

# Federal Rules for E-Discovery: A One-Page Guide

Electronic documents have always been discoverable. The amended federal rules therefore do not increase the actual scope of discovery. They do, however, provide specificity regarding e-discovery and codify some existing good practices.

**New Rule 26(a)(1)(B): Automatic Disclosures.** The list of items that a party must disclose automatically has been amended specifically to address electronically stored information. A party must, without awaiting a discovery request, provide to other parties "a copy of, or a description by category and location of, all ... electronically stored information ... that the disclosing party may use to support its claims or defenses ...." **Comments:** See the Project Planning Guide on the other side of this card for assistance in determining the appropriate scope of these disclosures.

**New Rule 26(b)(2)(B): Scope of and Limitations on Discovery.** The obligation to produce electronic documents can be limited if the burden is excessive: "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." This can be challenged, however: "On motion to compel, ... the party from whom discovery is sought must show that the information is not reasonably accessible ...." If that showing is made, the court may order discovery from such sources and "may specify conditions for such discovery." **Comments:** Information "not reasonably accessible because of undue burden or cost" might include things like the contents of the daily rotation of disaster-recovery backup tapes, deleted data that would require forensic processes to recover, and data from obsolete systems that are no longer supported.

**New Rule 26(f): Conference of Parties; Preservation.** During the initial conference, the parties must discuss issues relating to "preserving discoverable information" and must include a discussion of "any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced." **Comments:** For tips on preservation, see the Project Planning Guide on the other side of this card. At the preliminary conference, you should generally not agree to produce in native format. It is better to produce in a mainstream e-discovery format compatible with litigation-support database and review systems. This format typically includes TIFF images endorsed with numbers and confidentiality legends, searchable text, and searchable metadata in an appropriate load format (Summation, Concordance, etc.).

**New Rule 16(b)(5): Pretrial Conferences & Scheduling Orders.** After receiving the report of the parties under Rule 26(f), the court's scheduling order may include "provisions for the disclosure or discovery of electronically stored information." According to the Committee Notes, this amendment "is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation."

**New Rule 33(d): Interrogatories; Option to Produce Business Records.** The option to provide access to business records in lieu of answering interrogatories now explicitly addresses electronically stored information. "Where the answer to an interrogatory may be derived or ascertained from ... electronically stored information" and "the burden of deriving or ascertaining the answer is substantially the same" for either party, "it is a sufficient answer ... to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries." **Comments:** The producing party may be required to provide technical support to the requesting party if this option is used. Note that providing the opposing party with direct access to data systems may not be feasible due to confidentiality and privacy issues with the data to be reviewed.

**New Rules 34(a) and (b): Request for Production of Documents.** Electronically stored information may be produced in either native format or other searchable format: "Unless the parties otherwise agree, or the court otherwise orders, ... (ii) if a request for electronically stored information does not specify the form of production, a responding party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. The party need only produce such information in one form" [emphasis added]. **Comments:** It is generally not advisable to produce in native format unless there is a specific reason to do so. Production of native files can lead to document control and authenticity issues because they cannot be adequately numbered and endorsed and because they can be inadvertently altered even by the simple act of opening them (e.g., dates that automatically update). Native files can also contain viruses, may require software that the receiving party does not possess, may vary in format and appearance if opened in a different environment, may not be compatible with litigation-support review systems, and generally cannot be redacted adequately.

**New Rule 37: Failure to Disclose; Sanctions.** The amendments provide a safe harbor for inadvertent spoliation of electronic documents: "Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if: (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system." **Comment:** Be sure to issue preservation letters as described in the Project Planning Guide on the other side of this card.

## Other side: Project Planning for E-Discovery

For more information, please call.