

CLIENT ALERT

Supreme Court Approves E-Discovery Amendments to FRCP

Apr. 18, 2006

Last week the United States Supreme Court approved, without comment or dissent, each of the proposed amendments to the Federal Rules of Civil Procedure concerning the discovery of electronically stored information. Absent contrary congressional action, the amended rules will take effect on December 1, 2006. The amendments are designed to acknowledge the differences between electronically stored information and traditional paper files, including the vastly greater volume of electronic material, differences in the way that electronic files are created, stored, collected and archived, and the particular challenges parties face when trying to identify, preserve, and produce potentially relevant electronic material.

These significant amendments to the Federal Rules include provisions:

- Requiring E-discovery issues to be examined at the outset of a lawsuit (Rules 16 & 26(f));
- Requiring the mandatory disclosure of categories and locations of electronically stored information (Rule 26(a)(1)(B));
- Imposing a “reasonably accessible” standard to determine if a party must produce electronically stored information (Rule 26(b)(2)(B));
- Introducing a “clawback” provision relating to inadvertently produced privileged information (Rule 26(b)(5)(B));
- Establishing a standard for the production of electronic files (*i.e.*, “ordinarily maintained” or “reasonably usable”) if a production format is not specified by the requesting party (Rule 34); and
- Creating a “safe harbor” provision for electronic information that is lost due to the routine operation of IT systems as long as reasonable steps were taken to preserve the information after knowing it was discoverable (Rule 37).

Even before the amendments were approved, we have found that courts increasingly have been following these general principles. We expect much debate and litigation regarding the interpretation of these rules, as parties continue to struggle with the litigation challenges created by electronic discovery.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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