

ABA Young Lawyers Division Fall 2006 Conference

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Ready or Not, Here They Come: The New Rules on Digital Discovery And Why They Will Change Litigation As We Know It

The Key To The New Rules: C/3/C

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Major Changes To Rule 26

Rule 26 Initial Disclosure Obligation

Rule 26(a) now provides for upfront disclosure of ESI:

“Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

* * *

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;”

Rule 26 Meet and Confer

Counsel must now cover “any issues relating to preserving discoverable information.”

The parties’ discovery plan must now cover:

- “(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 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.”

District Court's Upfront Role

Rule 16 (b) Scheduling Order may now contain:

- “(5) provisions for disclosure or discovery of electronically stored information;
- (6) any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production;”

Preservation Orders

The Advisory Committee sought to limit the frequency and breadth of preservation orders:

“The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation should issue only in exceptional circumstances.”

Inaccessible Information

Rule 26(b)(2)(B) limits initial production of inaccessible information identified by the party:

“(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”

Determining Accessibility

It is important to recognize that the determination of whether or not a particular source of electronically stored information (ESI) is accessible or inaccessible does *not* depend upon physical access to the data, availability of technology (hardware or software) to deal with the data, or on the format of the data

The determination must be based on “undue burden or cost.”

This burden/cost test directly ties the discovery of ESI to the concept of marginal utility. Accordingly, the key question for the discovery of ESI now becomes:

“Will the quantity, uniqueness and/or quality of responsive data that I can get from any particular type or source of ESI justify the burden and/or cost of the acquisition of said data?”

This is a critical distinction. Just because certain types of ESI sources are difficult to get to—backup tapes, legacy data on obsolete systems, and databases are frequently mentioned—has no bearing on whether or not they are “accessible” for the purposes of discovery

