

# A Matter of Interpretation

*How Courts Have Applied the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*

BY CRAIG A. COHEN  
AND MARK H. ROSENBERG

*Special to the Legal, PLW*

On Dec. 1, 2006, the Federal Rules of Civil Procedure were amended to address concerns regarding the impact of electronic document storage in the discovery process. The shift toward electronic document storage often led to a substantial increase in the amount of potentially discoverable data, thereby making the discovery process far more burdensome and expensive.

Quite often, such information is only available from “inaccessible” sources such as removable magnetic tapes, which require significant burden and expense to retrieve. Furthermore, many computer systems have been designed to automatically erase and recycle data that is no longer needed; leading to accusations of spoliation even when there is no evidence of bad faith.

By requiring parties to discuss electronic discovery issues at the outset of litigation, limiting the ability to seek discovery from “inaccessible” sources and providing a “safe harbor” for the loss of electronic evidence due to the routine operation of an electronic system, the recent amendments to the Federal Rules of Civil Procedure seek to alleviate the burden and expense of electronic discovery. However, as the amendments have been drafted to provide courts with broad discretion in their application, it remained to be seen whether courts would interpret the amendments to accomplish these goals.

While cases interpreting these amendments have not always gone in favor of the producing party, most courts have demonstrated a willingness to interpret the amendments to serve the purpose for which they were intended.

For example, in *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, the U.S. District Court for the District of Minnesota reversed a magistrate’s order and determined that a corporation was not obligated to preserve and restore a database containing potentially discoverable information. In doing so, the court applied the amendment establishing that a litigant is not required to produce electronic discovery that is “not reasonably accessible due to undue burden or cost” absent a demonstration of good cause, which in turn must be decided through reference to a number of factors focused on whether the burden of producing the data is outweighed by the benefits to the requesting party.

The court held that the requesting party’s contention that the corporation “haphazardly conducted electronic discovery” failed to establish good cause, as it did not demonstrate that the information on the database was not available from another source.



COHEN

ROSENBERG

**CRAIG A. COHEN** is a partner in the complex litigation department at Nelson Levine de Luca & Horst, a national law firm focused on the insurance industry, and concentrates his practice in the area of complex litigation, primarily representing the insurance industry in the defense of national class actions and bad faith matters. He is part of a group that serves as coordinating counsel to a major insurance carrier, managing the defense of complex and class action litigation countrywide. Cohen frequently writes on topics relating to litigation in the insurance industry.

**MARK H. ROSENBERG** is an associate in the firm’s complex litigation department. He specializes in the defense of complicated insurance practice and bad faith disputes, and frequently advises insurance clients regarding business practices and regulatory developments. Rosenberg is experienced in litigating class certification issues, and has taken a primary role in drafting successful motions in opposition to class certification.

Courts have also been willing to interpret the electronic discovery amendments in a flexible manner to advance the principles underlying the rules. In *W.E. Aubuchon Co., Inc. v. BeneFirst LLC*, a federal court held that even if electronic data was stored in a clearly “accessible” format (such as an active server), the data could be deemed “inaccessible” if the method of storage made the retrieval of data extremely costly.

However, as the record clearly demonstrated that the “inaccessible” documents were central to the litigation and could not be obtained from any other source, and in light of the requesting party’s agreement to narrow the scope of the request, the court ultimately concluded that good cause existed to compel the production of the data.

In addition, courts have applied the principles reflected in the electronic discovery amendments to issues not directly addressed by the amendments. For example, while the electronic discovery amendments do not address the discoverability of “metadata” (ancillary information generated automatically as part of a file), a federal court held in *Michigan First Credit Union v. Cumis Ins. Society Inc.* that such evidence was ordinarily not obtainable, as the burden of producing such data is rarely justified by the benefit to the requesting party.

Similarly, in *Self v. Equilon Enterprises LLC*, a federal trial court applied an analysis analogous to the electronic discovery amendments concerning the production of “inaccessible” data in allocating costs for additional searches of a producing party’s e-mail system. The court held that as the requesting party

had failed to demonstrate that the producing party had withheld relevant e-mails from previous searches, the requesting party failed to demonstrate that the burden and expense of additional searches was justified.

In addition, the principles elucidated in the electronic discovery amendments have been applied by state courts not bound by the amendments. For example, in *Ex parte Cooper Tire & Rubber Co.*, the Alabama Supreme Court applied the federal electronic discovery amendments — as well as recent federal case law analyzing electronic discovery — in its analysis of whether the burden of producing electronic data was justified by the benefits to the requesting party.

While courts have often applied the electronic discovery amendments to alleviate the burden and expense of electronic discovery, courts have recognized that these amendments have certain limits. For example, courts have held that while parties may be relieved of performing unduly burdensome searches of inaccessible data for discoverable information, parties are

not similarly relieved from having to search accessible data for relevant information, even if this may prove costly. In fact, courts have been quick to impose sanctions upon parties that fail to fully comply with the electronic discovery amendment requiring litigants to meet and confer with regard to electronic discovery issues at the outset of litigation. The Middle District of Florida’s decision in *In re Seroquel Products Liability Litigation* sanctioned the litigant for failing to meet and confer with regard to terms to be used in search of electronic discovery.

Furthermore, courts have recognized that the electronic discovery amendments do not diminish or otherwise alter a party’s obligation to ensure that data placed under a preservation hold is not deleted. Cases include the District of Colorado’s *Cache La Poudre Feeds, LLC v. Land O’Lakes Inc.* and the Southern District of New York’s *see also In re NTL, Inc. Securities Litigation*, imposing adverse inference sanction for failure to impose litigation hold.

Given the underlying intent of the electronic discovery amendments to limit burden and expense, courts have been particularly hesitant to interpret the amendments to impose additional discovery obligations not expressly set forth in the amendments.

For example, in *Scotts LLC v. Liberty Mut. Ins. Co.*, the U.S. District Court for the Southern District of Ohio rejected the contention that the electronic discovery amendments routinely authorize a litigant to obtain access to an opposing party’s computer system on the mere suspicion that the party has failed to provide complete responses to discovery

requests. Noting that the electronic discovery amendments simply confirmed that electronic discovery was on “equal footing” with paper discovery, the court concluded that “without a qualifying reason, plaintiff is no more entitled to access to defendant’s electronic information storage systems than to defendant’s warehouses storing paper documents.”

Furthermore, the Northern District of California has held in *In re ATM Antitrust Litigation* that the amendment requiring the production of electronic data “in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable” does not override an agreement entered into by the litigants (prior to the enactment of the new rule) with regard to the form of production.

Most federal courts in the past year have resolved electronic discovery disputes through a careful application of the electronic discovery amendments, both in terms of the plain language of the amendments and the underlying purpose of minimizing burden and

expense. However, this has not always been the case.

For example, in *In re Veeco Instruments Inc. Securities Litigation*, the Southern District of New York found that good cause existed to order the production of “inaccessible” back-up tapes. The court observed, “E-mails

sent or received by Defendants relating to the issues herein could constitute important relevant evidence and are reasonably calculated to lead to admissible evidence,” that the discovery requests at issue were specific, and that the information was not shown to be “reasonably available from any other easily accessed source.”

Although the court’s analysis applied a number of relevant factors identified in the advisory committee note for the electronic discovery amendments, it failed to analyze the central issue of whether the benefits of discovery outweighed the burden of production. By overlooking this point, the *Veeco* court’s approach suggests that a party can be compelled to produce data from “inaccessible” sources regardless of expense, so long as these sources contain discoverable data that is not available from another source. This broad approach would allow discovery of inaccessible data in a wide variety of circumstances, thereby rendering the limitations on such discovery in the federal rules virtually meaningless.

Aside from such rare cases, courts have generally taken a thoughtful and well-reasoned approach to the application of electronic discovery amendments. In the months and years to come, this approach should substantially reduce the burden and expense that has often accompanied discovery in the electronic era. •

*Courts have applied the principles reflected in the electronic discovery amendments to issues not directly addressed by the amendments.*