

**Q:** *As a business owner, how concerned do I need to be about the storage and maintenance of electronic data and documents?*

**Companies have an obligation, to preserve electronic information as soon as litigation appears probable.**

**A:** The explosion of electronic data—email, voicemail, spreadsheets, data files and more—has raised significant issues when companies are required to produce documents and other evidence in a lawsuit. New amendments to the Federal Rules of Civil Procedure (FRCP) take effect today, Dec. 1, 2006, in response to some of the problems facing businesses regarding discovery of electronic information including the maintenance, production and acquisition of electronic data and documents in litigation. These amendments will apply only to litigation pending in federal courts, although many state courts have enacted their own rules governing “e-discovery” or have study panels working on those issues.

While some of the federal rule amendments simply recognize the existence of “electronically stored information” (ESI), others have the potential to alter significantly the way businesses and their lawyers approach federal cases involving electronic information. Among the most important changes are: (1) increased protections for electronic information that is stored in forms deemed “not reasonably accessible,” (2) creation of a “safe harbor” from sanctions for electronic data lost through the “routine” and “good-faith” operation of a computer system, (3) the creation of a “claw-back” procedure for retrieving inadvertently produced information subject to the attorney-client privilege or work-product doctrine, and (4) increased emphasis on the litigants’ working out e-discovery issues at an early stage of the litigation.

**Treatment of Electronic Information Deemed “Not Reasonably Accessible”**

Recognizing the expense and difficulty of obtaining certain forms of electronic information, the FRCP now permits parties to avoid producing electronic information stored in forms that they identify “as not reasonably accessible because of undue burden or cost.” While the FRCP does not provide any examples, probable categories include “data tapes” stored for disaster-recovery purposes, data stored on unused and obsolete systems and possibly “deleted” but recoverable information. The party seeking discovery may challenge a “not reasonably accessible” designation as inappropriate

or if it considers the information sufficiently important to the case.

**“Safe Harbor” Against Sanctions**

The most controversial amendment to the FRCP related to e-discovery was the creation of a “safe harbor” against sanctions. Litigants have been penalized, sometimes harshly, for failing to preserve relevant electronic information. Through this new amendment, the FRCP now recognizes that companies delete, overwrite and alter data routinely or automatically in their day-to-day operations. The FRCP states that outside of “extraordinary circumstances,” a company will not be sanctioned for losing electronic information “as a result of routine, good-faith operation of an electronic information system.”

Companies have an obligation, however, to preserve electronic information as soon as litigation appears probable. Therefore this “safe harbor” amendment may not be as significant as it first appears. Under best practices, companies should continue to implement relatively aggressive “litigation hold” strategies as soon as litigation appears probable, including the sequestering of electronic data that is apt to be relevant to the anticipated litigation.

**The “Claw-Back” of Inadvertently Disclosed Privileged Information**

This amendment may be the most significant because, unlike the others, it is not limited exclusively to electronic information. It focuses, rather, on privileged information—information that, despite its relevance, is not subject to discovery. Electronic data has substantially increased the overall amount of information that must be processed during litigation. This amendment addresses the increased likelihood that privileged information will be disclosed inadvertently to other litigants and the privilege possibly waived. Under this amendment, if the party asserting the privilege properly notifies the opposing litigants receiving the privileged information, the receiving party “must promptly return, sequester, or destroy the specified information” and even take “reasonable steps” to retrieve any copies of the specified information from any other persons to whom it was disclosed. If the receiving party



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disagrees with the assertion of privilege, assistance from the court can be sought to determine whether privilege is being properly asserted.

**Conference on E-Discovery Issues Early in Litigation**

This amendment may have the most immediate effect. The FRCP already provide that litigants must “meet and confer” about a wide variety of issues early in the litigation and typically before discovery can be initiated. Among other things, the parties are supposed to agree, or attempt to agree, on how discovery is to be conducted. This amendment now requires the parties to discuss specifically “provisions for disclosure or discovery of electronically stored information.” These e-discovery issues include those addressed above, as well as any number of issues specific to the particular case. It is important for counsel to become familiar with the company’s document-retention policies and data-storage architecture, as well as the basics of data storage. This amendment only increases the importance of obtaining this familiarity, so that counsel can be adequately prepared for the conference.