

Comment

Preventing and Reducing Costs and Burdens Associated with E-discovery: The 2006 Amendments to the Federal Rules of Civil Procedure

I. INTRODUCTION

On December 1, 2006, amendments to the Federal Rules of Civil Procedure (the “Rules”) regarding the discovery of electronically stored information went into effect.¹ This form of discovery is referred to as e-discovery.² The 2006 amendments have significant effect on the obligations and responsibilities of parties, their lawyers, and the courts when dealing with discovery of electronically stored information. Specifically, the 2006 amendments affect how companies maintain, preserve, and produce electronically stored information. First, electronically stored information is now included in permissible discovery.³ Second, parties are required to “meet and confer” about the discovery of

1. FED. R. CIV. P. 16(b), 26, 33(d), 34, 37(f), 45.

2. Jackson Lewis, LLP, *Anticipating and Preempting the “Endless” Search for Electronic Documents in Discovery Requests*, Feb. 9, 2006, <http://jacksonlewis.com/legalupdates/article.cfm?aid=900>.

3. FED. R. CIV. P. 34.

electronically stored information at the onset of litigation.⁴ Third, issues pertaining to claims of privilege and waiver of privilege for electronically stored information are addressed.⁵ Fourth, matters relating to the production and form of production of electronically stored information are discussed.⁶ Fifth, limitations are imposed on the discovery of electronically stored information where a substantial burden or cost is imposed on the producing party.⁷ Sixth, a safe harbor provision is created to prevent sanctions from being imposed when electronically stored information is inadvertently destroyed or “lost as a result of the routine, good-faith operation of an electronic information system.”⁸

Although the 2006 amendments are intended to help reduce the costs and burdens imposed by electronic discovery, there are direct costs and burdens associated with preserving and producing electronically stored information.⁹ Additionally, failure to properly preserve and maintain electronically stored information can result in sanctions; however, sanctions can be avoided under the Rules’ new safe harbor provision when electronically stored information is inadvertently destroyed or lost as a result of the routine, good-faith operation of a computer system.¹⁰ To comply with the 2006 amendments and avoid substantial costs, sanctions, and burdens, companies must take preemptive measures prior to a lawsuit being filed and responsive measures once litigation is reasonably anticipated. One type of preemptive measure is the implementation of a retention and destruction policy. A retention and destruction policy establishes standards and guidelines for determining if and when electronically stored information should be destroyed.¹¹ By implementing and following a retention and destruction policy, a company may prevent sanctions from being imposed under the Rules if electronically stored information is inadvertently destroyed.¹² Forms of responsive measures include initiating a litigation hold and complying with the parties’ meet and confer obligations. Prior to meeting and

4. FED. R. CIV. P. 26(f).

5. FED. R. CIV. P. 26(b)(5)(B), 16(b)(6).

6. FED. R. CIV. P. 33(d), 34(b).

7. FED. R. CIV. P. 26(b)(2)(B).

8. FED. R. CIV. P. 37(f).

9. Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 67-68 (2007); Jackson Lewis, LLP, *Avoiding Gotcha! Are You Ready for the New Rules on Preserving Electronic Information?*, Feb. 6, 2007, <http://jacksonlewis.com/legalupdates/article.cfm?aid=1069>.

10. FED. R. CIV. P. 37(f).

11. Jackson Lewis, *supra* note 9.

12. *Id.*

conferring to discuss discovery of electronically stored information, parties must prepare in advance and gather information regarding their computer systems and electronically stored information.¹³ A party must make a good faith effort to preserve electronically stored information, which can be accomplished by instituting a litigation hold.¹⁴ A litigation hold uses a team approach and provides notice to several individuals to ensure evidence is properly preserved.¹⁵ Additionally, parties may reduce costs associated with electronic discovery by demonstrating that sources are not reasonably accessible because of undue burden.¹⁶

II. BACKGROUND

A. *What Is Electronically Stored Information?*

The 2006 amendments permit discovery of electronically stored information.¹⁷ While the term “electronically stored information” is not specifically defined in either the amendments or the advisory committee’s notes to the Rules, one commentator has defined it as “information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software.”¹⁸ Electronically stored information includes word processing documents, emails, voice mails, instant message logs, backup tapes, blogs, and database files.¹⁹ Different media can be used by a company to store electronic information—computer punch cards, magnetic tapes, CD-ROMs, computer printouts, and other machine-oriented components that record or store data.²⁰ Moreover, computers, network servers, personal digital assistants, and digital phones may contain electronically stored information.²¹ Additionally, electronically stored information contains

13. SHIRA A. SCHEINDLIN, E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 5-6 (2006).

14. *Id.* at 10.

15. *Id.*; Jackson Lewis, *supra* note 9.

16. FED. R. CIV. P. 26(b)(2)(B).

17. FED. R. CIV. P. 34(a).

18. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 173 (2006).

19. Eric J. Sinrod, *Perspective: The New E-discovery Burden*, Oct. 17, 2007, http://www.news.com/The-new-e-discovery-burden/2010-1030_3-6213845.html.

20. Lawrence R. Youst & Haejung Lisa Koh, *Management and Discovery of Electronically Stored Information*, 1997 COMPUTER L. REV. & TECH. J. 73, 75.

21. *Electronic Discovery: Questions and Answers*, CIV. ACTION (Nat’l Ctr. for State Courts, Williamsburg, Va.), Summer 2007, at 1 [hereinafter *Questions and Answers*].

metadata, which is data created by a computer describing certain characteristics and information about electronically stored information, such as when a document was created, who it was created by, and when it was last accessed or edited.²²

B. How Electronically Stored Information Differs from Paper Documents

Electronically stored information differs significantly from paper documents, and the majority of information is now stored electronically as opposed to retaining paper documents. Electronically stored information “is retained in exponentially greater volume than hard-copy documents; is dynamic, rather than static; and may be incomprehensible when separated from the system that created it.”²³ Because electronically stored information differs significantly from paper documents, new problems arise in the discovery of electronic data that are not prevalent in traditional discovery of paper documents.

The volume of information that is stored electronically is significantly larger than the amount of paper documents that are stored. For example, ninety-five percent of all information generated is in digital format.²⁴ Out of approximately sixty billion emails sent worldwide on a daily basis, twenty-five billion are business-related.²⁵ On average, an employee at a large company will receive or write at least fifty emails per day.²⁶

Storing documents in electronic format versus paper copies allows a large number of documents to be managed more efficiently.²⁷ For example, each year a person creates approximately 800 megabytes of information that is stored on a computer system, which if converted to paper form would be approximately thirty feet of books.²⁸ Additionally, electronic information that is sent to another individual is saved not only on the sender’s and the receiver’s hard drives, but the information is also stored in several different locations on their computer systems.²⁹ This

22. SCHEINDLIN, *supra* note 13, at 2.

23. Noyes, *supra* note 9, at 51 (quoting CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2005), available at <http://www.uscourts.gov/rules/Reports/CV5-2005.pdf>).

24. SCHEINDLIN, *supra* note 13, at 2.

25. Jackson Lewis, *supra* note 2.

26. SCHEINDLIN, *supra* note 13, at 2.

27. Youst & Koh, *supra* note 20, at 74.

28. Withers, *supra* note 18, at 173-74.

29. *Id.* at 174.

differs significantly from paper documents because paper documents do not automatically replicate themselves as electronic information does.³⁰

Searching electronically stored information to comply with discovery requests differs significantly from searching paper documents. Searching through documents to comply with discovery requests can be easier and more efficient with electronic data as opposed to paper copies.³¹ For example, electronic data can be searched using keyword or phrase searches.³² Moreover, keyword searches may reduce the amount of time, expense, and inaccuracy of a manual search of paper documents.³³ However, it may be difficult to determine where certain electronically stored information is located because it may be stored in different locations on a company's various storage devices.³⁴ Additionally, conducting a privilege review of electronically stored information may be more costly and time-consuming than conducting the same type of review with paper documents because computers store electronically stored information in a form that may need to be restored or translated before a privilege review can be performed.³⁵

Furthermore, inadvertent destruction of information or disclosure of documents can occur with electronically stored information. When producing discovery to another party, there is a risk of inadvertently producing information that is protected by the attorney-client privilege or the attorney work-product privilege because of the vast amount of information that may be produced and the difficulty involved in scanning such a large amount of information for privileged information.³⁶ Parties spend substantial time reviewing documents to prevent inadvertent disclosure of privileged information; however, these efforts impose substantial costs and time delays.³⁷ Additionally, electronically stored information can be accidentally modified, lost, deleted, or written over.³⁸ For example, auto-delete policies may delete emails after a certain amount of time, even without an intentional action to delete the document.³⁹ Even though deleted information may be transferred to a

30. *Id.*

31. Youst & Koh, *supra* note 20, at 74.

32. *Id.*

33. *Id.*

34. SCHEINDLIN, *supra* note 13, at 5.

35. *Id.* at 3.

36. Jennifer M. DelMonico, *Amendments to the Federal Rules of Civil Procedure: What You Need to do to Be Prepared*, Jan. 5, 2007, <http://www.worldservicesgroup.com/publications.asp?action=article&artid=1688>.

37. *Id.*

38. *Id.*

39. *Id.*

backup tape, it may be difficult to restore the information because of technology upgrades or deterioration of the backup tape.⁴⁰ The destruction of electronically stored information may result in severe consequences, including sanctions, against a party.⁴¹ Additionally, the court may instruct the jury that it can infer that the missing electronically stored information was unfavorable to the party who lost it, and an opposing party may bring a separate claim for spoliation of evidence.⁴²

Moreover, electronic copies can provide more useful information than a paper copy. An electronic copy may contain metadata identifying who created the document, the creation date, and when the document was accessed or edited.⁴³ This type of information may be extremely beneficial in a lawsuit where there is a question of when a document was created or whether a document has been modified. Also, an author of a document may mistakenly believe that he or she has deleted a document when in fact it is saved on a backup system.⁴⁴ This mistaken belief may lead to the discovery of information that was never intended to be retained.

C. *Prior Attempts to Address the Discovery of Electronic Information*

Prior to the 2006 amendments, efforts were made to amend the Rules to include the discovery of electronically stored information and to reduce the costs and burdens associated with discovery. The first effort to address the discovery of electronic information came in 1970. In 1970 Rule 34(a),⁴⁵ which addresses the production of documents, was amended to include electronic media in permissible discovery.⁴⁶ The description of “documents” under Rule 34(a) was broadened to include “data compilations from which information can be obtained [and] translated, if necessary, by the respondent through detection devices into [a] reasonably usable form.”⁴⁷ Although the 1970 amendment allowed for the discovery of electronic information by broadening the definition of documents, the amendment was not sufficient to cover all types of electronically stored information.⁴⁸ The form and variety of electronically stored information has changed drastically since the 1970 amend-

40. *Id.*

41. *Id.*

42. *Id.*

43. SCHEINDLIN, *supra* note 13, at 2.

44. *Id.* at 2-3.

45. FED. R. CIV. P. 34(a).

46. Youst & Koh, *supra* note 20, at 73.

47. *Id.* (brackets in original) (quoting FED. R. CIV. P. 34(a)).

48. FED. R. CIV. P. 34(a) advisory committee’s note.

ment.⁴⁹ As a result, it was difficult for judges to determine which forms of electronically stored information fit within the definition of documents.⁵⁰

The broad scope of discovery prior to the 2006 amendments led to over-discovery and resulted in substantial burdens and costs for parties.⁵¹ Before the 2006 amendments, several attempts were made to reduce the undue burdens and costs associated with over-discovery, but none had been fruitful. In 1983 the Rules were amended to allow for increased judicial involvement in case management to reduce excessive discovery through judicial discretion.⁵² In 1993 the Rules were amended to create automatic disclosure provisions and limit the number of interrogatories and depositions permissible under the Rules.⁵³ In 2000 the Rules were amended in an attempt to contain the misuse of discovery by requiring judges to determine the proper scope of discovery, by establishing a time limit for depositions and by reducing mandatory initial disclosures.⁵⁴ However, the 1983, 1993, and 2000 amendments were ineffective because judges did not embrace their new authority to limit the scope of discovery and because courts failed to properly interpret the amendments in a way that would fulfill the goals of reducing the costs and burdens associated with over-discovery.⁵⁵

D. The Development and Approval of the 2006 Amendments

The Advisory Committee on Civil Rules (the “Committee”), a committee of the Judicial Conference of the United States, was concerned with adopting new amendments to the Rules that would include the discovery of electronically stored information.⁵⁶ In 2000 the Committee first began discussing amendments to the Rules that would address the discovery of electronically stored information.⁵⁷ To understand how discovery of electronically stored information differed from conventional discovery, the Committee held several conferences to receive input from lawyers, judges, academics, and technologists.⁵⁸ The Committee sought to create amendments to the Rules that would reduce the costs and burdens associated with the discovery of electronically stored informa-

49. *Id.*

50. *Id.*

51. Noyes, *supra* note 9, at 54-55.

52. *Id.* at 55-57.

53. *Id.* at 57.

54. *Id.*

55. *Id.* at 60-61.

56. *Id.* at 51.

57. SCHEINDLIN, *supra* note 13, at 1.

58. *Id.*

tion.⁵⁹ Additionally, because the previous Rules failed to provide adequate guidance in the area of electronic discovery, inconsistent caselaw developed among the courts.⁶⁰ Thus, the Committee sought to adopt a universal set of rules dealing with the discovery of electronically stored information that would “ensure that similarly situated litigants are treated the same, regardless of which federal district handles the case.”⁶¹ The Committee also sought to increase judicial involvement in case management to reduce the scope of discovery.⁶²

Immediately after the 2000 amendments were approved, members of the Committee met informally to discuss the discovery of electronically stored information, an issue that emerged in the public comment and testimony phases of the 2000 amendments.⁶³ Although the Committee began holding conferences in 2000 to discuss discovery of electronically stored information, it was not until 2002 and 2003 that the movement for amendments addressing electronic discovery gained momentum.⁶⁴ In 2002 and 2003, local federal district courts and states began to discuss rules that would address electronic discovery.⁶⁵ In addition, during this period, several publications began addressing electronic discovery, conferences and seminars were held across the country, and cases dealing with electronic discovery increased.⁶⁶ The culmination of these events made it clear that amendments to the Rules specifically addressing the discovery of electronically stored information were necessary.

In September 2002 the Discovery Subcommittee (the “Subcommittee”) sought out practitioners’ and academics’ opinions on electronic discovery.⁶⁷ Subsequently, in September 2003, “straw proposals” for amendments to the Rules were sent to practitioners and academics to obtain their responses; the responses showed overwhelming support of the amendments.⁶⁸ In February 2004 the Committee held a final conference to discuss electronic discovery.⁶⁹ In April 2004 a report of the

59. Noyes, *supra* note 9, at 67-68.

60. *Id.* at 68.

61. *Id.*

62. *Id.*

63. Kenneth J. Withers, *Two Tiers and a Safe Harbor: The Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, Aug. 25, 2004, at 2-3, http://www.discoveryresources.org/pdfFiles/04_withersRules_082504.pdf.

64. *Id.* at 4.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

February conference was sent from the Subcommittee to the Committee.⁷⁰ Subsequently, in May 2004, the Committee prepared a report, which contained the proposed amendments, for the Standing Committee on Rules of Practice and Procedure.⁷¹ The amendments were presented for a six month public comment period in August 2004.⁷² During the comment period, the Committee held three public hearings and received over two hundred written comments.⁷³ In April 2005, subsequent to the comment period, the Rules were revised.⁷⁴ On April 12, 2006, the Rules were approved by the United States Supreme Court.⁷⁵

III. THE 2006 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

A. “Meet and Confer” Requirements

The 2006 amendments to Federal Rules of Civil Procedure 26(f)⁷⁶ and 16(b)⁷⁷ establish that parties must discuss the discovery of electronically stored information at the onset of litigation.⁷⁸ Rules 26(f) and 16(b), as amended, establish new topics that must be discussed by the parties that pertain specifically to the discovery of electronically stored information and potential problems associated with the discovery of such information.⁷⁹ Rule 26(f) requires parties to meet and confer, prior to a scheduling conference, to discuss discovery-related issues and to develop a proposed discovery plan.⁸⁰ Additionally, Rule 16(b) requires parties to attend a pretrial conference with the court and directs the court to enter a scheduling order containing, among other things, the parties’ discovery plan.⁸¹

The 2006 amendment to Rule 26(f) adds three additional topics that parties, at their Rule 26(f) conference, must discuss regarding the discovery of electronically stored information.⁸² First, parties must discuss “any issues relating to disclosure or discovery of electronically

70. *Id.* at 5.

71. *Id.*

72. SCHEINDLIN, *supra* note 13, at 1.

73. *Id.*

74. *Id.*

75. *Id.*

76. FED. R. CIV. P. 26(f).

77. FED. R. CIV. P. 16(b).

78. SCHEINDLIN, *supra* note 13, at 4-5.

79. *Id.*

80. FED. R. CIV. P. 26(f).

81. FED. R. CIV. P. 16(b).

82. FED. R. CIV. P. 26(f).

stored information, including the form or forms in which it should be produced.”⁸³ Second, parties must discuss “any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order.”⁸⁴ Third, parties must discuss “any issues relating to preserving discoverable information.”⁸⁵ Parties should first determine if there will be discovery of electronically stored information because, if not, Rule 26(f) does not impose any new requirements.⁸⁶ Additionally, if parties do not specify a form of production during their Rule 26(f) conference, Rule 34(b),⁸⁷ as amended, permits the requesting party to specify the form of production.⁸⁸ If the requesting party fails to specify a form of production, Rule 34(a), as amended, requires the producing party to specify the form it intends to use.⁸⁹

Moreover, the amendments to Rules 16(b)(5) and (b)(6) require courts, during the initial scheduling order, to include any “provisions for disclosure or discovery of electronically stored information”⁹⁰ and to include “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production.”⁹¹ Therefore, the outcome of the parties’ Rule 26(f) conference will be contained in the report that the attorneys file with the court prior to the Rule 16 conference.⁹²

The issues to be addressed during the Rule 26(f) conference must be determined on a case-by-case basis.⁹³ In addition to the topics discussed above, parties should address how to balance the need to preserve evidence with the need to continue routine operations.⁹⁴ For instance, a party may have difficulty continuing its routine operation if there is complete cessation of the party’s computer operations.⁹⁵ Parties should

83. FED. R. CIV. P. 26(f)(3).

84. FED. R. CIV. P. 26(f)(4).

85. FED. R. CIV. P. 26(f).

86. FED. R. CIV. P. 26(f) advisory committee’s notes.

87. FED. R. CIV. P. 34(b).

88. FED. R. CIV. P. 26(f) advisory committee’s notes.

89. *Id.*

90. FED. R. CIV. P. 16(b)(5).

91. FED. R. CIV. P. 16(b)(6).

92. FED. R. CIV. P. 16.

93. FED. R. CIV. P. 26(f) advisory committee’s notes.

94. *Id.*

95. *Id.*

take considerations such as this into account when agreeing on reasonable preservation steps.⁹⁶

These amendments to Rules 26(f) and 16(b) are intended to preemptively avoid difficulties that may arise regarding discovery of electronically stored information.⁹⁷ In addition to the amendments, early agreements between parties may avoid later delays and increased litigation costs.⁹⁸ For example, an agreement that inadvertent disclosure of privileged information does not constitute a waiver may avoid expensive litigation.⁹⁹

B. *Privilege Issues*

The amendment to Federal Rule of Civil Procedure 26(b)(5)(B) establishes the procedure for requesting the return of privileged or work-product information that is inadvertently disclosed during discovery.¹⁰⁰ Rule 26(b)(5)(B) provides:

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.¹⁰¹

The notification should generally be in writing and should be specific and detailed enough to identify the privileged information that was inadvertently disclosed.¹⁰² If notice is first given orally, a written notice should also be sent.¹⁰³ Moreover, the notification should be given as early as possible because the timing of the notice may be considered by the court in determining whether a waiver of privilege has occurred.¹⁰⁴ Rule 26(b)(5)(B) does not, however, address the evidential-

96. *Id.*

97. SCHEINDLIN, *supra* note 13, at 4.

98. *Id.* at 5.

99. *Id.*

100. FED. R. CIV. P. 26(b)(5)(B).

101. *Id.*

102. FED. R. CIV. P. 26(b)(5) advisory committee's notes.

103. SCHEINDLIN, *supra* note 13, at 20.

104. *Id.*

ry question of waiver.¹⁰⁵ The evidentiary question of waiver is left to the courts, which “have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information.”¹⁰⁶

Additionally, parties may enter into agreements regarding privilege issues. Rule 26(f), as amended, works in conjunction with amended Rules 26(b)(5)(B) and 16(b).¹⁰⁷ Rule 26(f) requires parties to discuss privilege issues during their initial meet and confer conference.¹⁰⁸ Rule 16(b) allows parties to ask the court to include in an order any agreements regarding privilege issues that the parties enter into during their Rule 26(f) conference.¹⁰⁹ In the advisory committee’s notes discussing the Rules, two examples of such agreements are provided. The first is a “clawback agreement,” which provides that privileged documents that are inadvertently disclosed will be returned to the producing party after the documents are identified as privileged.¹¹⁰ Under a clawback agreement, the inadvertent disclosure of the privileged documents does not constitute a waiver of privilege.¹¹¹ Also, parties may agree on a “quick peek,” which allows a responding party to provide requested materials for an initial examination.¹¹² Using a Rule 34 request for production, the requesting party designates the specific documents that it would like to be produced from those initially examined.¹¹³ Subsequently, the responding party produces the designated documents and only does a privilege review of those specific documents.¹¹⁴ The quick peek is not deemed a waiver of privilege.¹¹⁵

C. Production and Form of Production of Electronically Stored Information

The 2006 amendments address production issues pertaining to the disclosure of electronically stored information. First, under Federal Rule of Civil Procedure Rule 26(a), electronically stored information is now included in the required initial disclosures.¹¹⁶ The amendment to Rule

105. FED. R. CIV. P. 26(b)(5)(B) advisory committee’s notes.

106. *Id.*

107. *Id.*

108. FED. R. CIV. P. 26(f).

109. FED. R. CIV. P. 16(b).

110. FED. R. CIV. P. 26(f) advisory committee’s notes.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. FED. R. CIV. P. 26(a)(1)(b).

26(a)(1)(B) requires parties, “without awaiting a discovery request, [to] provide other parties . . . a copy of, or a description by category and location of, all . . . electronically stored information . . . that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”¹¹⁷ This amendment makes clear that electronically stored information is a separate category of records and information that is distinct from documents and that must be disclosed on its own.¹¹⁸ As the advisory committee’s notes provide: “Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses.”¹¹⁹ The amendment to Rule 26(a)(1)(B) also deletes the term “data compilations” because it is a subset of both documents and electronically stored information.¹²⁰

Second, the amendment to Federal Rule of Civil Procedure 33(d)¹²¹ addresses how to answer interrogatories when the answer can be derived from electronically stored information. Amended Rule 33(d) permits a party to reply to an interrogatory by specifying the electronically stored information from which the answer can be derived or ascertained and allows the requesting party to examine or inspect such information.¹²² Pursuant to Rule 33(d):

Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, . . . and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained.¹²³

In addition, the requesting party is permitted to make copies, compilations, abstracts, or summaries of such information.¹²⁴ A party may have to provide the requesting party with assistance in order for the requesting party to derive the answer to the interrogatory from the electronically stored information.¹²⁵

Third, the amendments to Federal Rules of Civil Procedure 34(a) and (b) put discovery of electronically stored information on “equal footing

117. *Id.*

118. SCHEINDLIN, *supra* note 13, at 20.

119. FED. R. CIV. P. 26(a) advisory committee’s notes.

120. *Id.*

121. FED. R. CIV. P. 33(d).

122. *Id.*

123. *Id.*

124. *Id.*

125. FED. R. CIV. P. 33(d) advisory committee’s notes.

with discovery of paper documents.¹²⁶ The amendment to Rule 34(a) includes electronically stored information in a party's request for production.¹²⁷ Amended Rule 34(a) is intended to be "broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."¹²⁸ This broad definition is to be applied to any reference to electronically stored information in the Rules.¹²⁹ In addition, Rule 34(a), as amended, permits a party to inspect, copy, test, or sample electronically stored information.¹³⁰ Testing and sampling of electronically stored information does not give a party a routine right to direct access to the other party's electronic information system; however, in certain circumstances such access may be warranted.¹³¹

Rule 34(b), as amended, permits the requesting party to specify the form in which electronically stored information should be produced.¹³² Specifying a form facilitates "the orderly, efficient, and cost-effective discovery of electronically stored information."¹³³ Because electronically stored information may be maintained in different forms, such as email messages, electronic spreadsheets, image and sound files, or materials contained in databases, allowing the requesting party to specify different forms of production for different types of electronically stored information decreases the costs and burdens of producing such information.¹³⁴ If a requesting party does not specify the form of production for electronically stored information or if the responding party objects, the responding party is required to state the intended form before production occurs.¹³⁵ This procedure allows the parties to identify and resolve disputes prior to production, thereby reducing the expense and time involved in producing such information.¹³⁶ If electronically stored information is produced in a form that was not specified in advance and is in an unusable format, the producing party may be required to reproduce the electronically stored information.¹³⁷ If either party objects to the form of production indicated by the other

126. FED. R. CIV. P. 34(a) advisory committee's notes.

127. FED. R. CIV. P. 34(a).

128. FED. R. CIV. P. 34(a) advisory committee's notes.

129. *Id.*

130. *Id.*

131. FED. R. CIV. P. 34(b) advisory committee's notes.

132. FED. R. CIV. P. 34(b).

133. FED. R. CIV. P. 34(b) advisory committee's notes.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

party, under Rule 37(a)(2)(B),¹³⁸ the parties are required to attempt to resolve the matter before the requesting party can file a motion to compel.¹³⁹ The court is permitted to require the electronically stored information to be produced in any form, even if the form is not one originally identified by the parties.¹⁴⁰ In situations where “the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.”¹⁴¹

Fourth, the amendment to Federal Rule of Civil Procedure 45¹⁴² provides that electronically stored information can be sought by subpoena.¹⁴³ Pursuant to Rule 45, 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.¹⁴⁴ Rule 45(a)(1) provides that the form of production for electronically stored information can be designated in the subpoena.¹⁴⁵ Additionally, a party can object to the designated form of production, and if no form is indicated, the electronically stored information is to be produced in the form in which it is usually maintained or a reasonably usable form.¹⁴⁶ A responding party is not required to produce electronically stored information in more than one form.¹⁴⁷

Additionally, Rule 45(c) protects individuals served with a subpoena against undue burden or expense.¹⁴⁸ A party serving a subpoena “shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.”¹⁴⁹ A responding party may not have to provide discovery of electronically stored information from sources that are not reasonably accessible; however, the court may order discovery if the requesting party can demonstrate good cause.¹⁵⁰ In

138. FED. R. CIV. P. 37(a)(2)(B).

139. FED. R. CIV. P. 34(b) advisory committee’s notes.

140. *Id.*

141. *Id.*

142. FED. R. CIV. P. 45.

143. FED. R. CIV. P. 45(a)(1)(C).

144. *Id.*

145. FED. R. CIV. P. 45(a)(1)(D).

146. FED. R. CIV. P. 45(c)(2)(B) advisory committee’s notes.

147. FED. R. CIV. P. 45(d)(1)(C).

148. FED. R. CIV. P. 45(c)(1).

149. *Id.*

150. FED. R. CIV. P. 45(d)(1)(D).

determining whether good cause exists, the court must consider the limitations of Rule 26(b)(2)(C).¹⁵¹ Rule 26(b)(2)(C) provides:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.¹⁵²

D. *Limitations on E-discovery*

The amendment to Federal Rule of Civil Procedure 26(b)(2)(B) limits the scope of information a party must produce pursuant to Rule 26(a) initial disclosures and Rule 34 requests for production.¹⁵³ Rule 26(b)(2)(B) states: "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."¹⁵⁴ The Rule 26(b)(2)(B) amendment addresses "issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information."¹⁵⁵ Although use of electronic storage systems makes locating and retrieving electronically stored information easier, some information cannot be accessed absent a substantial burden and cost.¹⁵⁶ Rule 26(b)(2)(B) creates two types of information.¹⁵⁷ The first is "accessible," which is presumptively discoverable, and the second is "not reasonably accessible," which is presumptively not discoverable.¹⁵⁸ "Not reasonably accessible" is defined as a source that would require a party to incur an undue burden or cost in order to produce relevant, nonprivileged information.¹⁵⁹

Although a party may identify sources that are not reasonably accessible, the party is still obligated to preserve evidence pursuant to

151. *Id.*

152. FED. R. CIV. P. 26(b)(2)(C).

153. SCHEINDLIN, *supra* note 13, at 14.

154. FED. R. CIV. P. 26(b)(2)(B).

155. FED. R. CIV. P. 26(b)(2) advisory committee's notes.

156. *Id.*

157. SCHEINDLIN, *supra* note 13, at 15.

158. *Id.*

159. *Id.* at 15-16.

common-law and statutory obligations.¹⁶⁰ Additionally, the advisory committee's notes to Rule 26(b)(2)(B) provide:

If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.¹⁶¹

If the parties are unable to reach an agreement, the seeking party may bring a motion to compel discovery or the responding party may bring a motion for a protective order; however, the parties must first confer before bringing either motion.¹⁶² The producing party bears the burden of demonstrating that the identified sources of information are not reasonably accessible because of undue burden or cost.¹⁶³ To test the producing party's assertion that the identified sources are not reasonably accessible, the requesting party may conduct a sampling of the information contained in such sources or conduct depositions of individuals who have knowledge about such sources.¹⁶⁴

Similar to Rule 45, even if a party demonstrates that a source is not reasonably accessible because of undue burden or cost, the court may nonetheless order discovery if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).¹⁶⁵ In addition to the Rule 26(b)(2)(C) factors, the advisory committee's notes list the following several factors that the court should consider in determining whether good cause has been demonstrated:

(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.¹⁶⁶

160. FED. R. CIV. P. 26(b)(2) advisory committee's notes.

161. *Id.*

162. *Id.*

163. *Id.*

164. FED. R. CIV. P. 26(b)(2) advisory committee's notes.

165. FED. R. CIV. P. 26(b)(2)(B).

166. FED. R. CIV. P. 26(b) advisory committee's notes.

The court may consider a requesting party's assertion that it will bear part of the costs of production in determining if good cause exists.¹⁶⁷ In addition to conducting a good cause analysis, the court has the authority to set other conditions on discovery, including limiting the amount of information to be produced and requiring the requesting party to bear the cost of production from sources that are not reasonably accessible.¹⁶⁸

E. Sanctions and the Safe Harbor Provision

The amendment to Federal Rule of Civil Procedure 37(f) states that a court may not impose sanctions for a party's failure to provide electronically stored information that is "lost as a result of the routine, good-faith operation of an electronic information system," absent exceptional circumstance.¹⁶⁹ In the advisory committee's notes, "routine operation of an electronic information system" is defined as "the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs."¹⁷⁰ This also includes when electronic information is altered or overwritten by a computer system, absent intentional conduct on the part of a party.¹⁷¹ "Good faith" may include "a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation."¹⁷² A party may be required to preserve information pursuant to common law, a statute, a regulation, or a court order.¹⁷³ Additionally, the court may consider the steps taken to comply with a court order or a party agreement, under Rules 16(b) and 26(f) (requiring preservation of electronically stored information), in determining if the party acted in good faith.¹⁷⁴ Although Rule 37(f) prevents the imposition of sanctions where electronically stored information is inadvertently lost because of the routine, good-faith operation of an electronic information system, a court may use other means as an alternative for the lost information, such as requiring the responding party to produce an additional witness for deposition or respond to additional interrogatories.¹⁷⁵

167. *Id.* at 82.

168. *Id.*

169. FED. R. CIV. P. 37(f).

170. FED. R. CIV. P. 37(f) advisory committee's notes.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

IV. ANALYSIS—COMPLYING WITH THE 2006 AMENDMENTS: PRACTICAL IMPLICATIONS

Under the 2006 amendments, companies have new obligations regarding the discovery of electronically stored information. Companies utilize computer systems to handle most of their business because of the efficiency and ease that such systems provide. Companies must take preemptive and responsive measures regarding the discovery of electronically stored information to fully comply with the 2006 amendments and to avoid increased costs, sanctions, and burdens. For example, companies must adequately preserve evidence by utilizing retention and destruction policies and implementing litigation holds.¹⁷⁶ Additionally, companies must follow the new meet and confer requirements set out by the Rules. Companies must also consider privilege issues that arise with electronic discovery and determine whether the parties will create agreements to address these issues. Companies can reduce the costs and burdens associated with electronic discovery by adequately preparing and responding to requests for discovery of electronically stored information. A company's failure to follow the Rules and to take preventative and responsive measures can result in severe sanctions and increased costs and burdens.

In addition, companies may be motivated by their insurance companies to comply with the 2006 amendments. For instance, insurance companies may require retention and destruction policies to become part of underwriting decisions.¹⁷⁷ If a company's retention and destruction policies are ineffective, a company may be unable to obtain insurance or the cost of obtaining it may be affected.¹⁷⁸ Some insurance companies have minimized the costs of electronic discovery by assisting companies with document management or risk assessment programs.¹⁷⁹ Some insurance companies may exclude electronic discovery sanctions from coverage altogether.¹⁸⁰ By preparing for litigation involving electronically stored information in advance, companies can prevent increased insurance premiums and reduction in coverage.¹⁸¹

176. DelMonico, *supra* note 36.

177. Edwin M. Larkin, *Electronic Discovery: Insurers Are Getting in on the Act*, NAT'L L.J., Aug. 20, 2007.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

A. *Costs Associated with Electronic Discovery*

The 2006 amendments are intended to reduce the costs and burdens associated with discovery of electronic information.¹⁸² Costs associated with electronic discovery include the monetary costs associated with preserving and retrieving electronically stored information, the time involved in such procedures, and sanctions.¹⁸³ Because the 2006 amendments include electronically stored information in permissible discovery, parties can now request word processing documents, emails, voice mails, instant message logs, blogs, backup tapes, and database files, which increases the scope of discovery.¹⁸⁴ Although the 2006 amendments broaden the scope of discovery, the amended Rules reduce the costs associated with discovery of electronically stored information in several respects. Under Rules 26(f)¹⁸⁵ and 16(b),¹⁸⁶ parties can confer about electronically stored information and reach agreements to deal with problems that may arise in the discovery of electronic information, helping to reduce the costs of searching and producing electronic discovery.¹⁸⁷ Additionally, parties can reduce litigation costs by reaching agreements regarding privilege issues at the onset of litigation, negating the need to litigate issues that may arise if privilege material is inadvertently disclosed.¹⁸⁸ Furthermore, the Rules limit permissible discovery from sources that are not reasonably accessible.¹⁸⁹

However, there are some increases in costs associated with electronic discovery. For example, electronic discovery costs significantly more than traditional paper discovery because companies retain more information using electronic storage than is traditionally retained with paper documents.¹⁹⁰ With paper documents, storage space is an issue, and thus paper documents are destroyed more often than electronic documents.¹⁹¹ While paper documents must periodically be reviewed to determine which documents can be destroyed to make room for newer

182. Noyes, *supra* note 9, at 67-68.

183. Jackson Lewis, *supra* note 9.

184. Sinrod, *supra* note 19.

185. FED. R. CIV. P. 26(f).

186. FED. R. CIV. P. 16(b).

187. FED. R. CIV. P. 26(f) advisory committee's notes.

188. *Id.*

189. *See* FED. R. CIV. P. 26(b)(2)(B).

190. Fulcrum Inquiry, LLP, *Reducing Discovery Costs Before the Litigation Starts*, Oct. 2007, http://fulcruminquiry.com/Reducing_Discovery_Costs.htm.

191. *Id.*

documents, the capacity to store electronic documents is almost unrestricted.¹⁹² Thus, companies tend to retain several electronic versions and copies of the same document, increasing the amount of information that is retained.¹⁹³ Because a larger number of electronic documents are retained, more time and money must be spent on conducting privilege reviews.¹⁹⁴

Additionally, parties may incur increased costs when they fail to properly maintain electronically stored information. For example, restoring one backup tape may cost more than \$1000.¹⁹⁵ Moreover, because the Rules now require electronic discovery to be addressed at the onset of litigation, parties are experiencing an increase in costs earlier in the litigation process. This increase in costs comes from the parties' obligations to meet and discuss electronically stored information during their Rule 26(f) conference. Parties must spend more time and labor preparing for the conference and more time during the conference itself to address the discovery of electronically stored information. However, spending more time preparing for the conference and during the conference itself will reduce costs and burdens that may later arise. For example, if parties enter into privilege agreements, parties will have established, at the onset of litigation, a predetermined course of action if electronically stored information is inadvertently disclosed, thereby reducing the need for parties to spend money litigating the matter later.

Although the 2006 amendments did not add a new sanctions provision, the sanction provision of Rule 37(f) does apply to failure to preserve electronically stored information.¹⁹⁶ Sanctions can increase the costs of electronic discovery and can sometimes be severe. For example, in *Z4 Technologies, Inc. v. Microsoft Corp.*,¹⁹⁷ the court imposed severe sanctions against Microsoft for misconduct during discovery.¹⁹⁸ Microsoft intentionally failed to produce several emails and failed to inform Z4 of the existence of a certain database during discovery. The existence of this discoverable information only came to light the day before trial and during the trial itself.¹⁹⁹ The court ordered Microsoft to pay an additional \$25 million in damages on top of attorney's fees.²⁰⁰

192. *Id.*

193. *Id.*

194. *See id.*

195. Jackson Lewis, *supra* note 9.

196. *See* FED. R. CIV. P. 37.

197. No. 6:06-CV-142, 2006 WL 2401099 (E.D. Tex. Aug. 18, 2006).

198. *Id.* at *27.

199. *Id.* at *22-26.

200. *Id.* at *27.

B. "Meet and Confer" Requirements

Obligations of both the court and parties are altered by the amendments to Rules 26(f) and 16(b).²⁰¹ These alterations change an attorney's duty to confer at the beginning of litigation and enforce the notion that early and thorough discussions at the onset of litigation will prevent problems from later arising.²⁰² Parties are now required to discuss three additional issues pertaining to the discovery of electronically stored information during their Rule 26(f) conference: (1) preservation of discoverable information; (2) disclosure of electronically stored information, including the form of such disclosure; and (3) privilege claims.²⁰³ To adequately discuss these topics during a conference, a company and its lawyers must act prior to the conference and gather information about the company's computer systems.²⁰⁴ Specifically, a company and its lawyers must be knowledgeable about how electronically stored information is maintained and stored, and they must be able to identify which individuals can aid in the discovery process.²⁰⁵ The best source for this information is the company's IT department. The IT department can provide information about the company's computer systems, such as what types of computer systems are used, how electronic information is stored and organized, and the costs and difficulty of retrieving the information.²⁰⁶ Moreover, a determination should be made about which sources are reasonably accessible and which sources are not reasonably accessible.²⁰⁷ By preparing this information in advance, parties will be able to effectively discuss electronic discovery issues during their conference.

C. Preserving Electronically Stored Information

Companies are required to act reasonably and in good faith in preserving evidence.²⁰⁸ The Rules do not require evidence to be preserved when litigation is commenced or anticipated; however, the Rules acknowledge the common-law and statutory duty to preserve evidence.²⁰⁹ When preparing for the preservation of electronically

201. See SCHEINDLIN, *supra* note 13, at 5.

202. *Id.*

203. FED. R. CIV. P. 26(f).

204. SCHEINDLIN, *supra* note 13, at 5-6.

205. *Id.*

206. *See id.*

207. *Id.* at 6.

208. *Questions and Answers*, *supra* note 21, at 3.

209. SCHEINDLIN, *supra* note 13, at 6.

stored information, a party should consider when the duty attaches and the scope of the duty.²¹⁰ Although the Rules do not answer these questions, courts have held that “the duty is triggered when litigation is reasonably anticipated.”²¹¹ Determining when litigation is reasonably anticipated is fact-specific and determined on a case-by-case basis.²¹² For example, a complaint or demand letter puts a company on notice of litigation.²¹³ In the absence of a complaint or demand letter, a manager’s actual anticipation of litigation should be sufficient.²¹⁴

Parties will also be obligated to preserve electronically stored information pursuant to the recommended scheduling order from the Rule 26(f) conference. By properly preserving electronically stored information, parties can avoid sanctions under the safe harbor provision of Rule 37(f) when information is lost or destroyed.²¹⁵ Destroying documents in an impromptu manner or based on an informal procedure could lead to a claim that a party intentionally destroyed evidence.²¹⁶ When electronically stored information is intentionally or negligently destroyed, (1) a party may be barred from asserting a claim or defense, (2) the judge may instruct the jury about the lost or destroyed evidence, (3) the action may be dismissed, (4) a default judgment may be entered, or (5) the party may be held in contempt of court.²¹⁷

1. Retention and Destruction Policies. The Rules provide an increased incentive for companies to implement retention and destruction policies to avoid sanctions from being imposed if electronically stored information is accidentally destroyed or lost.²¹⁸ These retention and destruction policies should address what records should be maintained, how long each type of record should be maintained, and when each type of record should be destroyed.²¹⁹ The policies should be written and actually followed by the company.²²⁰ After examining all electronically stored information, the type, format, and location of data that is being retained should be identified.²²¹ In addition to

210. *Id.*

211. *Id.*

212. *Id.* at 6-7.

213. Jackson Lewis, *supra* note 9.

214. *Id.*

215. DelMonico, *supra* note 36; see FED. R. CIV. P. 37 advisory committee’s notes.

216. DelMonico, *supra* note 36.

217. *Questions and Answers*, *supra* note 21, at 3.

218. Jackson Lewis, *supra* note 9.

219. *Id.*

220. DelMonico, *supra* note 36.

221. Fulcrum Inquiry, *supra* note 190.

creating a retention and destruction policy, a company should regularly audit the policy to ensure the policy is being followed and to ensure that all employees and new hires receive proper training regarding the policy.²²² Because changes in business conditions may occur, a company should periodically review its policy to ascertain if changes in the policy are appropriate.²²³ Regularly conferring with the IT department and managers is also imperative.²²⁴ Any changes to the company's computer system such as auto-delete features, archives, or backup functions may require the policy to be updated to conform to these changes.²²⁵ An update to a company's policy should be followed by additional training for employees so that they are familiar with the updated policy.²²⁶ Moreover, a company should randomly test its computer system to determine what types of information can be restored, which sources are reasonably accessible, and which sources are not reasonably accessible.²²⁷ This procedure is beneficial because information contained in a source that is not reasonably accessible is presumptively not discoverable, absent a showing by the requesting party demonstrating good cause.²²⁸

Maintaining a retention and destruction policy can reduce costs associated with electronic discovery. A retention and destruction policy allows a company to systematically and periodically reduce the amount of information that it stores in electronic format by indicating in advance what types of documents are to be destroyed after a certain period of time.²²⁹ By reducing the amount of information that is stored, a company reduces the time and expense that would be spent on conducting privilege reviews of electronically stored information.²³⁰ Moreover, a retention and destruction policy may prevent a court from imposing sanctions on a party when electronically stored information is inadvertently destroyed.²³¹

2. Litigation Holds. In addition to maintaining a retention and destruction policy, a company must make a good faith effort to save relevant evidence by instituting a litigation hold. To fully comply with

222. DelMonico, *supra* note 36.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. FED. R. CIV. P. 26(b)(2) advisory committee's notes.

229. *See Fulcrum Inquiry, supra* note 184.

230. *See id.*

231. Youst & Koh, *supra* note 20, at 88.

the 2006 amendments to the Rules, “it is imperative that businesses fully understand their computer systems and know how to stop routine destruction of [electronically stored information] and paper documents as soon as they reasonably anticipate litigation.”²³² A litigation hold can reduce the costs of electronic discovery by preventing sanctions under the newly created safe harbor provision of Rule 37.²³³ A litigation hold should be initiated once a company reasonably anticipates litigation, and it should apply to any documents or electronically stored information that may be relevant to the litigation.²³⁴ A company should use members of its IT department, human resources division, legal department, and key business leaders to implement a litigation hold.²³⁵ These individuals can provide useful information for creating, implementing, and following a litigation hold. Additionally, using individuals from different areas within the company helps to ensure that the litigation hold is universally applied and followed.

A litigation hold consists of several components that must be implemented in a timely manner. The time element is extremely important when dealing with electronically stored information because such information can be destroyed or modified in the usual course of a company’s business and a computer system’s routine operations.²³⁶ A litigation hold must be customized to the anticipated litigation, depending on the nature and scope of the claims; however, a number of different procedures and records should be included in most cases.²³⁷ First, notice of the litigation hold should be provided to all relevant employees to preserve information.²³⁸ Second, a plan establishing how relevant electronically stored information will be retrieved and preserved must be created.²³⁹ Third, notice (and records of such notice) directing record custodians to suspend the destruction of relevant information should be maintained.²⁴⁰ Fourth, a record identifying what evidence has been preserved should be created.²⁴¹ Fifth, monitoring procedures to ensure employees are utilizing the litigation hold should be implemented.²⁴² Sixth, notification (and records of such notification)

232. DelMonico, *supra* note 36.

233. Jackson Lewis, *supra* note 9; FED. R. CIV. P. 37.

234. DelMonico, *supra* note 36.

235. Jackson Lewis, *supra* note 9.

236. DelMonico, *supra* note 36.

237. *Id.*

238. SCHEINDLIN, *supra* note 13, at 10.

239. *Id.* at 5-6.

240. Jackson Lewis, *supra* note 9.

241. *Id.*

242. SCHEINDLIN, *supra* note 13, at 10.

regarding the termination of the hold when litigation is no longer anticipated should be maintained.²⁴³

D. *Privilege Issues*

In dealing with privilege issues, parties should utilize the procedures in the 2006 amendments that address unique privilege issues that may arise in electronic discovery. When producing discovery to another party, there is a risk of inadvertently producing information that is protected by the attorney-client privilege or the attorney work-product privilege because of the vast amount of information that may be produced and the difficulty involved in scanning such a large amount of information for privileged or protected information.²⁴⁴ If privileged information is inadvertently disclosed, parties should follow the procedures set out in Rule 26(b)(5)(B) for requesting the return of such information. Because there is a substantial amount of time and cost involved in screening electronically stored information for privileged material, parties should enter into agreements to determine how privilege issues will be handled.²⁴⁵ These agreements help to minimize the costs and burdens associated with inadvertent disclosure of privileged information and issues regarding waiver.²⁴⁶ Two types of agreements available to parties are quick peek and clawback agreements. Under a clawback agreement, parties agree to return privileged information that is inadvertently produced.²⁴⁷ The returning party then agrees that it will not assert that the privilege has been waived.²⁴⁸ Under a quick peek agreement, a party is permitted to look at responsive documents prior to any screening for privilege.²⁴⁹ The screening for privilege occurs after the requesting party designates which documents it actually would like produced, and then only those designated documents are screened.²⁵⁰ Discussions regarding these agreements should take place during the parties' Rule 26(f) conference. Additionally, the parties should request that the court include in its initial scheduling order any agreement that the parties reach.

243. Jackson Lewis, *supra* note 9.

244. DelMonico, *supra* note 36.

245. FED. R. CIV. P. 26(f) advisory committee's notes.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

E. Limitations on the Scope of E-discovery

Although the 2006 amendments to the Rules permit more expansive discovery, the Rules do contain limitations on the type and amount of information to which a party is entitled through discovery. A party should utilize these limitations to ensure that it is not overburdened by the requesting party's discovery request or to protect information, such as information that is privileged. Rule 26(b)(2)(B) limits the scope of information a party is required to produce pursuant to Rule 26(a) initial disclosures and Rule 34²⁵¹ requests for production.²⁵² If a party can establish that a source of electronically stored information is not reasonably accessible then the information is presumptively not discoverable, but the requesting party may overcome this presumption if it can establish good cause.²⁵³

F. Requesting and Producing Electronically Stored Information

Lawyers should utilize the same types of procedures for requesting electronically stored information as they would with paper document requests; however, because electronic discovery differs from traditional discovery of paper documents, lawyers must take additional steps to effectively request electronically stored information. A lawyer "drafting discovery requests should no longer think in terms of requests for production of documents, but rather in terms of requests for information."²⁵⁴ When drafting a discovery request for electronically stored information, a lawyer should follow the steps involved in the production of paper documents: (1) analyze the discovery request, (2) gather the information, (3) produce the data, and (4) review the information.²⁵⁵ In addition to these steps, a lawyer should ensure that he or she is requesting the production of all relevant electronically stored information.²⁵⁶ A lawyer should request that information be produced in a form that is computer-readable, so that file information is preserved when it is produced because translating information from its original form increases the risk that information will be lost.²⁵⁷ Lawyers should also obtain information about the opposing party's computer systems. A lawyer should ascertain who has access to the opposing

251. FED. R. CIV. P. 34.

252. See FED. R. CIV. P. 26(b)(2)(B).

253. *Id.*

254. Youst & Koh, *supra* note 20, at 81.

255. *Questions and Answers*, *supra* note 21, at 1.

256. Youst & Koh, *supra* note 20, at 81.

257. *Id.*

party's computer systems, if remote access is available, and how information is backed up and archived.²⁵⁸ In addition to gaining an understanding of the opposing party's computer systems, the lawyer should conduct an on-site inspection, pursuant to Rule 34(b), of the opposing party's computer system.²⁵⁹ By conducting an on-site inspection, a lawyer may be able to uncover documents that were not originally produced.²⁶⁰

When a party is producing electronically stored information there are some considerations that should be taken into account. The responding party should act quickly after reasonably anticipating litigation to ensure that electronically stored information is preserved.²⁶¹ Delaying preservation may cause information to be destroyed, which can raise issues of sanctions or claims for spoliation of evidence.²⁶² Additionally, when information is retrieved, the producing party should ensure that it is not altered in the process.²⁶³ Moreover, copied files should be labeled, identifying who accessed the files and when such access occurred.²⁶⁴

V. CONCLUSION

The 2006 amendments significantly affect the obligations and responsibilities of companies, their lawyers, and the courts when dealing with discovery of electronically stored information. Companies can reduce the costs, burdens, and sanctions associated with electronic discovery by taking preemptive and responsive measures regarding the discovery of electronically stored information. By properly preserving evidence, following the new meet and confer requirements, addressing privilege issues at the onset of litigation, and following the production requirements for electronically stored information, companies can reduce the costs and burdens associated with electronic discovery.

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258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Questions and Answers, supra* note 21, at 2.

263. *Youst & Koh, supra* note 20, at 81.

264. *Id.*