Global Headquarters: 5 Speen Street Framingham, MA 01701 USA P.508.872.8200 F.508.935.4015 www.idc.com

EXCERPT

Key Amendments to the Federal Rules of Civil Procedure for Electronic Discovery

Vivian Tero

IN THIS EXCERPT

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Key Amendments to the Federal Rules of Civil Procedure for Electronic Discovery

The upcoming amendments to the Federal Rules of Civil Procedure for Electronic Discovery are expected to take effect on December 1, 2006. The adoption of these proposed changes has significant implications for corporate records and information management policies and infrastructure and would influence future investment plans. The amendments worth noting include:

- Rule 26(b) introduces the second concept of bifurcation in electronic discovery. The amendment states:
  - "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."

This amendment addresses the issue of cost shifting, especially on addressing some of the uncertainty around the potentially expensive restoration of back-up tapes and forensics services, by starting to define the discoverability and accessibility of electronic information across the tiered-storage environment. This development, in turn, impacts how litigants can negotiate and plan the scope of electronic discovery. The amendment clarifies that the producing party will not have to initially produce "electronically stored information" from "sources" that "are not reasonably accessible because of undue burden or cost," provided these sources are identified to the "requesting party." It also requires the requesting party to evaluate information from readily accessible sources before insisting that the producing party search and produce the "responsive information" from other sources. Rule 26(b) also includes

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enhanced requirements around the privacy of information in redacted files and on the use of privileged information inadvertently produced during discovery.

These revisions place the onus on the litigants' legal counsels to be facile about their clients' information systems. To demonstrate the integrity of the process and information systems, the litigants' records and information management and storage professionals will also need to show that the organization is consistently enforcing records and information retention policies.

- The amendment to Rule 26(f) requires litigants to "discuss any issues relating to preserving discoverable information." It directs the parties to develop a discovery plan that would include:
  - "Any issues relating to disclosure or discovery of electronic information, including the forms in which it should be produced"
  - "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"

The proposed amendment will provide the opposing party more visibility into the type of information its adversaries have in electronic format. Both parties will also enhance their abilities to estimate the cost of production and mitigate the risks from excessive costs during the review and production process. When this amendment takes effect, organizations that have their information houses in order will also be able to better plan their electronic discovery strategies and minimize the disruption to their ongoing business operations that may arise out of a preservation order.

- Rule 34(b) would be amended:
  - To permit the requesting party to "designate the form or forms in which it wants electronically stored information to be produced"
  - To require the responding party to identify the form in which it intends to produce such information "if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies"
  - To require the parties to meet and confer if there is a dispute about form of production
- Also, "if the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in form or forms in which it is ordinarily maintained or in form or forms that are reasonably usable."

The discussion on the Rule 34(b) amendment is specifically contentious around the metadata associated with the responsive information. Because of the nature of electronically generated and stored information, the metadata oftentimes becomes part of the responsive information. As a general rule of thumb, the more interactive the application, the more critical the metadata is to understanding the transaction and

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activity output. Readers should also note the valid concerns that metadata may inadvertently reveal confidential or privileged information.

Since opposing parties are required to negotiate and come to an agreement during the discovery conference on the production format of the responsive materials, the Rule 34(b) amendments could mitigate ongoing arguments about the production format and also offer the opportunity to control potential "runaway" costs.

- Rule 37 adds a new section, Rule 37(f), which provides a safe harbor from sanctions arising from spoliation. According to this section, "absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information as a result of the routine, good faith operation of an electronic information system."

Readers evaluating their response to the Rule 37(f) requirements should also take into account their interpretation of the event that would "trigger" the duty to preserve relevant information. This section highlights the criticality of a clearly articulated, well-executed, and uniformly enforced records retention program's ability to provide some level of protection from "adverse inference" rulings arising from spoliation. It also stresses the need to take a holistic view when planning a records retention program. Information management and legal technology operations experts stress the value of "careful" language when articulating and communicating corporate records retention policies, the need to align business processes and the organizational structure to support consistent execution, and having the appropriate technologies in place to uniformly enforce, track, and audit records retention policies.

Recommendations for End Users

- IDC recommends organizations should consider putting in place a corporate records retention program as part of its litigation-readiness and corporate governance activities for the following reasons:

  - According to case law, the duty to preserve records — paper, electronic, or other forms — is triggered when a party learns of pending litigation, "reasonably anticipates" litigation, or is put on notice that litigation is imminent. The oftentimes protracted time lag between the "event trigger" and the actual discovery requests combined with the challenge of determining the specific time when litigation is reasonably anticipated makes it very difficult to determine the scope of the potential litigation.

  - Rule 16 and Rule 26(b) requirements for opposing parties to meet and discuss the discovery plan and associated issues provide a very short window for both parties to identify and evaluate the relevant electronic information. Absent an effective records retention program, executing a litigation hold and planning for the discovery conference entail prohibitively costly search and collection of potentially responsive materials. It would disrupt the normal business operations and increase the risk of spoliation.

  - Rule 37(f) was intended to provide an opportunity for potential litigants to demonstrate good-faith efforts that they were not willfully destroying responsive material.

- Organizations can leverage their existing records retention investments for Sarbanes-Oxley compliance and extend these to build their records and information infrastructure. The benefits will come from having automated, standardized, and repeatable processes for records and information management. From a litigation cost standpoint, having a records retention program as part of its litigation-readiness initiative would enable the organization to reduce the volume of information that would be sent to outside legal counsel for review. Also, these investments do not only address retention requirements for compliance and electronic discovery, they could also provide better predictability in estimating the discovery costs and operational business benefits (e.g., enhanced ability to optimize an organization's storage infrastructure).

- Organizations putting together their records retention and litigation-readiness programs should include the following internal and external stakeholders on their planning and execution teams: compliance officers, in-house legal counsel, external legal counsel, HR managers, records managers, and IT operations managers (from IT security, storage, database, information management, email). Information management for compliance and electronic discovery should not operate in a separate silo but should be embedded within an organization's normal business operations — its policies, processes, and systems. IT operations should be involved, as early as possible, in the process to ensure that the solution supports the business processes and fits within the confines of the existing IT infrastructure. Ideally, the solution should be able to extend the existing records and information infrastructure investments for Sarbanes-Oxley compliance.

- Organizations should investigate ways to leverage existing investments in the information and security infrastructure and evaluate available tools to address the "white spaces." For example, organizations with decentralized IT infrastructures can look into tools that leverage federated technologies as well as solutions that could track the records and information by system and physical location. Outside experts emphasize systems that support existing processes instead of reengineering the business process to fit the vendors' solutions.

Recommendations for Vendors

IDC forecasts healthy growth in the overall legal discovery market through 2010. Still, vendors in this space should consider the following as they position themselves to compete:

- Forward-thinking organizations will be the earliest adopters of records retention programs. Those that do decide to implement such programs will start to investigate ways to extend their Sarbanes-Oxley investments to build out their records and information infrastructure. There will be opportunities for vendors that would assist end users on the strategy, architecture, and implementation of these programs.

- Legal discovery originates from an agency audit or from the plaintiff bar. Organizations from highly regulated industries with discrete records retention requirements, such as financial services, insurance, pharmaceuticals, life sciences, and healthcare, will be the proverbial low-hanging fruits. In light of the current political environment, the organizations most likely to deal with legal discovery from the plaintiff bar will come from industries with product liability, employment discrimination, and employment health and safety issues. Firms from manufacturing, insurance, life sciences and healthcare, pharmaceuticals, and natural resources (e.g., energy, mining, and waste) will be most receptive to a records retention program.

- Vendors have been aggressively marketing email archiving applications to address records retention issues, and competition continues to intensify in this functional market. However, vendors need to remember that except for SEC regulations 17a-3 and 17a-4, there are no specific requirements to archive email. The more sophisticated organizations are becoming aware of this distinction, so email archiving vendors need to reconsider their marketing strategies outside the "broker-dealer" environment.

- Vendors should be able to make the distinction between "retention," "preservation," "collection," and "archiving" as well as the expected responsibilities of the customers' stakeholders. These distinctions will have implications for the customer's IT infrastructure decisions. Vendors should be prepared to have these discussions as a way to demonstrate domain knowledge. Vendors cannot claim to have domain expertise in the legal business process and IT operations requirements for legal discovery, and it would make sense to partner with the relevant domain experts. Vendors should focus on educating end users on embedding electronic discovery requirements within their overall compliance and governance initiatives.

- Vendor solutions should focus on the tighter integration between records management, messaging, security, information and data management, and storage technologies.

- Competition in the records management and email archiving application markets continue to heat up, and it is becoming increasingly difficult for vendors to differentiate themselves. Vendors that can demonstrate their ability to support industry best practices, enable federated management capabilities, unify the management of physical records with electronic records, incorporate ILM principles, and support the development of a secure records and information infrastructure will have a leg up.

- Organizations are wary of solutions that appear to "rip and replace" their existing information infrastructure investments. Vendors should consider solutions that support open standards and enable end users to leverage federated capabilities (e.g., federated records management and federated search capabilities).

LEARN MORE

Related Research

- *Worldwide Compliance Infrastructure 2006–2010 Forecast: SOX 404 Requirements and the Emergence of the Records and Information Infrastructure Platform Define the Market* (IDC #201961, June 2006)
- *Worldwide Legal Discovery and Litigation Support Infrastructure Taxonomy* (IDC #201528, May 2006)
- *IDC's Worldwide Compliance Infrastructure Platform Taxonomy, 2006* (IDC #201417, April 2006)
- *Compliance Infrastructure Landscape: Drivers and Future Outlook* (IDC #201274, April 2006)
- *Businesses Look to Records Retention Program to Enable Sustainable Corporate Governance and Control Runaway eDiscovery Costs* (IDC #34961, February 2006)
- *ZANTAZ Launches First Discovery Solution Suite for Electronic Discovery* (IDC #34900, February 2006)

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