Maintenance of Electronic Data in Wake of Amendments to Federal Rules of Civil Procedure

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In April of 2006, the rules of discovery found in the Federal Rules of Civil Procedure were amended, effective December 1, 2006. The discovery rules were amended to provide in greater detail for the production of "electronically stored information" in so far as parties to litigation may request and must disclose "electronically stored information" that may be relevant or used to support claims or defenses. The amendments to the discovery rules acknowledge the realities of modern electronic document storage and retrieval. Because of the wide variety of computer systems currently in use and the rapidity of technological change expected to continue into the future, "electronically stored information" is meant to be read as broadly as possible and will include *any* type of information that is stored electronically on *any* type of computer system.

In particular, Federal Rule 34 was amended to include the right to discover by inspection, copying, testing or sampling, "electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form." Rule 34 discovery production applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. Upon such discovery requests, the responding party must produce all "electronically stored information" that is relevant, not privileged or protected and which is reasonably accessible (non-substantial burden or costs or difficulties in locating, retrieving and providing discovery), subject to the same issues and limitations that apply to all other discovery. While a responding party need not provide discovery of "electronically stored information" from sources that the party identifies as not reasonably accessible because of undue burden or costs, the responding party still must identify the *sources* of information containing potentially responsive information not being searched or produced so as to provide enough detail to the requesting party to enable it to evaluate the asserted burdens and costs of providing the discovery on one hand and the likelihood of finding discoverable information on the identified sources on the other hand.

Resolution of discovery issues related to such electronically stored information and sources is still subject to the same rules, discussions and legal processes as other forms of discoverable information. In fact, Rule 45 was amended to recognize that electronically stored information can be sought by subpoena. However, the amendments to Rule 26 require the parties to specifically discuss the forms in which such information will be produced and any other issues related to the preservation of discoverable electronically stored information pending litigation pursuant to a mandated discovery-planning conference. While the definition of electronically stored information is broad, whether and to what extent material that falls within that term should be produced and in what form are separate issues that must be addressed by the parties.

However, while many discovery issues related to electronically stored data will be resolved according to the existing rules of discovery as a matter of course, the amendments acknowledge that the nature of electronically stored information will necessarily make claims of privilege and other discovery issues more complicated. The permitted inspection or testing of certain electronically stored information may raise issues of confidentiality or privacy. The sheer volume of such electronically stored data and the informality that attends the use of e-mail and some other types of electronically stored information may make privilege determinations more difficult and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose difficulties for privilege review as well, such as imbedded information included in electronic files, e.g., computer programs may retain draft language, editorial comments, and other deleted matter in an electronic file not readily apparent to the creator or reader. Moreover, information describing the history, tracking or management of an electronic file is not usually apparent to the reader viewing a hard copy or screen image. The Committee Notes accompanying the amendments indicate that these topics may necessarily have to be discussed in the Rule 26(f) discovery planning conference as well.

Finally, Rule 37 was amended to state that 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. It is stressed that this exception applies only to information lost due to the "routine operations" of an electronic information system. "Routine operations" are described as the essential functions generally designed, programmed and implemented into the system to meet the party's technical and business needs and may include the alteration and overwriting of information, often without the operator's specific direction or awareness. In addition, the exception applies only to information lost due to the routine operation of an informational system "in good faith." "Good faith" in this context is determined in part by the steps a party takes to comply with a discovery request or a court order or an agreement pursuant to Rule 26(f) requiring the preservation of certain electronically stored information. "Good faith" means that a party may not 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 that it was otherwise required to preserve by common law, statute, regulation, discovery rules or a court order. "Good faith" therefore, may impose an affirmative burden of intervening to modify or suspend certain features of a computer system's "routine operation" in order to prevent the loss of information that must be preserved.

In conclusion, all entities subject to federal lawsuits and, therefore, the Federal Rules Of Civil Procedure, should be aware of these new discovery rules and should ensure that their electronic information systems and electronic document management policies and procedures are sufficient and in place if and when litigation is commenced or anticipated. To the extent that school districts are subject to federal laws and lawsuits, these rules apply equally to school districts as to any other entities.

What this means in practical terms is that in relation to potential or anticipated legal disputes, school districts must treat their electronic data similar to how they treat similarly relevant "hard" documents. Electronically generated information should be regularly and routinely stored and deleted according to set patterns, processes, and procedures relevant to each type of document. School districts should develop guidelines, policies and procedures related to saving, storing and deleting such information similar to saving other physical documents and records. More specifically, school districts should maintain such electronic information in a manner and for the period of time consistent with all applicable State and Federal laws pertaining to the maintenance of public records in general and school records in particular. To the extent that no such laws pertain to any particular type of electronically stored data, the school district should state or develop its own procedures related to the manner and time period for maintaining and deleting such information consistent with good practices and follow those procedures. In any event, such information should not be prematurely destroyed or deleted on an ad hoc basis. In addition, regardless of such procedures or practices, when faced with potential or anticipated litigation, a school district should segregate and maintain information relevant to that dispute for at least as long as the statute of limitations applicable to that potential litigation and, of course, for the duration of any such litigation once commenced. Finally, if a school district has not already done so, it should clarify the acceptable use of such information systems with all employees, Board members, and stakeholders to avoid or limit the related issues attendant to discovery disputes.

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