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Coming Changes to Federal Rules Will Impact Counsel's Role Regarding Electronically Stored Information

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The proposed changes to the Federal Rules of Civil Procedure, effective December 2006, include new language regarding electronically stored information (ESI). Historically, corporate counsel have weighed the need of organizations to collect, retain, and delete information against the requirements of regulation, legal guidance, and litigation strategy. The impact of the proposed changes regarding ESI accelerates corporate counsel's need for technical knowledge, willingness to address an evolving set of discovery issues, and the requirement to manage new costs of business.

The proposed changes to the rules were approved by the U.S. Supreme Court in April, and will take effect on December 1, as long as there is no action initiated by Congress to the contrary.

Rules 26, 34 Amended

The proposed changes to Rules 26 and 34 define ESI and provide guidance regarding litigants' roles in requesting and producing ESI.

Other rules, such as Rule 16 and 37, also have proposed changes. However these changes are not discussed in this article, as Rules 26 and 34 have a greater impact on corporate counsel's role and guidance is needed.

The proposed changes to Rule 26, "General Provisions Governing Discovery and Duty of Disclosure," include requiring parties to discuss the disclosure or discovery of ESI early in a litigation. The proposed new rules further note that a responding party does not need to provide ESI that is not reasonably accessible based on a standard of undue burden or cost. However, the rule does state that the responding party should review its accessible information sources to determine if the ESI sought is available in a reasonably accessible format.

The proposed changes to Rule 34, "Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes," acknowledges that ESI is now separate from its predecessor, the "document." With respect to the production of ESI, Rule 34 permits, but does not require a requesting party to specify the form of production of ESI (e.g., in specific pro-

grams or as certain types of files). The responding party can object to the form requested. If such a form is not specified, the default is that ESI is to be produced as it is "ordinarily maintained" or in a "reasonably usable" form. Not all ESI is required to be produced in the same form.

Impact of New Rules

Enhanced Level of Technical Knowledge: Corporate counsel, with current and detailed knowledge of the availability and format of ESI throughout their organizations, are better prepared to face the demands of litigation. To meet this need, many organizations are identifying teams tasked with understanding what ESI is, where it exists and to what extent it is "accessible." These teams are often comprised of individuals from across the organization, including the information technology (IT) department, human resources, compliance, legal, records management, and others.

This collaborative approach requires learning about issues faced by other departments (e.g., the IT department needs an understanding of the obligations and strategy considerations of the legal department, while the legal department needs to understand the practical constraints faced by the IT department serving a multitude of users). Additionally, these cross-departmental teams can respond to requests for ESI in accessible forms based on developing knowledge of the types of data collected as a result of different business processes. Corporate counsel can also participate in these collabo-

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rative teams by drafting documentation regarding ESI policies, championing these policies, and providing illustrative examples that resonate with specific audiences of employees.

Corporate counsel can also set standards for outside counsel's approach to ESI. Outside counsel, with an enhanced level of knowledge regarding the proposed rule changes, can formulate specific and accurate requests for discovery and respond to discovery requests in a timely and comprehensive fashion. Attorneys who communicate effectively and accurately regarding ESI requests will also reduce the latitude for interpretation by opposing counsel.

Corporate counsel can work with outside counsel to gain insight into the data, systems, and infrastructure of the opposing party (or parties) as discussions of ESI and its form of production evolve. Organizations—even those in the same industry—may have different approaches to ESI. Thus, effective approaches to ESI requests for production may require corporate counsel to learn about alternate business models or more advanced approaches to IT infrastructure.

Evolving Discovery Issues: Corporate counsel has the opportunity to consult with outside counsel on ESI requests and production in litigation. Furthermore, corporate counsel can affect organizational policy regarding the creation, use, retention, and deletion of ESI in the ordinary course of business. As such, corporate counsel faces an array of evolving issues that affect discovery of ESI.

One issue is how much ESI to maintain. Due to the accessibility standard for ESI, corporate counsel are starting to take a look at the ESI generated by their organizations and evaluate what is necessary to retain for business purposes (once regulatory requirements are satisfied). For example, organizations that have years of backup tapes in offsite storage for disaster recovery purposes are debating the necessity of such storage for long periods of time.

Corporate counsel may start a dialog in the organization regarding the balance between the business needs

of the organization and the possible necessity to produce this ESI in future litigation and/or the possible controversy regarding the reasonableness of production costs. Rather than face a discovery argument in the future regarding the accessibility of the ESI, corporate counsel may recommend that the organization choose not to maintain certain ESI as long as the organization is operating within its current document retention policy and in compliance with applicable laws/regulations.

Thus organizations may revamp document retention policies applicable to the ordinary course of business. As a specific example, BDO Seidman Computer Forensics and e-Discovery professionals recently conducted an internal investigation at an organization that retained only eight weeks of back-up tapes of their e-mail server. The only long-term backup tapes that were identifiable and accessible were those kept in response to prior litigation.

Another ESI discovery issue relates to what comprises ESI. Metadata is the typical example. Metadata is often defined as "data about data" and can include a file's modified date, creation date, and author. Corporate counsel and outside counsel may need to address whether and how metadata will be requested or produced. In a fraud claim, the ownership and history of a file may be relevant. Additionally, information about authorship may be useful for developing further discovery requests or identifying witnesses.

Further questions regarding ESI include:

- how to produce data that is not set up to print, such as hidden columns and rows in spreadsheet files;
- the role of proprietary software needed to store or process data; and
- how to satisfy the privacy regulations of foreign jurisdictions.

Managing New Costs of Doing Business: Corporate counsel must advise senior management on litigation strategy as well as costs. The proposed changes to the rules regarding ESI have prompted speculation as to the cost impact. Corporate counsel may follow different strategies based

on their organizations' general susceptibility to litigation, the magnitude of possible damages claims, their reliance on alternate dispute resolution, or their tendency to settle. Because the proposed changes to the rules require discussions before production and allow the requesting party to specify the form of production, one result may be less duplication of effort in the overall production phase of a case and a decrease in costs.

However, if an organization rarely faces litigation (or litigation is avoided before the production phase), the upfront time, energy, and cost may outweigh the benefit of reduced costs for production of ESI.

The cost/benefit discussion points to be considered by corporate counsel can be tactical as well. For example, if the parties agree on production of files in native format (the file format that an application normally reads and writes), the cost of production may be less expensive than traditional production of hard copy or image files.

In addition, as noted above, according to the proposed changes to the rules, a responding party is not required to provide ESI that is considered not reasonably accessible because of undue burden or cost. The impact of this accessibility standard for ESI may also be a cost savings, as well as a more responsive, smaller production.

Conclusion

Although corporate counsel may have previously faced significant challenges identifying and producing ESI in the context of litigation, the proposed changes to the rules have raised awareness of the critical importance of these issues. By requiring discussion among litigants regarding ESI, the proposed changes to the rules underscore the importance of corporate counsel's role in an organization's ESI policy and practice. The availability and accessibility of ESI, its volume, variety, and form changes frequently and requires a commitment to ongoing education. Therefore, corporate counsel can advance litigation strategy and manage costs through a commitment to facing the complex questions raised by the ESI environment.