



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 324-5433
Facsimile: (916) 324-4293
E-Mail: tom.greene@doj.ca.gov

**AMENDED FEDERAL RULES OF CIVIL PROCEDURE PERTAINING TO
"ELECTRONICALLY STORED INFORMATION"¹**

Amendments to the Federal Rules of Civil Procedure for "Electronically Stored Information"; Effective December 1, 2006.

**Fed.R.Civ.P. 16, 26, 33, 34, 37, 45 and revisions to Form 35, available,
<http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=110>**

Major amendments to the Federal Rules of Civil Procedure pertaining to electronic discovery became effective on December 1, 2006.

The proposed amendments reflect the practical experience of federal courts with electronic evidence and input from think tanks like the Sedona Conference, numerous individual practitioners and various bar groups. The changes provide a thoughtful structure for managing the challenges and opportunities of digital discovery. These initiatives can be divided into four conceptual units: (1) provisions requiring early consideration of e-evidence issues; (2) provisions formalizing a two-tier approach to the most expensive aspects of digital discovery; (3) practical initiatives to facilitate discovery of electronic materials; and (4) a shallow safe harbor for the "routine, good-faith" operation of electronic systems.

A. Early consideration of e-evidence issues

Rule 16(b) is amended in two ways, both adding topics that may be included in a scheduling order following a scheduling conference. These are: (1) a new subdivision (b)(5) that includes "provisions for disclosure or discovery of electronically stored information" and (2) a new (b)(6) addressing "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production."

The Committee Note states that the changes are "designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in

¹A presentation of Tom Greene, Chief Assistant Attorney General, California Department of Justice, before the California CIO's Conference, on Friday, February 2, 2007.

the litigation if such discovery is expected to occur.” Rule 26(a)(1)(B), relating to mandatory, early disclosures, is amended to require that 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.” (emphasis supplied) The new term replaces the term “data compilations” used in prior versions of the rule.

Rule 26(f), related to conferences of parties and discovery planning, is amended to provide that at least 21 days before a scheduling conference under Rule 16, parties must meet to discuss “any issues relating to preserving discoverable information”, and to develop a proposed discovery plan that includes:

- (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 of 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;

Form 35, the form for reporting on parties’ planning meeting, is amended to include these changes.

These requirements early in the federal litigation process have significant implications for counsel on both sides of a case. If your client is likely to be the principal responding party, you need to get an immediate tutorial on its electronic systems and the location of potentially probative evidence on those systems. Preservation steps, if they have not been already taken, should be implemented immediately. Demanding parties also need to be prepared. They will need to have cogent strategies established for both preservation and production of e-material. The special danger to them in this process is the fact that it is so front-loaded, putting them at an information disadvantage vis-a-vis the producing party’s lawyers who are presumably getting tutorials on how that party’s systems work.

B. Two-tier approach to e-evidence that is not “reasonably accessible”.

Rule 26(b)(2)(B), as amended, adopts the so-called two-tier approach to digital discovery. Active files, like e-mail on a party’s servers, should be disclosed. However, materials on back-up media—like archival tape—that may involve great cost to recover, must be identified but not necessarily produced. The new rule provides that:

- (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 the 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.

But according to the Committee Note, “[a] party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common law or statutory duties to preserve evidence.”

Rule 26(b)(2)(C) authorizes a court to limit discovery if it finds that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues.

The Committee Note comments that the court may not be able to apply this calculus without authorizing “some focused discovery”. Such discovery “may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.” Although the Note does not formally cross-reference the *Zubulake* line of cases from the Southern District of New York, the analysis of Judge Scheindlin in those decisions animates these new rules.²

C. Practical Adjustments to Accommodate Electronic Discovery

The sheer volume of electronic evidence, particularly e-mail, presents daunting challenges to properly privilege a production. Amended Rule 26(b)(5)(B) begins to address the increasingly common problem of inadvertent disclosure of privileged information. The amended rule provides that:

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim

²*Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003) (*Zubulake I*), *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 7940 (S.D.N.Y. May 13, 2003) (*Zubulake II*), *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D. N.Y. July 24, 2003) (*Zubulake III*), *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. Oct. 22, 2003) (*Zubulake IV*), *Zubulake v. UBS Warburg, LLC*, 2004 U.S. Dist. LEXIS 13574, 2004 WL 1620866 (S.D. N.Y. July 20, 2004) (*Zubulake V*)

and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

This is a very practical change but it may mask a trap for the unwary. The rule proscribes use of inadvertently disclosed, privileged material by the receiving party. However, the Committee Note states that the rule “does not address whether the privilege or protection that is asserted after production was waived by the production.” This leaves open the possible waiver of privilege as to third parties. A proposed amendment to Federal Rule of Evidence 502 would allow federal courts to issue orders that would preserve privileges as to third parties but only in the federal system. Those proposed changes with commentary can be found at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4

Rule 33 is amended to allow parties to respond to an interrogatory by providing, *inter alia*, electronically stored information.

Of greater tactical importance are amendments to Rule 34 that allow demanding parties to “specify the form or forms in which electronically stored information is to be produced.” Fed.R.Civ.P 34(b). Thus, demanding parties can demand e-documents in their original form including the original metadata or in other standard formats. The use of the plural “forms” is designed to allow the designation of different forms of production for different kind of electronic documents, e.g. TIF files for e-mail but original format for spreadsheets.

The rule also provides that responding parties can object to the form of production. In the event that there is no specification as to the form of the production, “a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably useful and... a party need not produce the same electronically stored information in more than one form.”

Rule 45, related to subpoenas, receives amendments to conform to the requirements of the other new rules.

D. Shallow Safe Harbor

The introduction to amendments to Rule 37(f) notes that the changes respond “to a distinctive feature of electronic information systems, the routine modification, overwriting, and deletion of information that attends normal use.” Under these circumstances, spoliation sanctions must be tailored to take into account these routine aspects of such systems. The rule provides that:

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules 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.

This language strikes a middle ground between an intentional destruction standard, considered too lenient, and a negligence standard that arguably provided insufficient guidance and protection to producing parties. The Committee Note makes clear that the term “good faith” imposes important operational obligations on parties. It states:

Good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information to be destroyed that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold.” Among the factors that bear on a party’s good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

This language suggests that responding parties are well counseled to have policies that allow for the imposition of litigation holds in all the circumstances in which a preservation obligation may arise. If they do not, they risk being left outside the shield for “routine, good-faith” destruction of e-documents, and potentially subject to case-determinative spoliation sanctions.



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Telephone: (916) 324-5433
Facsimile: (916) 324-4293
E-Mail: tom.greene@doj.ca.gov

TOM GREENE

Tom Greene is the Chief Assistant Attorney General for the Public Rights Division. In this role, he manages the Antitrust, Charities, Consumer, Corporate Responsibility, Energy, Environment, False Claims, Gaming, Lands, Resources and Tobacco units in the California Department of Justice. Prior to this position, Tom was the chief of a special task force investigating and prosecuting actions arising from the California energy crisis. In 2001-2002, he was resident with Williams & Connolly in Washington, D.C., coordinating the work of nine states litigating the scope of relief in the *Microsoft* monopolization case. Previously, Tom led the Antitrust Law Section, where he managed a diverse case load in federal and state court. His own practice ranged from bid-rigging cases in state court to complex, multi-district litigation in federal court. In 1992, he served as national class counsel in *In re Insurance Antitrust Litigation*, which created a model for effective multistate litigation. In 1989, he briefed and argued *California v. ARC America Corp.*, 490 U.S. 93 (1989), which vindicated state indirect purchaser remedies.

Tom has served in leadership roles in a variety of multistate actions and was lead attorney for the State of California's action against the tobacco industry, which was ultimately settled for \$26 billion. Earlier in his career, Tom served as special counsel to the Committee on Interstate and Foreign Commerce of the U.S. House of Representatives and as a trial lawyer for the Los Angeles County Public Defender and the Criminal Division of the California Attorney General's office.

Tom is a past chair of the Multistate Antitrust Task Force of the National Association of Attorneys General, and a recipient of the association's Marvin Award for national leadership. He served on the Judicial Council's Complex Civil Litigation Task Force, which issued a bench book on the management of complex cases in California trial courts. He is the author of various publications on antitrust and the management of complex litigation. He was honored to be named Antitrust Lawyer of the Year by the California Bar Association's Antitrust and Unfair Competition Law Section in 2001. He is a member of the Sedona Conference and is currently working on a publication on the interplay of antitrust and intellectual property law.

He received his B.A. in economics from the University of California at Berkeley and his J.D. from the University of California at Davis. He practices in Sacramento.