



**White Paper**

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**Electronic Discovery: A More  
Rational Approach**

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Within the past five years, requests for electronic discovery have become overwhelmingly more prevalent than requests for paper discovery. This has resulted in both the courts and organizations involved in litigations to be confronted with new legal issues, such as how to identify and search for relevant electronic information, how to produce such data, and who bears the costs associated with these processes. To manage these emerging issues, the Committee on Rules of Practice and Procedure proposed amendments to the Federal Rules of Civil Procedures, with the United States Supreme Court approving these amendments in April 2006, which will take effect on December 1, 2006.

The amendments to the Federal Rules of Civil Procedures include modifications to Rules 16, 26, 33, 34, 37, and 45, and were heavily influenced by the cases *Zubulake v. UBS Warburg, LLC* and *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, both of which were ultimately decided in 2005. As the previous rules did not necessarily conform to issues relating to electronic discovery, which was made clear in both *Zubulake* and *Coleman*, the amendments are designed to streamline electronic discovery and establish procedures and clearer guidelines for electronic discovery.

### **Rules 16(b) and 26(f)**

The amendments to Rules 16(b) and 26(f) provide that it is at the court's discretion to include electronic discovery in its scheduling orders and requires the involved parties to discuss electronic discovery before the initial pretrial conference. In addition, the new subsections Rules 26(f)(3) and 26(f)(4) encourage the use of "non-waiver", "quick peek", or "clawback" agreements, in which the parties enter into voluntary agreements to produce electronic information in bulk without prescreening it, with the option of later asserting it as privileged. The purpose of this amendment is to reduce the costs associated with the responding party reviewing potentially millions of electronic documents and provides a type of safety net in the event that a privileged document is inadvertently turned over.

### **Rule 26(b)2(b)**

Under the current rule, parties must produce all requested data, whether or not it is reasonably accessible. The amendment to Rule 26(b)2(b) allows the responding party to designate certain electronic data as being, "inaccessible or unreasonably accessible," as a result of undue burden or cost. The amendment to Rule 26(b)2(b) also discusses that the responding party may attempt to compel production or preservation, and that the requesting party may move for a protective order if they are able to demonstrate that the designated electronic information is not reasonably accessible.

### **Rule 26(b)(5)**

Similar to the amendment of Rule 26(f), the amendment to Rule 26(b)(5) provides a procedure for addressing the inadvertent production of privileged or attorney client work product and requires the recipient, upon notification by the responding party, to turn in, sequester, or destroy the specified privileged electronic information until the matter is resolved.

### **Rule 33**

The amendment to Rule 33 specifies that electronically stored information may meet the criteria as appropriate business records from which an answer to an interrogatory may be determined.

**Rule 34**

The current Rule 34 relates to document requests, and the amendment to Rule 34 both references electronically stored information and provides a procedure for denoting and objecting to the form in which electronic information is to be produced. Specifically, Rules 34(b)(ii) and 34(b)(iii) state that electronic information be produced in the form in which it is “ordinarily maintained” or “reasonably usable” and that the responding party need only produce electronic information in one form.

**Rule 37(f)**

The amendment to Rule 37(f) states that a court cannot, under these rules, impose sanctions on a party for failing to provide electronic information that has been destroyed as a result of the “routine, good-faith operation of an electronic information system.” The Advisory Committee Notes clarify that the purpose of this amendment is due to the fact that normal computer usage results in electronic information being altered, destroyed, overwritten, or modified, which differs greatly from paper documents being purposefully destroyed as a result of an impending or ongoing litigation.

**Rule 45**

The amendment to Rule 45 integrates the amendments to Rule 26(b) and Rule 34 to also apply to the production of electronic information by third parties as a result of a subpoena.

**Conclusion**

After years of applying the traditional discovery rules to electronic discovery, the approval of the amendments to the Federal Rules of Civil Procedures to reflect the discovery of electronic information is vitally important to the practice of law. The amendments to Rules 16, 26, 33, 34, 37, and 45 showcase the evolving changes to discovery and validate that electronic discovery is now an essential aspect of nearly every case being litigated within the United States.

*To view the amended rules in full, please see [www.uscourts.gov/rules](http://www.uscourts.gov/rules).*