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# Implications of the New Federal Rules and the Proposed NCSC Guidelines

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# Biography

**Thomas Y. Allman**  
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As senior counsel with Mayer Brown, Tom provides consulting and legal representation to major US and international corporations with interests in updating policies and procedures to accommodate changes in corporate compliance activities, including e-discovery, electronic information management and integration of technologies.

Prior to joining Mayer Brown in 2004, Tom was Senior Vice President, Secretary & General Counsel for BASF Corporation where he was responsible for all NAFTA legal, compliance, intellectual property issues; for the Washington Office of Legislative Affairs; and for managing the Legal Department of more than 50 lawyers. While at BASF Tom served as Committee Chair for ACC, CJRG, LCJ and other Industry advocacy groups, developed and implemented E-Discovery, Records Management integration and Information Management Initiatives, and led a coalition of corporations supporting Amendments to E-Discovery Federal Rules.

Previous to that, Tom was with Taft, Stettinius & Hollister where he was a Partner for more than twenty years. There he specialized in Commercial Litigation and corporate governance, including shareholder litigation.

# Trends (1995 – 2005)

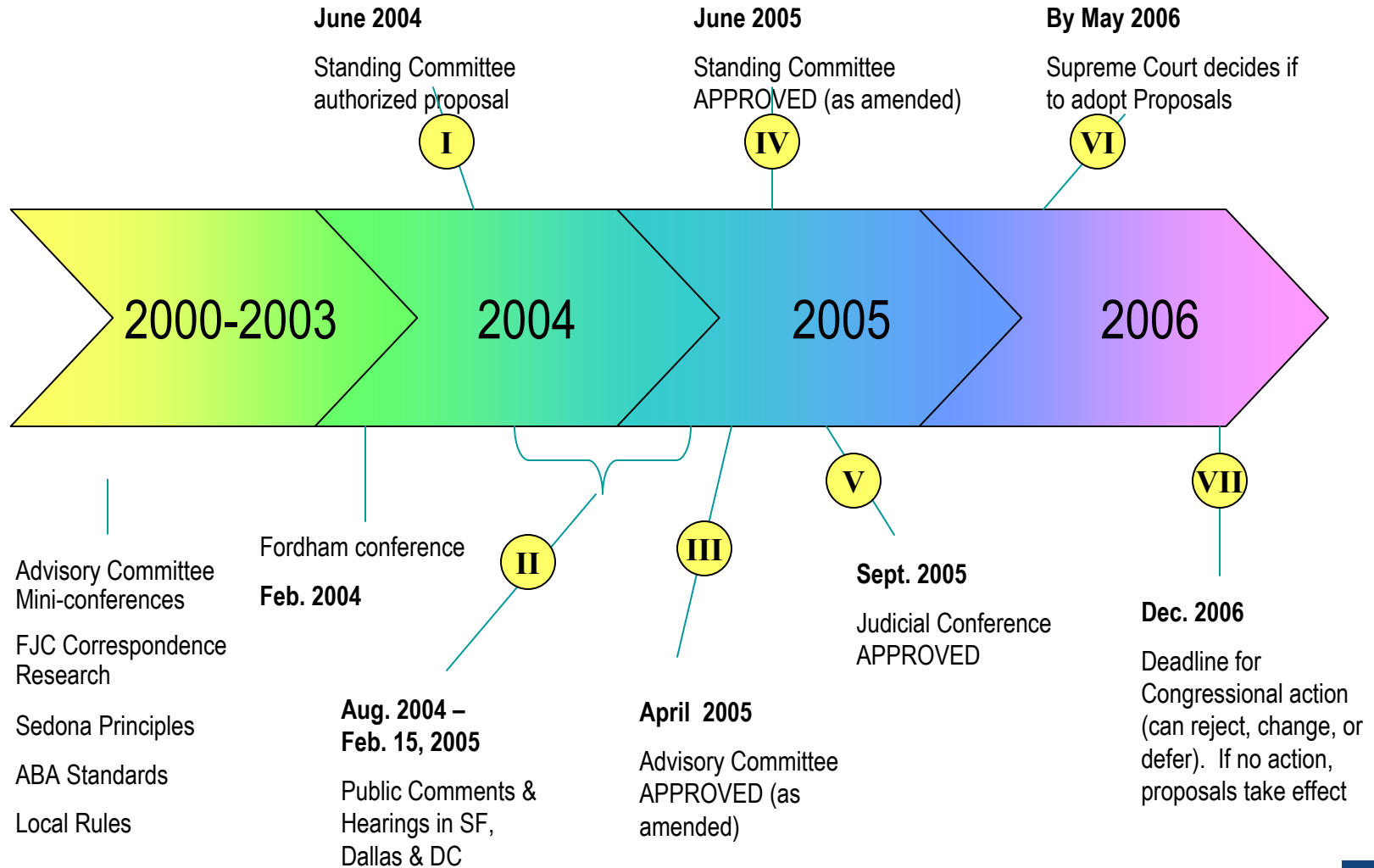
- Increased volumes of potentially discoverable information in electronic format
  - Shift away from oral (largely undocumented) and written (letters and documents) to e-mail communications
  - Relational data bases
  - Enormous duplication and proliferation of individual storage devices
    - Use of “backup” or snapshots for disaster recovery purposes
- Increased burdens and costs to access and review for relevant non-privileged information for production
- Challenges to losses of information and growth of robust sanction practice

# Responses

- Case by Case adjudication under existing discovery rules (with some “guidelines” for selected issues)
  - Favored by many US Magistrate Judges
    - See Hedges, “A critical Appraisal of some Proposed Amendments,” 227 FRD 123 (2005)
  - and the Conference of Chief Justices:
    - See “Proposed Guidelines for State Courts,” Conference of Chief Justices (Review Draft, September, 2005)
- [And] Adopt amendments which address the differences but without tying to current technology
  - Adopted by the Judicial Conference of the United States
    - September 20, 2005
  - No visible movement by State Court Rule-making bodies

# Federal Rules

[www.uscourts.gov/rules/new rules6.html](http://www.uscourts.gov/rules/new%20rules6.html)



# Electronically Stored Information

- A new category of discoverable information added to Rule 34 (“Production of Documents, **Electronically Stored Information**, and Things. . . .”)
  - In addition to “documents” and “things”

# Early Discussion

- Parties must meet to “discuss any issues **relating to preserving discoverable information**” before the Scheduling Conference (Rule 26(f)).
- Committee Note
  - Counsel should “**become familiar with [a parties’ information] systems**” before the conference
  - Counsel should agree on “reasonable preservation steps” to avoid future disputes
  - While maintaining ongoing operations
  - Cautions against routinely issued preservation orders – especially *ex parte* ones

# Expanded Discovery Plans

- (Rule 26(f)): Parties must meet to develop proposed discovery plan reflecting their views on:
  - “Issues” relating to “**disclosure or discovery** of electronically stored information”
    - **NOT “preservation”**
  - And the “form or forms in which it should be produced”
  - And “issues” relating to claims of privilege or protection as trial-preparation materials
  
- Committee Note:
  - Can discuss possible protocols to avoid excessive costs of privilege review (can be included in Scheduling order and Form 35 Discovery Plan)

# Scope

- As is true currently, the producing party selects the relevant, non-privileged information it is prepared to produce in response to a request for production (usually those most accessible to the party)
- Rule 26(b)(2)(B) clarifies that a party will not initially have to produce “electronically stored information” from “sources” that are “not reasonably accessible because of undue burden or cost”
  - Provided that the party “identifies” those sources to the requesting party

# Duty to Identify

- Draft Committee Note (Rule 26(b)(2)(B):
  - “The responding party must also identify, by category or type, the sources containing potentially responsive [electronically stored] information that it is neither searching nor producing.”

# Inaccessible sources

- In addition to accessible sources, **inaccessible sources** of electronically stored information must be searched and relevant information produced if
  - “good cause” exists
  - NOTE: Frequency of access “in ordinary course” is not the test – its whether there is undue burden or cost involved
- Issue can be raised by motion for a protective order or by motion to compel

# Examples

- **Examples of Inaccessible Sources under current technology:** (Introduction to Rule 26(b)(2):
  - Magnetic **backup tapes**
  - **Legacy data** which is unintelligible
  - **Fragmented data** after deletion
  - **Unplanned output** from databases different from designed uses

# Good Cause

- “Good cause” balances the “need” and “justification” against the costs of accessing the **SOURCE** (Committee Note, Rule 26(b)(2))
  - Seven “considerations” listed in Note
  - **Requesting party should evaluate information available from readily accessible sources before insisting that a party search and produce from other sources**

# Caveat

- One may have to **preserve inaccessible sources** - even if believed to be beyond discovery - pending resolution of claims to discovery
  - NOTE: may depend on whether a party believes it likely to contain discoverable information and whether the information is available from other reasonably accessible sources. (Committee Note, Rule 37(f))

# Form of Production

- Rule 34(b):
  - Absent agreement or court order, electronically stored information must be produced in form or forms “in which it is ordinarily maintained “ or in a “reasonably useable form”

# Privileged Information

- Rule 26(b)(5)(B): If notified of inadvertent production of privileged information or trial preparation materials, a party must promptly return, sequester or destroy all copies and may not use the information until the claim is resolved
- Committee Note to Rule 26(f):
  - Parties may agree to allowing initial review before a privilege review (“quick peek”) or
  - Allowing belated claims of privilege (“clawback”).
- Committee Note to Rule 26(b)(5)(B): Whether claim made within a “reasonable” time may be relevant to waiver issue

# Spoliation

- Rule 37 (f):
  - “**Absent exceptional circumstances**, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the **routine, good faith operation** of the party’s electronic information systems.”
- Why needed?
  - “It is unrealistic to expect parties to stop . . . routine operation of their computer systems as soon as they anticipate litigation.” (Introduction, Rules App. C-83)

# Routine Operations

- Committee Note (Rule 37(f)):
  - No specific examples given
  - Defined as:
    - “[T] the ways in which such systems are generally **designed, programmed, and implemented** to meet the party’s technical and business needs.”

# Examples

- Routine Operations under current technology: (Committee Report, Introduction to Rule 37(f) (at Report, p. C-83):
  - Recycling of **backup tapes**
  - Automatic overwriting of **deleted information**
  - Automatic deletion of **e-mail that has not been accessed within a defined period**
  - Automatic **changes to metadata** as information used
  - **Dynamic database programs** which are automatically updated and discard information

# Culpability

- Committee Introduction to proposed Rule 37(f)
  - The Advisory Committee revised Rule 37(f) to provide protection from sanctions “only for the ‘good faith’ routine operation of an electronic system.” (Rules App. C-84,85)
    - Intended as an “intermediate” degree of culpability

# An Interpretation

- A presumption that a party acted in “good faith” - and is entitled to ‘safe harbor’ - should attach to losses due to routine operations where no intentional or willful blindness
  - Can be overcome only if the party claiming it failed to take steps required by good faith

# Limitation on Rule 37(f)

- Rule 37(f) does not apply in “**exceptional circumstances**”
- Nor does it apply to “**non-sanctions**” (such as ordering additional depositions)
- And is limited to rule-based sanctions
  - See *Zubulake V*, 229. F.R.D. 422, 2004 WL 1620866 (2004)(“The **authority to sanction** litigants for spoliation **arises jointly under the Federal Rules of Civil Procedure and the court’s inherent powers**”).

# Preservation

- The current Rules do not establish the extent of **preservation** obligations that arise from independent sources of law
- Nor do the proposed amendments, BUT they do address the issue

# Summary

- One may have to **preserve** inaccessible sources - even if information contained believed to be beyond discovery - pending resolution of claims to discovery and may have to **intervene to suspend** features which could cause loss of information through routine operations
  - Note: may depend on **whether a party believes information likely to be discoverable and whether it is available from other reasonably accessible sources.**
  - Such actions are one aspect of what is often called a “**litigation hold.**”

# Preservation References

- Rule 26(f) Conference of Parties; Planning for Discovery

- As soon as practicable [before scheduling conference] parties must meet and confer to discuss **any issues relating to preserving discoverable information**

- Committee Note:

- Should balance competing needs re continuing routine operations critical to ongoing activities
  - Counsel should become familiar with systems

Intro to 26(b)(2)	Committee Note
May need to preserve difficult to access sources until discoverability is resolved	Identification as not reasonably accessible does not relieve party of duty to preserve
Rules do not state or define a preservation obligation	Obligations Depend on circumstances
	Useful to discuss preservation early

Intro to 37(f)	Committee Note
Difficult to isolate and preserve discrete parts of some types of information	“Good faith” may require intervention to prevent loss and to preserve inaccessible sources
A party may have to intervene to suspend certain features as part of a “litigation hold”	Preservation obligations arise from common law, statutes, regulations or court order
A party may have to preserve information on sources believed not reasonably accessible	May depends upon whether party reasonably believes likely discoverable and not available from accessible sources

# Litigation Holds

- Upon trigger: Identify systems (“sources”) which might contain discoverable information
  - Evaluate the likelihood that the source may contain discoverable information of material value to any party to the case
  - Identify risks of routine loss of information
- Formulate and Issue Litigation Hold tailored to sources selected:
  - Isolate information relating to “key players” and known issues
  - Where potential for loss due to system operations or through inadvertent behavior, consider making “mirror image” or otherwise intervening to suspend or preserve
  - Document sources not subjected to holds

# Examples

<b>“Source of information”</b>	<b>Type</b>	<b>Other accessible sources?</b>	<b>Burdens and costs to produce</b>	<b>Litigation hold action</b>
Accessible	Active e-mail of key actors	No	Normal	Individual holds
Accessible but subject to routine deletion	Active e-mail subject to size or duration limits	No	Normal	Suspend automatic deletion
Inaccessible but relatively static	Fragments of deleted e-mail on hard drives	Probably not	Excessive	None absent special circumstances
Inaccessible and subject to routine deletion	Disaster recovery backup tapes	Very likely	Excessive	Probably none unless deleted e-mails at issue

# Evaluation

- Emphasizes need for thorough attention to Litigation Hold process
  - Rewards careful and documented policies
  - Requires training and auditing
- Does not fully address problems caused by unrealistic expectations about individuals
  - Sheer impossibility of preserving all unstructured data
  - May lead to serious use of archiving
- Spoliation sanctions unlikely to be reduced
  - Issue for what is believed to be intentional conduct
  - Courts may use “inherent” power to avoid R. 37(f)

# NCSC Guidelines

- Proposed “guidelines” for state trial courts faced with e-discovery disputes
- Emphasizes duty of producing parties to become informed about client information systems - and take responsibility to share that information voluntarily
- Makes extensive use of “checklists”
- Attempts to resolve many of same issues covered by Judicial Conference in proposed Federal Rules

# Conclusion

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E-Discovery Proposals are logical evolutions of existing practices and trends - no real changes in substantive content - will require practical procedural adjustments/emphasis