



JUNE 2006

LITIGATION CLIENT ALERT

U.S. SUPREME COURT APPROVES NEW CIVIL PROCEDURE RULES FOR E-DISCOVERY

INTRODUCTION

On April 12, 2006, the U.S. Supreme Court approved amendments to the Federal Rules of Civil Procedure that, for the first time, directly address the issue of electronic discovery or what the new rules call "electronically stored information" ("ESI"). These amendments, which are scheduled to go into effect on December 1, 2006 after Congressional approval, will have a significant impact on issues of burden, cost, scope of disclosure, privilege, sanctions and third-party discovery with respect to ESI. The amendments affect Rules 16, 26, 33, 34, 37 and 45 and are designed, in part, to "provide support for early party management and, where necessary, effective judicial supervision." This Client Alert summarizes the key changes to these rules.

SCOPE AND PROCEDURE

The amendments contain some basic changes regarding the scope and procedure for producing ESI which may place real burdens on the producing parties. The federal rules have long permitted discovery of "documents" and "things," and have now been specifically expanded to include ESI, permitting discovery of dynamic databases and other forms of electronically stored information.

The amendments affect the procedure for producing information. A requesting party is now permitted to designate the form in which it wants ESI produced. If the form of production is not specified, the responding party must produce ESI either in a form in which it is ordinarily maintained or in a form that is "reasonably usable." The amendments also require, if necessary, a responding party to "translate" information it produces into a "reasonably usable" form. This may require the

responding party to provide some reasonable amount of technical support, information on application software, or other assistance to enable the requesting party to use the information. If the requesting party is not satisfied with the form the responding party intends to use, the requesting party may move to compel.

UNDERSTANDING THE CLIENT'S INFORMATION SYSTEMS

The amended rules also impose new initial disclosure obligations upon parties. They require a party, without awaiting a request, to provide a copy of, or a description by category and location of, ESI. Further, the parties' initial proposed discovery plan must include "any issue relating to disclosure or discovery of" ESI, "including the form or forms in which it should be produced." The proposed discovery plan must also address the burdens of pre-production privilege review of ESI.

As these amendments impact litigation right out of the gate, it is imperative that counsel understand what information the client maintains in electronic media, the format in which it is stored, and where it is stored. Counsel must also be aware of any issues that might affect the client's disclosure of ESI, including the form in which it is produced, such as whether that ESI can be reviewed using standard software or requires the client's proprietary software. If using standard software is not an option, a party may be required to provide the requesting party access to its proprietary software to allow discovery of ESI.

THE NEW PROCEDURE FOR ASSERTING PRIVILEGE AFTER PRODUCTION

The procedure under the current federal rules is that claims of attorney-client privilege or work-product protection must be made *before* production. Because the risk of waiver can increase substantially due to the volume of ESI and the time and effort required to review it, the amended rules establish a procedure that allows the responding party to assert a claim of privilege or of work-product protection *after* production. Upon notice, the receiving party is required to promptly return, sequester or destroy the specified information and, if it has already disclosed the information, to take reasonable steps to retrieve it. If the claim of privilege is contested, the burden is on the receiving party to promptly present the issue to the court for resolution. However, although the amendments provide a mechanism to assert such a privilege after production, they do *not* address the issue of the effect, if any, of this procedural change on the right of an opposing party to claim that the privilege or protection asserted after production has been waived. It appears the issue of whether a waiver has occurred will have to be resolved by the courts.

ONLY "REASONABLY ACCESSIBLE" INFORMATION MUST BE PRODUCED

The amendments do not provide a blank check to parties seeking ESI and establish that only "reasonably accessible" ESI may be subject to discovery. Notwithstanding that limitation, the court may still order the discovery for "good cause."

Under the new rules, a party need not provide discovery of ESI if it is not "reasonably accessible" due to "undue burden or cost." This may be asserted even where the responding party has not examined the information. In such circumstances, a party need only identify, by category and type, the sources containing potentially responsive information that it is neither searching nor producing. A party will, however, still need to preserve the information.

The requesting party need not accept a representation that ESI is not "reasonably accessible," and could move to compel. The burden would then shift to the responding party to show that the ESI is not "reasonably accessible." The court may also permit discovery by the requesting party to test this assertion.

Even if the responding party is able to show that the ESI is not "reasonably accessible," the court may nonetheless order the discovery if the requesting party shows "good cause." The "good cause" determination is complicated by the fact that the parties may know little about what information the sources identified as not "reasonably accessible" might contain, its relevance or value in the litigation. The court may need some discovery to help it determine whether good cause exists. The court may set conditions for such discovery, including payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.

NONPARTY DISCOVERY

The changes also address nonparty discovery. The amendments concerning burden, cost, scope of disclosure, sanctions and privilege that affect parties are made applicable to nonparty discovery through the rule changes concerning subpoenas. Thus, the new rules concerning ESI will impact parties to a litigation and nonparties who are involved as a result of a subpoena.

SANCTIONS

The amendments also provide limited protections against sanctions for parties' inability to produce ESI by precluding sanctions when information is lost as a result of the "routine, good faith operation of an electronic information system," absent "exceptional circumstances." These amendments also apply to "an" electronic system, not "the party's" electronic system, extending its protections to outside firms that may provide electronic information storage to a party.



JUNE 2006

CONCLUSION

These amendments are designed to facilitate discovery by providing added clarity concerning a party's obligations with respect to ESI. The amendments also make it especially important for counsel to understand their client's information systems in order to fashion an effective and cost-efficient discovery plan.

FOR FURTHER INFORMATION CONTACT:

NANCY E. DELANEY
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 PARK AVENUE
NEW YORK, NY 10078-0061
E-MAIL: NDELANEY@CM-P.COM
TEL: (212) 696-6939
FAX: (212) 697-1559

Ms. Delaney is a partner in the Litigation Department and has been with the Firm since 1988. Her experience in civil litigation includes complex commercial, securities and trust matters.

MYLES K. BARTLEY
E-MAIL: MBARTLEY@CM-P.COM
TEL: (212) 696-6098
FAX: (212) 697-1559

Mr. Bartley is an associate in the New York office and has been in the Litigation Department since 1998. His experience includes general commercial litigation, securities litigation and white collar criminal defense.

TINA TOLENTINO
E-MAIL: TTOLENTINO@CM-P.COM
TEL: (212) 696-8836
FAX: (212) 697-1559

Ms. Tolentino is an associate in the New York office and joined the Firm's Litigation department in 2005. She is admitted to practice in New York State.

ABOUT CURTIS

CURTIS is headquartered in New York, with branch offices in Frankfurt, Houston, London, Mexico City, Milan, Muscat, Stamford, Paris and Washington, D.C. Curtis' core practices of International Corporate Law, Finance and Litigation are complemented by numerous specialty areas, including: Admiralty, Banking & Regulatory, Bankruptcy & Creditors' Rights, Environmental, Immigration, Intellectual Property, Real Estate, Tax, and Trust & Estates.

The material contained in Curtis' Litigation Client Alert is only a general review of the subjects covered and does not constitute legal advice. No legal or business decision should be based on its contents. Please contact Greta Schneider, Client Relations Manager at +1 212.696.6975 or gschneider@cm-p.com with any questions.