3 OKLA. J.L. & TECH. 32 (2007)
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The Dangers of E-Discovery and the New Federal Rules of Civil Procedure

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I. Introduction

A number of revisions and amendments to the Federal Rules of Civil Procedure are expected to go into effect on December 1, 2006, barring any unforeseen congressional action.[1] The most notable additions to the Federal Rules include a number of proposed amendments that attempt to deal with the discovery of electronic data or "e-discovery."[2] The prevalence of records kept in an electronic format certainly needs to be addressed by the Federal Rules, however there are those who feel that the amendments will create more problems than they attempt to solve. More specifically, there is a very real possibility that the proposed amendments to Rules 26(b) regarding discovery limitations and 37(f) regarding discovery sanctions will provide a mechanism for parties who wish to conceal or destroy damaging electronic data, to do so without penalty.

II. Summary of Proposed Amendment to Federal Rule of Civil Procedure 26(b)(2)(B)[3]

Recognizing the substantial difference between accessing paper records and accessing electronic records, the Judicial Committee opted to include a provision to deal with difficult to

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[1] Janice McAvoy & Gordon Eng, *Forging Ahead on E-Discovery*, N.Y. L.J., June 19, 2006, (Special Section), *available at* http://www.ffhsj.com/reprints/060619_nylj_macavoy.pdf.
[2] For an overview of the proposed amendments, see Federal Rulemaking: Pending Rules Amendments, http://www.uscourts.gov/rules/newrules6.html#cv0804 (last visited Sept. 23, 2006).
[3] Summary of the Report of The Report of the Judicial Conference on Rules of Practice and at app. C-43, C-44 (Sept. 2005), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=128.
The proposed FED. R. CIV. PRO. 26(b)(2)(B) states in full:

> 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 part 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 show good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Id.

access electronic data. The proposed rule changes include an addition which specifically limits the discovery of electronic data which is stored in a format that is "not reasonably accessible because of undue burden or cost."[4] The Committee's comments suggest that the proposed amendment is intended to encompass information stored on obsolete or outmoded computer systems, back up tapes intended only for disaster recovery purposes or any other format or storage system that would require significant data recovery efforts.[5]

Instead of responding to a discovery request for such "not reasonably accessible" data, the responding party may instead submit a list of such data and the reasons why it is inaccessible.[6] *Id.* The requesting party may then challenge the "not reasonably accessible" designation of the materials by showing that the information is in fact reasonably accessible.[7] A judge also has the discretion to require the responding party to disclose the electronic information in spite of the burden it would present if the requesting party can demonstrate good cause.[8]

III. Summary of Proposed Amendment to Federal Rule of Civil Procedure 37(f)[9]

While it generally takes a concerted effort to destroy paper documents, the nature of electronic data storage systems require that systems routinely erase and overwrite outdated information as part of its normal operation. The proposed amendment to Rule 37(f) protects a

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[4] *Id.*
[5] Report of the Civil Rules Advisory Committee 42 (May 27, 2005), *available at* http://www.uscourts.gov/rules/Reports/CV5-2005.pdf.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Report of the Committee on Rules of Practice and Procedure at app. C-86 (May 2005), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=171.

The Proposed FED. R. CIV. PRO. 37(e) states in full:

> Absent Exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically store information lost as a result of the routine, good-faith operation of an electronic information system.

Id.

party from discovery sanctions for the erasure of data so long as (1) it is part of the computer system's normal operating routine and (2) the erasure occurred in "good faith."[10]

IV. Opposition to the Proposed Rules

After the Rules Committee drafted the original proposed amendments to the Federal Rules and they were published for comment, the Committee held a series of open hearings on the new proposed rules.[11] From the outset, a significant portion of the bar expressed dissatisfaction with the proposed amendments. Two issues generated the most concern: (1) that the exception for "not reasonably accessible" information in proposed Rule 26(b) would encourage litigants to store damaging information in such a way as to take the "materials off the table,"[12] and (2) that the shield from sanctions in the proposed Rule 37(f) would encourage purges of electronic data that would "foster a 'hide and destroy' mentality."[13]

A major split appears to have formed between the corporate bar and those who primarily represent the interests of plaintiffs. Executives and counsel for Intel, Phillip Morris, Dow, GM, American Airlines, Microsoft, CIGNA, State Farm and Johnson & Johnson testified or submitted statements endorsing the new changes arguing that they would significantly reduce the burden on corporate defendants.[14] However, the Association of Trial Lawyers of America, several state employment lawyers associations, several state bar associations, and Trial Lawyers for Public

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[10] Rule 37(f) will be enacted as FED. R. CIV. PRO. 37(e) because of a number of stylistic changes being made to the Federal Rules. During its drafting, comment and revision, it was referred to as 37(f) and will be referred to as such in this article in order to avoid confusion. *See* Report of the Civil Rules Advisory Committee 279 (June 2, 2006), *available at* http://www.uscourts.gov/rules/Reports/CV06-2006.pdf.
[11] For an overview of the Judicial Committee's rule-making process, see Federal Rulemaking: A Summary for Bench and Bar, http://www.uscourts.gov/rules/proceduresum.htm (last visited Sept. 23, 2006).
[12] Summary of Testimony and Comments on E-Discovery Amendments, 2004-05, Gerson Smoger, 04-CV-046, at 24, *available at* http://www.uscourts.gov/rules/e-discovery/SummaryE-DiscoveryComments.pdf (last visited Sept. 23, 2006) [hereinafter Summary of Testimony & Comments].
[13] *Id.*, William Butterfield, 04-CV-075, at 7.
[14] *Id.*

Justice argued that defendants, particularly corporate defendants, in the absence of a provision expressly authorizing electronic information preservation, will use the rules to hide, destroy or render inaccessible electronic information that could give rise to liability.[15] In written comments submitted to the Rules Committee, Todd Smith, the president of ATLA, argued that the proposed amendments would foster a "culture of discovery abuse" and would allow some parties to "avoid discovery by arranging frequent erasure of electronically stored information".[16] The Committees involved with drafting the rules concluded that the concerns of the ATLA and other attorney's groups were unfounded or overly exaggerated.[17] However, it is certainly of interest that while the rest of the rule changes were approved and submitted unanimously, Rules 26(b) and 37(f) were challenged by a number of Committee members who voted not to submit those rules to Congress or the U.S. Supreme Court.

V. Will The Proposed Rules Fix The Right Problems?

The approval process and comments on the proposed Rules 26(b) and 37(f) are significantly more contentious and acrimonious than one would expect from commentary on the Federal Rules of Civil Procedure. One certainly would have to wonder about the origin of this deep division and whether these were legitimate concerns. There is further evidence that the divide between corporate counsel and the plaintiff's bar was not merely coincidence. A study submitted to the Judicial Conference Committee on Civil Rules suggests that when it comes to electronic discovery, the interests of single plaintiffs and larger corporate entities may be at

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[15] *Id.*
[16] *Id.*, Todd Smith, 04-CV-012, at 5.
[17] Report of the Civil Rules Advisory Committee*, supra* note 5, at 44.

odds.[18] The study is based on a survey of attorneys, technology consultants and magistrate judges, and points to a number of important trends related to electronic discovery. Magistrate judges reported that the types of cases which are typically filed against larger corporate entities (employment actions, employment class actions and product liability actions) comprised approximately 40% of cases where computer based discovery is involved.[19]This may explain the opposition of many plaintiff's lawyers, especially those in the employment litigation field who worry that the new rules will make it harder to prevent erasure of the electronic data held by corporations.

Other findings from the study suggest that the erasure of electronic data, both intentional and inadvertent, is a frequent problem, but that the issuance of preservation orders is not a common occurrence.[20] Of those surveyed, 47% of magistrate judges had encountered a case in which there were allegations of the erasure or spoliation of electronic data, but only 35% of those same magistrate judges had ever issued a preservation order to halt the erasure of electronic data.[21] The technology professionals surveyed stated that prevention of the erasure or spoliation of data possessed by the opposing party was an issue in approximately 80% of the cases in which they were involved.[22] Magistrate judges reported that preventing erasure of data until discovery was completed played a role in approximately 80% of cases involving electronic discovery, though preservation orders were issued in only 10% of those cases.[23] These numbers suggest that

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[18] Molly Treadway Johnson, Kenneth J. Winters & Meghan A. Dunn, A Qualitative Study of Issues Raised By The Discovery of Computer-Based Information In Civil Litigation (Sept. 13, 2002), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ElecDi10.pdf/$file/ElecDi10.pdf.
[19] *Id.* at 6.
[20] *Id.* at 8.
[21] *Id.*
[22] *Id.* at 11.
[23] *Id.* at 12.

there is a significant discrepancy between the problems raised by erasure of data and the means to prevent loss of potentially relevant information.

So far as electronic discovery is concerned, the advantage has to a certain extent been shifted to the responding party in possession of the electronic data. Discovery requests are already difficult enough when too specific a request yields little information and too expansive a request will be objectionable as overly broad. The problems with the new rules lie in the fact that it will add new weapons in the discovery arsenal of the responding party. Under Rule 26(b), a party may now argue that information is either too difficult or expensive to access and under Rule 37, a party may now, without fear of sanctions, simply explain that the computer system deleted it. The party requesting the electronic data will be forced to show "good cause" under Rule 26(b) and bad faith under Rule 37(f) to gain access to information which would have been easily discoverable had it been in paper format. Discovery disputes over electronic data will now be waged over the exact meaning of "not reasonably accessable" and "routine, good-faith operation of an electronic information system".[24] Without doubt, decisions as to what is reasonable and what is done in good faith undermine the consistency and predictability that discovery rules generally seek to create.

VI. How can Clients and Attorneys Respond to the New Rules?

Barring any congressional opposition, these rules will go into effect on December 1, 2006. The question then becomes how lawyers and their clients will react to the new rules.

At the very least, attorneys will need to become more computer savvy and become well acquainted with a technology consultant or consultants who can assist the attorney in the practical aspects of e-discovery. Attorneys will also have to consider how quickly to file a

[24] Report of the Civil Rules Advisory Committee, *supra* note 5, at 44, 86.

complaint. A delay of several months or even several weeks may well mean that important information will be overwritten by a computer storage system. Those who expect to request some variety of electronic information should be prepared to seek orders for the preservation of electronic data as quickly as possible following the commencement of the action. Opposition to a preservation order may be intense as one considers the enormous cost that may be incurred in halting the normal routine of a computer system.[25] Plaintiffs may be left with little or no recourse if the computer storage system overwrites important information.

The reaction to the proposed rules of those who own and operate computer systems is sure to be varied. There will be those who see the proposed rules as an opportunity to make their systems more discovery compliant by incorporating readily accessible extra storage and implementing more efficient suspension of routine maintenance. However, there will almost certainly, be a minority who, under the shields of 26(b) and 37(f), will create systems that retain less data in less accessible formats for the purpose of avoiding disclosure of electronic information which might give rise to liability.

VII. Conclusion

In a legal climate which has seen the misdeeds by the likes of Enron and WorldCom, it seems almost naive to provide a safe harbor from sanctions for destruction of potentially relevant evidence based on assertions of good faith. That is not to say that the rules in and of themselves are flawed. Nor are these rules likely to encourage those who would ordinarily act in good faith to seek to destroy possible damaging documents. The real trouble that arises is that those who may already be inclined to obscure or destroy evidence of any sort will now be able to

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25 According to Phillip Morris USA, it costs over $5.6 million per day to suspend their e-mail system's maintenance routine. Summary of Testimony and Comments, *supra* note 12, Jose Luis Murillo, 04-CV-078, at 6.

hide behind the shield of good faith and undue burden to protect themselves from sanctions. The realm of electronic data is already far more mutable, nebulous and unnavigable than the more concrete and tangible world of paper documents, and these rules will very possibly make e-discovery all the more complex and more expensive for parties seeking discovery.