

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-09

June 22, 2007

TO: Division Heads and Branch Chiefs, Office of the General Counsel,  
Regional Directors and Regional Attorneys

FROM: Ronald Meisburg, General Counsel

SUBJECT: Information and Guidance for Managing The Discovery of Electronically  
Stored Information<sup>1</sup>

INTRODUCTION

The following information and guidance is provided to attorneys who may engage in litigation on behalf of the Board in federal district courts with respect to the discovery of electronically stored information.<sup>2</sup> Section I discusses the recent amendments to the Federal Rules of Civil Procedure that will impose new requirements and procedures for the discovery of electronically stored

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<sup>1</sup> These guidelines are not intended, nor should they be interpreted, as an independent source of rights for, or obligations to, parties in litigation with the National Labor Relations Board. Application of the guidelines in specific litigated matters will vary depending on the nature of the litigation, the types of electronically stored information that is relevant, local rules and procedures, and case-specific orders. Moreover, electronic discovery is a dynamic and emerging area, and the guidelines may be subject to supplementation or other changes.

<sup>2</sup> While this protocol focuses primarily on civil litigation in trial courts to which the Agency is a party, it also should be a reference for administrative proceedings before the Equal Employment Opportunity Commission ("EEOC"). EEOC Management Directive 110 chapter 8, paragraph II, expressly provides that when an EEO complaint is filed, the agency must take care to preserve all evidence with potential relevance to the complaint.

Discovery and document preservation obligations in other administrative proceedings are beyond the scope of the protocol. If it becomes reasonably probable that administrative proceedings will lead to litigation in the trial courts, however, attorneys should be aware of the guidelines outlined in the protocol and the standards the trial court may use to judge document preservation efforts.

The protocol can also be useful as a checklist in Merit Systems Protection Board (MSPB) proceedings and other litigation to which the Agency may be a party, but it should be considered in light of the forum's general rules of procedure, local rules, and orders in specific proceedings, any of which could have a material impact on the necessary steps to take in a particular case.

When the Agency is served with a third-party subpoena that calls for the production of electronic records, certain aspects of the protocol may also be useful as a checklist of matters to consider, even though many of the items discussed in this protocol may be inapplicable to most third-party subpoena situations.

information. Section II explains a number of the basic technical terms that are used to describe the types of electronically stored information and the locations where the information may reside. Section III offers general guidelines for identifying and preserving electronically stored information. Section IV discusses various forms of production for electronically stored information.

Agency attorneys will likely require a significant amount of advice and technical assistance from the Records Management Section and office records managers as well as the Office of the Chief Information Officer to comply with the new amendments to the Federal Rules of Civil Procedure and otherwise navigate the electronic discovery process. Accordingly, in each case, please request the Chief Information Officer, the Chief of the Records Management Section and/or the appropriate records officer in the region(s) or office to designate an information technology specialist in OCIO and a records specialist to serve as points of contact on electronic discovery issues.

#### I. ELECTRONIC DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

##### *Will all cases be subject to the electronic discovery amendments?*

The electronic discovery amendments (“amendments”) apply in all civil cases filed in federal court on or after December 1, 2006, and in pending cases, to the extent that it is “just and practicable.” That means that attorneys with civil cases pending on December 1, 2006, should expect that the new rules will apply in their cases, if the cases are in the early stages of litigation.

##### *What specific rules are affected by the amendments?*

The amendments affect Rules 16 (scheduling orders), 26 (initial disclosures), 33 (interrogatories), 34 (requests for production), 37 (discovery sanctions) and 45 (subpoenas).

##### *What are the major changes that will occur as a result of the amendments?*

Major changes in the requirements and procedures for discovery of electronically stored information include:

##### Amended Rule 26 (initial disclosures)

Amended Rule 26 requires that initial disclosures must include a description by category and location of all potentially relevant electronically stored information. Rule 26(a)(1)(B). In addition, it requires that the parties confer early in the case to discuss any issues relating to preserving discoverable information and the disclosure or discovery of electronically stored information, such as the form of production and matters of privilege. Rule 26(f). As a practical matter, this means that, in advance of the Rule 26 “meet and confer,” attorneys will need to understand a number of technical matters such as: the basic architecture of the Agency’s computer systems; where potentially relevant electronic data is located on the computer systems and other storage media; what software was used to

create the potentially relevant electronically stored information; and what policies and procedures normally are in place for electronic data retention and backup.<sup>3</sup>

It also establishes a “two-tiered” process for discovery of accessible versus inaccessible electronic data. Parties will not be required, in the first instance, to produce electronic data from sources that are “not reasonably accessible because of undue cost or burden.” On a motion to compel, the responding party has the initial burden to prove inaccessibility. Thereafter, the requesting party may overcome that proof by showing “good cause.” Rule 26(b)(2)(B). This means that attorneys who want to avoid having to produce electronically stored information from inaccessible sources, such as back up tapes or legacy systems, will need to identify the Agency’s inventory of inaccessible sources and demonstrate why it would be unduly difficult or costly to produce information from those sources.

#### Amended Rule 34 (requests for production)

The amendment to Rule 34 provides that the requesting party may specify the form of production (e.g. native format, PDF, TIFF) when it requests electronically stored information. The amendment contemplates a procedure whereby the responding party may object and propose an alternate form of production. If the alternate form proposed is not acceptable to the requesting party, the matter will be resolved by the court on a motion to compel. Where the requester does not designate the form of the production, the default is the form in which the information is “normally maintained” or in a form that is “reasonably usable.” To meet the requirement that the form be reasonably usable, the responding party may be required to provide technical assistance to enable the requesting party to use the information. Rule 34(b).

Agency attorneys should avoid having to produce electronic data in a disadvantageous format, which could be the native format. See Section IV. To accomplish this, attorneys must be conversant in the various forms of production, and understand the cost and other implications to the Agency of producing information in one form as opposed to another. Additional information concerning form of production issues and terminology is presented in Section IV.

#### Amended Rule 37 (discovery sanctions)

Another important highlight of the amendments is the “safe harbor” provision of Rule 37, which provides that the loss of electronically stored information that occurs as the result of the “routine, good faith operation of an electronic information system” will not be subject to sanction by the court absent “exceptional circumstances.” Rule 37(f). However, in most instances, “good faith”

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<sup>3</sup> A list of issues concerning electronically stored information that counsel should consider in advance of Rule 26 meetings is attached as Appendix A.

will require parties to invoke "litigation holds" to modify or interrupt routine operations that would otherwise result in the destruction of relevant electronically stored information, at the very outset of the litigation or when the litigation is reasonably foreseeable. Additional information concerning the preservation of electronically stored information and the litigation hold process is presented in Section III.

*Where can I go to learn more about the amendments?*

The full text of the amended rules and the accompanying committee notes are contained in the 2007 Federal Civil Judicial Procedure and Rules. In addition, in-house training on electronic discovery issues is being planned.

II. ELECTRONICALLY STORED INFORMATION

*What is electronically stored information?*

Electronically stored information includes:

- Electronic correspondence, such as e-mail, and voice-mail;<sup>4</sup>
- Electronic business documents, such as word processing documents, spreadsheets, personal and shared calendars;
- Computer databases such as financial and human resources databases; and
- "Metadata," which is information about the files, databases and software on the computer. Among other things, it documents when computer files, databases or electronic mail messages are generated, modified or sent, and identifies the computer users and systems involved. Metadata is automatically generated by the computer. Usually, it is hidden inside the documents and is not seen under normal viewing conditions.

*Where is electronically stored information physically located?*

Electronic information may be located in:

- **ON-LINE STORAGE MEDIA.** Online storage media are connected at all times to a computer, making the data immediately available. Typically, this storage media is used for data that is accessed on a regular basis. Common examples are the hard drives in PCs and network storage devices, as well as the memory chips in personal digital assistants (such as Palm Pilots and Blackberries).
- **NEAR-LINE STORAGE MEDIA.** Near-line storage media are connected to a computer, making the data generally available within minutes. Examples are disk and tape libraries which users may access through their computer network.

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<sup>4</sup> Although the new Federal Rules cover instant messages, agency policy prohibits the installation of instant messaging (IM) software on agency computers. The Agency does not have a retention policy covering voice mails.

- **OFF-LINE STORAGE MEDIA.** Off-line storage media are not connected to a computer. Examples include floppy disks or CDs. Off-line storage media may be used to store copies of records that are not frequently used. Depending on where off-line storage media is located, accessing the data may take minutes, hours, or even days.

- **BACK-UP TAPES.** Back-up tapes contain copies of data stored on a network servers and are usually maintained for disaster recovery purposes.

For technical reasons relating to the different capabilities of servers and back up tape, data stored on back-up tapes is not easily accessible:

When storing a file on a server, a computer does not necessarily put all the data in one spot. Often, because various parts of the drive have already been used, no one block of free space is large enough for the new file. Therefore, the computer saves the new file in fragments stored in multiple free spaces on the drive and keeps an index or directory of where it placed the fragments. When the file is subsequently accessed, the computer uses the directory to reassemble the file fragments. This is done quickly, because a computer is able to directly access different parts of its drive.

By contrast, on a back-up tape, data is saved in the random order in which it appears on the drive, often using data compression technology. Unlike a hard drive, different spots on a back-up tape cannot be directly accessed. Therefore, the data stored on a back-up tape cannot be accessed without first loading it onto a hard drive. This is a time consuming and costly process called “restoring” the data.

- **RESIDUAL DATA.** Residual data typically is created when information is marked for deletion or is damaged. When a computer user deletes a file, the contents of the file are not actually erased from the computer’s hard drive. Instead, the file entry on the directory of the hard drive is changed to “not used,” thereby allowing the computer to overwrite the file fragments on the hard disk on which the file was stored. However, before all the file fragments are overwritten, it is possible to access them using computer forensics technology. An issue could arise as to whether such data would need to be produced in a particular discovery request.

- **REPLICANT FILES.** Replicant files, also called “temporary files” or “file clones,” are copies of files that are automatically created by a computer to prevent the loss of the data in the event of a computer malfunction. For example, word processing programs often save data automatically every few minutes to insure that if the computer freezes or experiences some other problem, the only work lost will be changes made since the last time the document was automatically saved. An issue could arise as to whether such data would need to be produced in a particular discovery request.

### III. IDENTIFYING AND PRESERVING ELECTRONIC DATA

*How do attorneys identify relevant electronically stored information?*

In the first instance, identifying relevant electronically stored information requires the same type of inquiry as identifying relevant paper documents. The Agency attorney assigned to litigate the case<sup>5</sup> must assess the underlying facts and issues of the case and interview potential witnesses and other key players who are likely to possess relevant information. With respect to potentially relevant electronically stored information, counsel should specifically ask interviewees about:

- E-mail (including attachments);
- Instant messages;<sup>6</sup>
- Electronic calendars, task lists, and other organizational aids;
- Word processing documents;
- Spreadsheets;
- Databases;
- NLRB external and internal websites;
- Audio and video recordings; and
- Voicemail.<sup>7</sup>

Counsel should also determine whether interviewees maintain relevant electronically stored information on their home computers or other equipment that may be found outside of the office, including Blackberries, laptops, flash drives and other portable storage devices.

In addition, counsel should work with the appropriate Records Officer(s) to determine where the information is located within the records systems and schedules of the region or headquarters office. Keep in mind that the Records Officer will likely be the document custodian who will authenticate the electronic record information at trial. Counsel should also work with the designated OCIO personnel to determine the physical location of the relevant information. The designated OCIO person will likely be the 30(b)(6) witness who will explain the operation and design of the computer systems, if such testimony is required.

*What other issues should counsel consider?*

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<sup>5</sup> In certain cases, Agency litigation attorneys work in collaboration with trial counsel from the Department of Justice. In these circumstances, the Agency attorney should discuss these issues with the DOJ counsel before proceeding.

<sup>6</sup> As noted, Agency policy forbids the installation of IM software on Agency computers. See footnote 4, *supra*.

<sup>7</sup> Although the Agency has no policy with respect to retention of voice mail, a voice mail would need to be retained if there is a litigation hold covering the voice mail.

- How are potentially responsive records and other information identified?
- Who is involved in the identification?
- Who will be contacted?
- Where and how will records and other information subject to the litigation hold be stored?
- Who collects and coordinates the retention of the records and other information subject to the litigation hold?
- Whether and how to regularize and document the document gathering process?
- What metadata, if any, may be material to a particular dispute and thus may need to be preserved?
- Whether records and other information must be “frozen” in a snapshot?
- Whether “point-in-time” information needs to be preserved on an ongoing basis (future snapshots), and, if so, when and how will this be done?<sup>8</sup>
- Is there a particular need to preserve and produce back-up media or systems?<sup>9</sup>

*When does the duty to preserve electronically stored information arise?*

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<sup>8</sup> In some cases, it may be necessary to create a forensic image of an employee’s computer or hard drive. A forensic image duplicates the exact state of a computer’s drive, including electronic documents, permanent and temporary files, computer settings and boot records. Forensic images may be appropriate when: a) there is reason to believe that evidence may be altered or destroyed; b) the employee is the subject of civil or criminal investigation or litigation; c) simply copying the relevant files provides an insufficient evidentiary trail; or d) an employee is an adverse party in litigation.

<sup>9</sup> The current state of the law is that only in very exceptional circumstances is there a need to produce information from back-up tapes that exist solely for disaster recovery purposes (as is the case with the Board’s current back-up system) — as opposed to routine retrieval of information. The law in this area is developing and legal research should be updated.

The duty to preserve relevant electronically stored information arises at the outset of litigation or when litigation is reasonably foreseeable. Ordinarily, the mere fact that litigation is possible is not enough to trigger the obligation to preserve potentially relevant information. There must be a specific set of facts or circumstances that would make litigation reasonably foreseeable.

Agency attorneys should be mindful of the potential impact of the duty to preserve electronically stored information in the context of administrative claims or appeals. This does not necessarily mean that litigation will be deemed reasonably foreseeable every time an administrative claim or appeal is brought or that attorneys should plan to issue “litigation holds” (discussed below) in every administrative matter. However, attorneys should be alert to the potential that administrative matters may give rise to the duty to preserve electronically stored information.

*What is a “litigation hold”?*

A “litigation hold” is a directive to suspend normal disposition procedures and preserve documents, including electronically stored information, which may be relevant to pending or reasonably foreseeable litigation. The appropriate procedure for issuing litigation holds may vary depending on the nature of the matter, the number of potential witnesses, and the location and quantity of potentially relevant material. In a small case, involving a single office, a limited number of witnesses and a discrete amount of information, it may be sufficient to issue the litigation hold in the form of a letter or memorandum from counsel to the potential witnesses, the Records Officer and the designated OCIO personnel.

Board attorneys have a professional responsibility to work with appropriate Agency personnel so that they know the existence and extent of these duties, take necessary steps to identify, preserve, and produce relevant material, and make it available in a proper format. The duty to preserve includes all material that may be potentially relevant to the litigation: it may be, but is not necessarily, coextensive with the duty to produce material in discovery. That is, the duty to preserve is an additional obligation triggered by litigation or the probability of litigation. The duty to preserve does not replace other pre-existing obligations to maintain or preserve documents.<sup>10</sup>

*What general guidelines apply to litigation holds?*

Regardless of the procedure used to issue them, the following guidelines apply to the content, dissemination and monitoring of litigation holds:

- The scope should be limited to information that may be relevant to the litigation, claim, or is the subject of a request for production or a preservation order from the court;

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<sup>10</sup> See the Agency’s Records Disposition Standards at:  
<http://nlrbnet/RecordsMgt/standards.doc>.

- The text should adequately describe the type of information that should be preserved;
- The text should direct that relevant electronically stored information must be preserved and describe the various forms that electronically stored information may take;
- Distribution should be targeted to individuals who are known to have, or may reasonably be expected to have, relevant information. Unless it is appropriate to do so, litigation holds need not be sent to all of the employees in a given office;
- The litigation hold should be distributed to the designated Records Officers. Among other things, this permits them to track the various litigation holds that affect the disposition of the records that are maintained by their office;
- The litigation hold should be distributed to the designated OCIO personnel and direct them to suspend automatic deletion processes that could destroy relevant information before it can be identified and preserved. In some instances, this may include suspending the recycling of disaster recovery back-up tapes;
- The litigation hold should be issued to contractors or other third parties who are known to have, or may reasonably be expected to have, relevant documents and information;
- Counsel should periodically review the litigation hold to determine whether to maintain, expand, or diminish the scope of its content or distribution;
- Counsel should monitor compliance with the litigation hold, by issuing periodic reminder notices. This is particularly important in large cases that may be pending over the course of a number of years;
- Once the litigation or claim is resolved, counsel should rescind the litigation hold. Typically, this should be accomplished using the same procedure that was employed for issuing the hold. It is especially important that counsel provide notice to the Records Officers and OCIO when a litigation hold is rescinded and
- Counsel should document or otherwise maintain a record of all actions with respect to issuing and monitoring litigation holds. Documentation should include a copy of the litigation hold notice(s), a distribution list for the notice(s), and a record of any other actions taken to implement and maintain the litigation hold.

*What technical or other assistance will attorneys require to effectively*

*preserve electronically stored information?*<sup>11</sup>

OCIO personnel play an essential role in preserving the electronically stored information. In the case of paper documents, attorneys may meet the duty to preserve relevant evidence by collecting the documents from the offices of witnesses or the possession of document custodians, and securing the documents in a room or file cabinet. The process of locating paper documents is relatively straightforward, and unless someone in physical possession of the documents takes affirmative steps to alter or destroy them, they will continue to exist in their original form.

By contrast, electronically stored information comes in many forms (e.g. word processing documents, e-mail, voicemail, databases, systems information or metadata) and it resides in a wide range of locations (e.g. hard drives, servers, CDs, back-up tapes). It is common for multiple people in a given organization to have access (hence, the ability to alter or destroy) the same electronically stored information. Electronically stored information may also be altered or destroyed automatically by function of the computer systems. Preserving electronically stored information may require technical skills and administrative rights to the computers systems. Thus, in at least some instances, attorneys will not be able to adequately preserve relevant electronic evidence without the help of an IT professional.

The designated Records Officers for the affected offices also play an essential role in preserving the electronically stored information. Presumably, at least some of the relevant electronically stored information will be records that are subject to the record retention schedules of the offices that are implicated by the claim or pending litigation. Recall that pursuant to amended Rule 37, a key step that must be taken to meet the duty of preservation is interrupting or modifying the record retention schedules that might otherwise result in the destruction of relevant electronically stored information. Counsel will likely need the assistance of the Records Officers to accomplish this step and impose "litigation holds" on the disposition of records that may be relevant.

#### IV. FORM OF PRODUCTION AND PRIVILEGE REVIEW

*How is electronically stored information produced?*<sup>12</sup>

Electronically stored information may be produced in a variety of imaging formats. The most commonly used imaging formats are Tagged Image File Format (TIFF) or Portable Document Format (PDF). Indeed, most large scale productions of paper documents are accomplished by scanning the paper document into a computer, creating an electronic image of the document (not unlike a photograph) and coding the image to identify it (the electronic equivalent

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<sup>11</sup> See Appendix B, which describes the basic IT terms that apply to the Agency.

<sup>12</sup> Producing electronically stored information includes requests to produce paper documents in electronic form.

of a Bate stamp) and aid in searching the database of text images. Thereafter, the electronic images are produced rather than the paper documents.

The same type of scanning or imaging process may be applied to electronic documents in their “native” file format. Native file format is the default format of a given software application such as Microsoft Word or Excel. The type of native format is designated by the filename extension (e.g. “.doc” for Microsoft Word files and “.xls” for Excel). As with paper documents, electronically stored information in its native format can be scanned to an image format.

At the present time, image-based formats such as TIFF or PDF are probably the most widely used form of production in electronic discovery. These computer based images are popular because they are conceptually similar to paper documents. They appear in “read only” format and cannot be easily altered. They may be Bate stamped without altering the original content of the document and easily redacted for privilege. Also, as with paper documents, the scanned images do not contain any metadata that would provide a range of secondary information such as who created the document, when it was edited and by whom. (It should be noted, however, that if it is relevant and requested, metadata may be captured during the imaging process and produced in an accompanying file.) The downside of scanning documents for production is the expense if they are voluminous.

Alternatively, electronic documents may be produced in their native format. Plaintiffs may prefer native format because the documents will appear the same as when they were originally created on a computer — complete with metadata, track changes and other hidden data elements, such as embedded data in spreadsheets. Production in native format also avoids the cost of scanning which may be considerable in large scale document productions. However, there are a number of disadvantages with native file production. For the most part, native files must be opened, viewed, or modified by using the software application or program in which the file was created. Therefore, the receiving party must have access to the original software applications for every document in the review set. This may be an expensive and time consuming endeavor, involving software licensing and other proprietary issues. Moreover, the metadata can be altered simply by opening a native file, potentially causing spoliation of the evidence. Other disadvantages include the inability to redact privileged information or add Bate numbers without altering the original content of the document. In addition, native files are more difficult to efficiently organize, categorize, review for privilege, and import into litigation support databases.

Please circulate this memorandum to those attorneys in your office who would have a need for this information.

If you have any questions regarding this memorandum, please contact Assistant General Counsel Nelson Levin.

*/s/*  
R. M.

cc: NLRBU  
NLRBPA

APPENDIX A  
ISSUES FOR DISCUSSION OR DISCLOSURE  
AT RULE 26 MEETING

- Persons (including former employees and contractors) who are knowledgeable of the information systems, technology, and software necessary to access potentially responsive data;
- The universe of potentially responsive data that exists, including the type of data, software format, and location where the electronic data may be found;
- Accessibility issues, such as the software that may be necessary to access the relevant data and the necessity of preserving disaster recovery backup tapes;
- Whether potentially relevant electronically stored information exists in a searchable format;
- What data retention policies and practices may affect the disposition of relevant electronically stored information and what steps have or will be taken to modify or suspend them;
- How the preservation of data generated subsequent to the filing of the claim will be accomplished;
- Possible use of key terms or other selection criteria to search large amounts of electronically stored information for relevant data;
- Privilege issues, including the identification of privileged documents, preservation of privileges in document productions, and inadvertent disclosure of privileged documents;
- Which party bears the cost of production, particular where the requesting party seeks a high volume of data and/or production in a specialized format.