e-discovery to subdivisions (e) and (f) of Rule 212, similar to those proposed to be included in Federal Rules 26(f) and 16(b).

Thus, when the parties meet and confer before a case management conference, they would be required to consider: (1) identifying and resolving any issues relating to preserving discoverable information, including electronically stored information; (2) identifying and resolving any issues relating to the discovery or voluntary disclosure of electronically stored information, including the form or forms in which the information should be produced; and (3) identifying and resolving any issues relating to claims of privilege or protection of attorney work product, 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. (See proposed amended Rule 212(f)(1)-(3).)

According to a January 5, 2007, article in *The Recorder*, "This is likely to be a longer-term project in the next several years," said Patrick O'Donnell, counsel to the Judicial Council's Civil and Small Claims Advisory Committee. "I think the situation in California [is], wait and see. Let's take a look and then hopefully benefit from the experience the federal courts and others are having." O'Donnell said the committee dropped the e-discovery amendments last year out of concern that the case management conference might come too late in litigation for parties to start talking about electronic data production. "One of the specific concerns was that it is probably desirable for parties to raise these issues and address them earlier on," he said.

Even though the state rules do not yet require that the parties meet and confer about issues related to e-discovery, there is certainly no harm in discussing the issue at the outset of a case to minimize

headaches associated with dealing with the data later.