

E-Mail Discovery

Federal Rules of Civil Procedure (FRCP)

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Recent amendments to the Federal Rules of Civil Procedure reflect growing attention focused on electronic records in litigation. When read together with recent case law, the amendments show that enterprises have incentives to keep more complete and more searchable e-mail archives and to retain those archives for longer periods of time.

In December 2006, amended parts of the Federal Rules of Civil Procedure (FRCP) came into effect with respect to electronic records and their discovery in litigation.

In the "discovery" phase of a lawsuit, each party is entitled to receive from the other copies of or access to most all the records the second party possesses that are relevant to the subject of the lawsuit. Implicit in the FRCP amendments is the risk that the holder of electronic records can, when answering a discovery request, make a mistake and open itself to sanctions.

Revelations about E-Records Early in Litigation

FRCP 26(a) has been amended to clarify that parties are obliged early in litigation to divulge the existence of and describe relevant electronic records. Further, parties are required under amended FRCP 16(b) to hold an early-stage conference that includes discussion of e-record issues and planning for discovery of e-records.

These two amendments make e-records a prominent topic right upfront, as litigation is starting. What this means is that enterprise litigants are expected quickly to have a handle on what e-records they possess, where they are, what format they are in, how accessible they are, how voluminous they are, what it will take and cost to compile them and so on.

Therefore, an enterprise needs to have more than just general knowledge of its information systems. It needs to know and be able to tell an opponent about the relevant records, especially the specific classes of e-mails touching on the topic of the lawsuit.

Readily-Accessible?

Recognizing how vast corporate information systems can be, the drafters of the FRCP amendments wanted to curb the search for records in areas that are unlikely to produce useful evidence at reasonable cost. So they drew a distinction between records that are readily-accessible and those that are not.

Under amended Rule 26(b)(2) relevant e-records that are readily-accessible are discoverable, and records that are not readily-accessible are presumed not to be discoverable. But the party seeking records can overcome the presumption of non-discoverability. Among the ways to overcome the presumption would be to produce circumstantial evidence that the records are relevant or that they are in fact accessible without undue expense.

As a practical matter, amended Rule 26(b)(2) makes little difference to a business manager who is setting a record retention policy before litigation has started. The amended rule does not tell the manager which data can safely be destroyed and which cannot be. It simply regulates the expenditure of effort in retrieving records after litigation is underway.

Litigation Hold and Sanctions for Destruction of Records

Courts will sanction an enterprise that tolerates the destruction of its records when they should be preserved. But for an enterprise to know, on any given day, what should be preserved for the future is not easy.

In the operation of a corporate IT system, records are constantly being created and deleted. But courts expect that the destruction of records relevant to pending litigation be suspended while the litigation is pending. This suspension is informally known as a "litigation hold." For a complex enterprise, to design and implement a litigation hold can be a big challenge. The firm must know what records it possesses, know which are relevant to the lawsuit, develop a practical plan to protect those records and so forth.

Amended FRCP 37(f) reminds the firm of the need to place a "hold" on the routine destruction of records after litigation breaks out or becomes reasonably foreseen. In practice, implementation of a litigation hold over electronic records can be tricky. It is therefore wise to keep more plentiful records (especially e-mail) for a longer time.



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