

# New Federal Rules of Civil Procedure

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On December 1, 2006, the electronic discovery-related amendments to the Federal Rules of Civil Procedure went into effect. Below is a summary of electronic discovery amendments.

**Rule 16(b)(5),(6): Pretrial Conferences; Scheduling; Management; Scheduling and Planning** - This Rule is amended to address discovery of electronically stored information early in the litigation, if it is anticipated. This Rule is also amended to include in the scheduling order any agreements among the parties that facilitate discovery by reducing the "risk of waiver of privilege or work-product protection."

**Rule 26(a)(1)(A),(B): General Provisions Governing Discovery; Duty of Disclosure Required Disclosures; Methods to Discover Additional Matter; Initial Disclosures** This amendment requires a party to provide, without awaiting a discovery request, contact information for anyone who might have discoverable information and "a copy of, or a description by category and location of" electronically stored information that may be used to support claims or defenses.

**Rule 26(b)(2)(B): General Provisions Governing Discovery; Duty of Disclosure; Discovery Scope and Limits; Limitations** - This rule provides 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. On both a motion to compel discovery or for a protective order, the burden is on the responding party to show that the information is not reasonably accessible because of undue burden or cost. Even if that showing is made, the court may nonetheless order discovery from that party if the requesting party shows good cause, considering the limitations that are set forth in Rule 26(b)(2)(C) (i.e. whether the discovery sought is cumulative, burden of expense outweighs the benefit, etc.). The court may also specify conditions for the discovery.

**Rule 26(f)(3),(4): General Provisions Governing Discovery; Duty of Disclosure; Conference of Parties; Planning for Discovery** - This rule requires that parties confer to discuss any issues relating to preserving discoverable information and any issues related to disclosure or discovery of electronically stored information. This includes the form or forms in which electronically stored information should be produced, and any issues relating to claims of privilege or protection as trial preparation material. If the parties agree on a procedure to assert such claims after production, the parties should discuss whether to ask the court to include this agreement in an order.

**Form 35: Report Parties' Planning Meeting** - The form adds a brief description of the parties' proposals for handling the disclosure or discovery of electronically stored information.

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***Rule 26(b)(5)(B): General Provisions Governing Discovery; Duty of Disclosure; Discovery Scope and Limits; Claims of Privilege or Protection of Trial-Preparation Materials; Information Produced***

This rule provides that if information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party is required to 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 is required to preserve the information until the claim is resolved.

***Rule 33(d): Interrogatories to Parties; Option to Produce Business Records***

This rule provides that where the answer to an interrogatory may be derived from electronically stored information, and the burden of deriving the answer is substantially the same for the responding party and the requesting party, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained. The responding party must allow the requesting party reasonable opportunity to examine, audit or inspect such records and make copies, compilations, abstracts or summaries.

***Rule 34(a),(b): Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and other Purposes; Procedure***

This rule provides that any party may serve on any other party a request to produce electronically stored information. The rule would also permit the party making the request to inspect, copy, test or sample electronically stored information stored in any medium from which information can be obtained - translated if necessary by the responding party into a reasonably usable form. The rule provides that the request may specify the form or forms in which electronically stored information is to be produced. The producing party may object to the requested form or forms for producing electronically stored information stating the reason for the objection. If an objection is made to the form or forms for producing electronically stored information - or no form was made in the request - the responding party would be required to state the form or forms it intends to use. If a request does not specify the form or forms for producing electronically stored information, 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 usable. A party need not produce the same electronically stored information in more than one form.

***Rule 37(f): Failure to Make Disclosures of Cooperate in Discovery Sanctions; Electronically Stored Information***

This section of Rule 37 provides that, absent exceptional circumstances, a court may not impose sanctions under the 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.

***Rule 45 Subpoena; Form; Issuance***

This rule adds that a subpoena shall command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of among other things, electronically stored information. In addition, a subpoena may specify the form or forms in which electronically stored information is to be produced. Subpoenas may be served to not only inspect materials but to copy, test or sample those materials. Similarly to Rule 34, if a subpoena did not specify the form or forms for producing electronically stored information, a responding party is required to produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and a party need not produce the same electronically stored information in more than one form. As in Rule 26(b)(2)(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 both a motion to compel discovery or for a protective order, the burden is on the responding party to show that the information is not reasonably accessible because of undue burden or cost. Even if that showing is made, the court may nonetheless order discovery from that party if the requesting party shows good cause, considering the limitations that are set forth in Rule 26(b)(2)(C) (i.e. whether the discovery sought is cumulative, burden of expense outweighs the benefit, etc.). The court may also specify conditions for the discovery. Similarly to Rule 26(b)(5)(B), if information is produced in response to a subpoena that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified a party would be required to promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose this information until the claim is resolved.

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