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Opinion

The Federal Rules of Civil Procedure, they are a-changin'


BALTAY


MILLER

By Matthew C. Baltay and Matthew E. Miller

Effective Dec. 1, the Federal Rules of Civil Procedure have been amended. The amendments, which aim to bring the federal rules into the e-era, concern discovery with respect to the newly minted term "electronically stored information" — that is, information stored on computers, such as e-mail and electronic documents (as opposed to plain old paper files).

The amendments, while not exactly revolutionary, represent a sensible attempt to bring the discovery rules in sync with the times, impose some limitations on potentially unlimited e-discovery and set a framework to guide future development.

A little history

The Federal Rules of Civil Procedure went into effect in 1938, decades before the dawn of the computer era. In 1970, the federal rules, perhaps ahead of their time, were amended specifically to allow for discovery of electronic "data compilations." This aspect of the rules, however, went unchanged for the next 36 years until the present amendments.

In the meantime, and most notably in the past 10 years, litigants, lawyers and the courts have begun to wrestle with issues of discovery of information generated by and stored on computers.

For example, how do you produce e-mail? Do you print it out and produce it on paper? What if there are hundreds of thousands of e-mails involved? What if one party wants the other to produce "metadata"? What if one party recycles its computer tapes and the other party cries foul?

As litigants and the courts began to confront such issues in recent cases, particularly in the larger securities, antitrust and like litigations, it became evident that the federal rules should be amended to change with the times. After five years of study and commentary, the federal rules have finally been amended to address e-discovery.

Scope of the amendments

While some have heralded the amendments as a seismic shift in federal procedure, it may be accurate to note that they in part simply catch up with the times, in part add an element of reasonableness in a discovery landscape that often threatens to spiral out of control, and in part lay a foundation for ongoing development that will take place in the

courts on a case-by-case basis.

- *E-terminology*: The first thing the amendments do is explicitly provide that litigants may discover "electronically stored information" from one another. This catch phrase is added to several of the core discovery rules: rules 16, 26, 33 and 34. Rule 45, governing subpoena discovery from third parties, makes the same change.

While this change may not be revolutionary as litigants already understand that e-mail, for example, is discoverable, it is nonetheless a welcome addition to the rules.

- *Surfacing and addressing e-issues early on*: Next, in recognition of the complexities and volumes that often go hand-in-hand with electronic discovery, the amendments direct the parties to discuss issues relating to "electronically stored information" early on.

Here, Rule 26(f), which obligates the parties to meet and confer at the outset of discovery, is amended to require parties to discuss the preservation and discovery of electronically stored information, including the form or forms in which it should be produced, and privilege issues that may surface in connection with discovery.

These amendments represent a thoughtful change as the parties will now be forced to confront and address e-discovery issues early on, before it is too late, and reach agreement where possible.

The provision mandating discussion of preservation issues may allow the parties to agree that certain categories, such as back-up tapes, need not be maintained indefinitely. Here, as elsewhere, the amendments sensibly acknowledge, and attempt to provide methods for addressing, the potentially staggering costs to litigants of discovery in the e-era.

The provision requiring parties to address at the outset the form in which e-information will be produced refers to whether electronic material such as e-mails will be produced on paper or on computer disk in TIFF, .pdf or their computer program "native" format. Although litigants have been facing this issue in recent cases, the amendment sends a clear signal that various formats of production, including native format, are potentially up for grabs.

The provision requiring parties to address privilege issues at the outset is a response to the growing problem that often follows when a party is forced to produce massive amounts of electronic material. The provision encourages parties to agree that when privileged material is inadvertently produced as part of vast e-document dumps, the producing party may designate material as privileged after the fact.

- *Court involvement*: The amendments also bring the court into the e-discussion by amending Rule 16 and its provisions on what the court should consider at the initial scheduling conference. While the court has long been directed to set a discovery plan at the opening case conference, the amendment encourages the court to address discovery of electronically stored information.

Although the directive is permissive and not mandatory, its very inclusion in the rules will undoubtedly cause many federal judges to join the discussion early on and help chart a reasonable course balancing legitimate discovery needs against the potentially enormous costs of electronic document preservation and production.

- *Limiting discovery*: Rule 26, which sets the general parameters of discovery in civil cases, is now amended to provide that 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. The amendment applies the age-old concept of proportionality to the realm of electronic discovery. The goalposts for determining what e-data is "reasonably accessible" will vary depending on the particulars in the context of each case, such as the data at issue (back-up tapes, embedded data, metadata, etc.) and the burdens and costs associated with accessing that data.

Even if a source of information is not reasonably accessible, the court may order production of material from that source upon a showing of "good cause." Whether good cause exists will depend upon the circumstances in each case,

including the need the party seeking the discovery has for the material and the availability of alternate, less costly sources. If production is ordered, the court may shift the costs of obtaining the data to the requesting party.

While future caselaw will help shape what is and is not "reasonably accessible" under various circumstances, the deliberate effort to re-impose proportionality and set limits to potentially overwhelming electronic discovery is a positive development.

- *Inadvertent production of privileged information*: As the framers of the amendments understood, the volume of electronic information to be searched for production can be enormous. Undertaking a detailed review of all such information for privileged or work product-protected material can be a back-breaking (and wallet-busting) effort. It is often difficult to ensure that all electronic information, including "embedded data" and "metadata," has even been reviewed.

The amended rules address these issues by allowing parties to produce electronic information without conducting a page-by-page (electronically speaking, that is) review. Rather, a party may "claw back" inadvertently produced privileged or work product-protected information after the fact. The new rules thus facilitate the discovery of electronic information and allow parties to avoid the often overwhelming costs associated with conducting a detailed review of their electronic information.

Note that the rules *do not* address whether a waiver of the privilege or protection has occurred. The rules encourage parties to form agreements early in the case providing that production without intent to waive the privilege will not work a waiver. The court may consider such agreements when making a waiver determination. Nevertheless, consideration should be given in each case as to whether production of potentially privileged information can be made consistent with an attorney's ethical obligation to preserve a client's confidential information.

- *Limiting sanctions*: Amended Rule 37 now provides that a court may not impose sanctions 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. While this provision stresses "good faith" and will not allow a party cavalierly to destroy information that it otherwise has an obligation to preserve during litigation, it also acknowledges the economic difficulties and perhaps impossibilities imposed upon litigants who may otherwise be required to freeze their computer system lest anything be inadvertently altered or deleted.

This amendment is certainly a positive and sensible one. Future caselaw will undoubtedly wrestle with questions of what the "good faith operation" of an information system may require in a given case, particularly once litigation has begun.

Amendments affect all federal cases

The amendments apply not only to cases commenced on or after Dec. 1, but also to all pending cases where their application would not be "unfair and unjust."

Overall, the amendments are a welcome and thoughtful update to the Federal Rules of Civil Procedure. Time will tell how well the changes to the rules conform to the constantly evolving landscape of discovery in the electronic information age.

Matthew C. Baltay is a partner and Matthew E. Miller is an associate in the litigation department at Foley Hoag in Boston.

Lawyers Weekly, Inc., 41 West Street, Boston, Massachusetts, 02111, (800) 444-5297