

Summary of the Amendments to the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure were amended effective December 1, 2006 specifically to address issues surrounding electronically stored information. The following is a summary of the changes.

Rule 16(b)(5) and (6): Pretrial Conference; Scheduling; Management; Scheduling and Planning.

The scheduling order entered under this rule provides for disclosure of discovery of electronically stored information and permits the parties to discuss and negotiate agreements for asserting attorney-client and work product privilege claims after production.

Rule 26(a)(1)(B): General Provisions Governing Discovery; Duty of Disclosure; Required Disclosures; Methods to Discover Additional Matter; Initial Disclosures.

Requires parties to provide electronically stored information or describe its category and location without awaiting a discovery request.

Rule 26(f)(3) and (4): General Provisions Governing Discovery; Duty of Disclosure; Conference of Parties; Planning for Discovery. (“Meet and Confer” Provision)

Requires that parties meet and confer at least 21 days before the scheduling conference is held to discuss all issues relating to preserving discoverable electronically stored information and any issues related to its disclosure and discovery. Specifically, the parties should discuss the form of production and issues relating to claims of privilege. If the parties agree to a clawback provision, they should discuss whether to include the agreement in a court order.

Rule 26(b)(2)(B): General Provisions Governing Discovery; Duty of Disclosure; Discovery Scope and Limits; Limitations. (“Reasonably Accessible” Provision)

States that a party does not need to provide discovery of electronically stored information that is not reasonably accessible because of undue burden or cost. The burden is on the responding party to show that the information is not reasonably accessible. The requesting party then has the opportunity to show good cause with consideration of the provisions of Rule 26(b)(2)(C). The court will then decide whether the benefit outweighs the burden and may order discovery of the information alleged to be not “reasonably accessible” by the responding party. The court may also specify conditions for such discovery.

Rule 26(b)(5)(B): General Provisions Governing Discovery; Duty of Disclosure; Discovery Scope and Limits; Claims of Privilege or Protection of Trial Preparation Materials; Information Produced. (“Claw Back” Provision)

Provides that if a party mistakenly produced information in discovery that is subject to a privilege claim, the party making the claim may notify the recipients of the privilege claim and the basis of the claim. The receiving party is required to promptly return, sequester, or destroy the information until the privilege claim is resolved. The receiving party may present the information to the court under seal for a privilege determination. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The producing party making the claim of privilege must preserve the information until the claim is resolved.

Rule 33(d): Interrogatories to Parties; Option to Produce Business Records.

States that a responding party may simply specify the records from which an answer to an interrogatory may be derived, if the burden of deriving the answer is substantially the same for the responding party and the requesting party. The responding party must allow the requesting party a reasonable opportunity to examine the records and make copies, compilations, abstracts, or summaries.

Rule 34(a) and (b): Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and other Purposes; Scope; Procedure.

Provides that any party may serve a request to produce electronically stored information on any other party. The rule permits the requesting party to inspect, copy, test, or sample data stored in any medium from which information can be obtained and converted to a usable form. The request may specify the form or forms in which electronically stored information is to be produced. The responding party may object to the requested form(s), and state the reason for the objection. The responding party is required to state the form(s) it intends to use. If the request for electronically stored information does not specify the form(s), a responding party must produce the information in the form(s) in which it is ordinarily maintained or in a form that is reasonably usable. There is no need to produce electronically stored information in more than one form.

Rule 37(f): Failure to Make Disclosures or Cooperate in Discovery; Sanctions; Electronically Stored Information. (“ Safe Harbor” Provision)




Stipulates that “absent exceptional circumstances,” a court may not impose sanctions 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.

Rule 45 Subpoena: Form; Issuance.

States that a subpoena shall command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of electronically stored information, among other things. Additionally, a subpoena may specify the form(s) in which electronically stored information is to be produced. Subpoenas may be served to inspect, copy, test, or sample those materials. As in Rule 34, if a subpoena does not specify the form(s) for producing electronically stored information, a responding party shall produce the information in a form(s) in which it is ordinarily maintained or reasonably usable, but not in more than one form. As in Rule 26(b)(2)(B), a responding party does not need to provide discovery of electronically stored information from sources identified as not “reasonably accessible” because of undue burden or cost. The burden is on the responding party to show that the information is not reasonably accessible. The requesting party then has the opportunity to show good cause with consideration of the provisions of Rule 26(b)(2)(C). The court will then decide whether the benefit outweighs the burden and may order discovery of the information alleged to be not “reasonably accessible” by the responding party. The court may also specify conditions for such discovery. Similarly to Rule 26(b)(5)(B), if information that is subject to a privilege claim is produced in response to a subpoena, the producing party making the privilege claim may notify the receiving party of the privilege claim and the basis for the claim. After notification, the receiving party is required to promptly return, sequester, or destroy the specified information until the claim is resolved.

Form 35: Report of Parties Planning Meeting

This form has been amended to include a brief description of the parties’ proposals for handling the discovery of electronically stored information.

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