

## **New Amendments to Federal Rules Emphasize Preparedness for Electronic Discovery**

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On December 1, 2006, new amendments to the Federal Rules of Civil Procedure took effect that specifically address electronic discovery. The amendments reflect the increasing prominence of electronic discovery in litigation. They impose new obligations on parties and clarify the procedures for gathering and producing electronically stored information. This memorandum summarizes the amendments and recommends several steps that companies can take to ensure preparedness for electronic discovery.

### **A. What is “electronic discovery”?**

The term “electronic discovery” refers to the discovery, before or during litigation, of information and documents stored electronically, including emails, voicemails, and documents stored on servers, hard drives, CDs, flash cards, backup tapes, and document management systems.

### **B. Why should companies ensure they are prepared for electronic discovery?**

Several recent, high-profile cases illustrate the consequences of failing to meet electronic discovery obligations. In April 2005, a jury awarded \$29 million to a former employee of UBS who sued the company for employment discrimination. During discovery in that case, UBS failed to produce a number of emails that had been stored on backup tapes. As sanctions for that failure, the judge permitted the jury to infer that the missing emails contained information harmful to the company’s case. The jury’s award included \$9 million in compensatory damages and \$20 million in punitive damages.

One month later, in May 2005, a jury awarded financier Ron Perelman a \$1.45 billion verdict against Morgan Stanley arising out of Perelman’s failed investment in Sunbeam. During discovery in that case, Morgan Stanley stated it had turned over all the backup tapes containing relevant documents, only to uncover later in the litigation nearly 1,500 additional backup tapes. As sanctions for that failure, the judge shifted the burden of proof to Morgan Stanley, forcing it to disprove all the plaintiff’s allegations. Although the verdict was reversed on appeal, it illustrates the danger of failing to meet electronic discovery obligations.

### **C. Summary of the New Amendments**

This section summarizes the most significant amendments to the federal rules.

- At the beginning of a lawsuit, parties are now required to disclose any electronically stored information they intend to use to support their claims or defenses.
- Parties are now given express permission to request production of electronically stored information and to designate the format in which that information is produced.
- Parties are now required to discuss issues related to electronically stored information when they meet and confer about discovery.
- Parties need not produce electronically stored information that “is not reasonably accessible because of undue burden or cost.”
- Parties are now permitted to answer interrogatories by providing access to electronically stored information, assuming the burden of deriving the answers would be the same for either party.
- New protections are made available to parties who inadvertently produce information that is subject to a claim of privilege.
- District courts are now expressly empowered to address discovery of electronically stored information in scheduling orders.
- District courts are now prohibited from imposing sanctions on a party for failing to produce electronically stored information lost as a result of routine, good-faith operation of an electronic information system. The commentary to this amendment makes clear, however, that parties cannot take advantage of this amendment by knowingly destroying information subject to a “litigation hold” under the guise of “good-faith operation.”

The full text of the amendments, along with the advisory committee notes, is available at [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf).

### **D. Ensuring Electronic Discovery Preparedness**

The publicity surrounding the new amendments has brought issues of electronic discovery to the forefront. In light of the potential consequences of failing to meet electronic discovery obligations, including the potential for disastrous verdicts as discussed above, companies are advised to take steps to ensure their preparedness to respond to electronic discovery requests. These steps can include designating one or more team members to prepare a litigation response plan addressing electronic discovery issues.

1. Meet with IT department. The response team should meet with members of the company's IT department who are responsible for document and email retention. The team should become familiar with the company's data-retention architecture. Questions that should be addressed include the following: How are emails and documents retained? Does the company have a policy for recycling backup tapes, and is that policy actually followed? How difficult, time-consuming, and expensive would it be to retrieve information from the backup tapes using targeted keyword searches?
2. Develop (or revise) litigation response strategy. Once the response team has a thorough understanding of the company's data-retention architecture, the team should develop or revise a litigation response strategy. The strategy should focus on (a) how to quickly identify key players implicated in the litigation matter, (b) how to issue a "litigation hold" on all relevant documents, including documents stored electronically or on backup tapes, (c) how to monitor compliance with the litigation hold, and (d) how to oversee production of relevant documents from a central location.
3. Share litigation response strategy with key personnel. Once the litigation response strategy has been developed, the team should send the policy to personnel likely to be responsible for overseeing production, including managers of various divisions and IT personnel. The team leader should emphasize the consequences of failing to follow the litigation response strategy, both for the company and the individual employees.

## **E. Conclusion**

The key to preventing disasters related to electronic discovery — including sanctions as severe as those imposed against UBS and Morgan Stanley — is to ensure preparedness *before* the next litigation matter comes in the door. The new federal rules reward careful preparation of a litigation response strategy and steadfast monitoring of compliance with that policy.

The Wyche Law Firm has assembled a team to assist our clients in evaluating their electronic discovery preparedness and in developing (or revising) a litigation response strategy. The service, which is termed "Electronic Discovery Preparedness Audits," consists of the following two components:

1. Two members of Wyche's electronic discovery team will meet with in-house counsel or executives in charge of overseeing litigation along with a representative from the company's IT department to discuss the company's data-retention architecture and litigation response strategy. The meeting will focus both on general electronic discovery issues as well as company-specific issues raised by the new federal rules.
2. After the meeting, the Wyche team will prepare a written evaluation of the company's electronic discovery preparedness. The report will include a set of specific recommendations for developing or improving the company's litigation response strategy.

If you are interested in this service, or if you have any questions related to electronic discovery and the new federal rules, do not hesitate to contact any member of Wyche's electronic discovery team.

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