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EFFECTIVENESS OF THE 2006 RULES AMENDMENTS

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On December 1, 2006, electronic discovery amendments to the Federal Rules of Civil Procedure ("Rules") went into effect. How effective have these amendments been in achieving their goals? At the 12th Annual Sedona Conference® on Complex Litigation, on April 8, 2010, a panel discussed that question. In preparation for that panel, I prepared this brief outline of the legislative history of the goals of the 2006 amendments and pulled together existing information that might assist in the discussion of whether the amendments have, about three years into their existence, achieved those goals. The empirical evidence on the effectiveness of the 2006 amendments is limited, but there is some support for the proposition that the amendments have succeeded, at least in a limited sense, in getting the parties in cases involving electronic discovery to pay early attention to potential problems.

I. GOALS OF THE 2006 AMENDMENTS

To evaluate the effectiveness of the 2006 amendments, it is first necessary to determine what goals they were intended to accomplish. In what follows, I have drawn on the report of the Committee on Rules of Practice and Procedure ("Standing Committee") to the Judicial Conference of the United States ("Judicial Conference"), from September 2005,[2] and from the report of the Advisory Committee on Civil Rules to the Standing Committee, from May 2005.[3] Overall, the 2006 electronic discovery amendments were intended to provide adequate "guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases" and to prevent the development of "a patchwork of [disparate local] rules" addressing electronic discovery issues.[4] In presenting the amendments to the Judicial Conference, the Standing Committee placed the 2006 amendments in the context of the 2000 amendments, which were aimed at reducing costs of discovery, increasing its efficiency, increasing uniformity of practice, and encouraging more active judicial case management, when appropriate.[5] In a sense, the 2006 amendments were intended to fill in the gaps in the discovery rules "to make the rules apply better to electronic discovery problems."[6]

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1 Senior Researcher, Federal Judicial Center. Affiliation provided for identification purposes only; views expressed herein are those of the author and do not represent those of the Federal Judicial Center or any other entity in the judicial branch. Tom Willging, Angelia Levy, and Jill Gloekler provided useful comments on the Article.

2 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States, September 2005 (hereinafter "Standing Report").

3 Report of the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, May 2005 (revised July 2005) (hereinafter "Advisory Report").

4 Standing Report, *supra* note 2, at 23.

5 *Id.* at 24 ("The proposed amendments to make the rules apply better to electronic discovery share the same focus.")

6 *Id.* The phrase "fill in the gaps" was suggested by my colleague Tom Willging, who was Federal Judicial Center liaison to Civil Rules throughout this period.

Both reports also list five sets of amendments with more specific purposes. First, the amendments to Rules 16, 26(a), and (f) were to "present a framework for the parties and the court to give early attention to issues related to electronic discovery," especially "frequently-recurring" preservation and privilege issues.[7]

- "Rule 16 is amended to invite the court to address the disclosure or discovery of electronically stored information in the Rule 16 scheduling order."[8]

- "The proposed amendment to Rule 26(a) clarifies a party's duty to include in its initial disclosures electronically stored information . . . ."[9]

- Finally, under this set of amendments, the 26(f) conference is "to include discussion of any issues relating to disclosure or discovery of electronically stored information," including "the form of produc[tion], a distinctive and recurring problem," and preservation issues.[10]

Second, the proposed amendments to Rules 33 and 34 (referred to as "discovery workhorses"[11]) are meant to "clarify" how they apply to electronically stored information.

- "The proposed amendment to Rule 33 clarifies that a party may answer an interrogatory involving review of business records by providing access to the information if the interrogating party can find the answer as readily as the responding party can."[12]

- "Under the proposed amendment to Rule 34, electronically stored information is explicitly recognized as a category subject to discovery that is distinct from 'documents' and 'things.'"[13]

- "Rule 34 is also amended to authorize a requesting party to specify the form of production . . . and for the responding party to object. Under the proposed amended rule, absent a court order, party agreement, or a request for a specific form of production, a party may produce responsive electronically stored information in the form in which the party ordinarily maintains it or in a reasonably usable form. Absent a court order, a party need only produce . . . in one form."[14]

- Rule 45 and Form 35 were also amended to conform to the proposed changes.[15]

Third, the proposed amendment to Rule 26(b)(5) was intended to deal with assertions of privilege after inadvertent production.

- "The proposed amendment to Rule 26(b)(5) provides a procedure for asserting privilege after production . . . . [T]he volume of electronically stored information searched and produced in response to discovery can be enormous,

7 *Id.* at 26.
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.* at 27.
12 *Id.*
13 *Id.* at 28.
14 *Id.*
15 *Id.*

and certain features of the forms in which [it] is stored make it more difficult to review for privilege and work-product protection than paper. The inadvertent production of privileged or protected material is a substantial risk."[16]

- "By providing a clear procedure to allow the responding party to assert privilege after production, the amendment helpfully addresses the parties' burden of privilege review, which is particularly acute in electronic discovery."[17]

Fourth, the proposed amendment to Rule 26(b)(2) was amended to "clarif[y] the obligation of a responding party . . . [when] information is not reasonably accessible, an increasingly disputed aspect of such discovery."[18]

- "The proposed amendment to Rule 26(b)(2) responds to distinctive problems encountered in discovery of electronically stored information that has no close analogue in the more familiar discovery of paper documents. . . . [S]ome forms of computer storage make it very difficult to access, search for, and retrieve information."[19]

- "Lawyers sophisticated in these problems are developing a two-tier practice in which they first obtain and examine the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources."[20]

- "The Rule 26(b)(2)(B) proposal authorizes a party to respond to a discovery request by identifying sources of electronically stored information that are not reasonably accessible because of undue burden or cost. If the requesting party seeks discovery from such sources, the responding party has the burden to show that the sources are not reasonably accessible. Even if that showing is made, the court may order discovery if . . . the requesting party shows good cause. The court may specify conditions for discovery."[21]

Fifth, the proposed amendment to Rule 37(f)[22] was intended to "provide guidance in a troublesome area distinctive to electronic discovery[23]… the application of sanctions rules in a narrow set of circumstances distinctive to electronic discovery."[24]

- "The proposed amendment provides limited protection against sanctions under the rules for a party's failure to provide [ESI] in discovery. . . . [A]bsent exceptional circumstances, sanctions may not be imposed . . . if [ESI] sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as the operation is in good faith."[25]

16 *Id.* at 29.
17 *Id.* at 30.
18 *Id.*
19 *Id.* at 31.
20 *Id.*
21 Advisory Report, *supra* note 3, at 40. The Advisory Report adds that "[i]n many circumstances, the two-tier approach will be worked out by negotiations." *Id.* at 41.
22 This is now Rule 37(e).
23 Standing Report, *supra* note 2, at 32.
24 Advisory Report, *supra* note 3, at 16.
25 Standing Report, *supra* note 2, at 33.

- "The proposed rule also recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome. . . ."[26]

In sum, the 2006 amendments were intended to clarify the discovery rights and obligations of the parties in cases with electronic discovery and, in so doing, provide guidance to litigants, lawyers, and judges. The Advisory Committee identified recurring problems in such cases—including disputes over the form of production of ESI, the cost of privilege review and the risk of inadvertent production, the preservation of ESI in dynamic information systems, and the risk of sanctions for spoliation—and then crafted amendments intended to provide rules and procedures to address them. The amendments also clearly envision that if the parties (and in some instances, the court) pay early attention to potential problems related to electronic discovery, those problems can be prevented or at least lessened. The goal of preventing inconsistent and conflicting local rules to address these issues is also present in the legislative history.

In providing guidance and clarity, however, the 2006 amendments may "not provide the sort of specificity that some who decry uncertainty seek . . . . Particularly with such a new topic, it is not likely that great certainty will come from rule changes."[27] The degree of specificity that rules *can* provide, and the degree of specificity that rules *should* provide, is an interesting and open question.

With that caveat in mind, it may be useful to ask, have the 2006 amendments achieved these goals? Are, for example, parties paying early attention to potential electronic discovery issues and, if so, is that having the desired effect? Are disputes over electronic discovery decreasing? Moreover, a number of recent surveys have asked litigants and lawyers for their views on whether the 2006 electronic discovery amendments have been effective. The next few sections present some information on these questions.

II. EARLY ATTENTION TO E-DISCOVERY ISSUES

Are attorneys and litigants paying early attention to electronic discovery issues as a result of the amendments? There is some available information on this question. A 2009 Federal Judicial Center ("FJC") survey of attorneys in civil cases found that, in about 1 in 3 cases, the attorneys discussed electronic discovery issues in a Rule 26(f) discovery planning conference.[28] Limiting the analysis to cases with one or more requests for production of electronically stored information, the attorneys discussed electronic discovery issues in more than half of the Rule 26(f) discovery planning conferences—53.2 percent of plaintiff attorneys and 51.5 percent of defendant attorneys reported doing so.

The most commonly discussed topic related to collection was the parties' practices with respect to preservation of electronically stored information, followed by the scope, method, and duration of preserving ESI, the potential cost or burden of collecting, reviewing, and producing ESI, and the possibility of restricting the scope of or altogether avoiding discovery of ESI.[29] The most commonly discussed topic related to production was the format of production of electronically stored information, followed by confidential, trade secret, and privilege issues, the media of production, and privilege log issues.[30]

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26 *Id.*
27 Richard L. Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 17 (2004).
28 EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON CIVIL RULES, AT 15, FIG. 5 (Federal Judicial Center, Oct. 2009) (hereinafter "Preliminary Report").
29 *See id.* at 16, Table 2.
30 *See id.* at 18, Table 3.

Given the sampling frame of the FJC closed-case survey (attorneys of record in civil cases terminated in the last quarter of 2008), about one third of the cases were filed prior to December 1, 2006, the effective date of the amendments, and two thirds after. This makes it possible to compare whether discussion of electronic discovery issues increased after the amendments went into effect. The answer is yes, but not dramatically. Prior to the effective date, 46.6 percent of plaintiff attorneys and 41.7 percent of defendant attorneys reported discussing electronic discovery issues at the Rule 26(f) conference. After the effective date, 54.9 percent of plaintiff attorneys and 53.8 percent of defendant attorneys reported having done so.[31]

While statistically significant, the substantive significance of these findings is open for discussion. After the amendments' effective date, in electronic discovery cases in which a Rule 26(f) conference was held, slightly more than half of respondents reported discussing electronic discovery issues. These issues are not being discussed in many cases in which the Rules envision that they should be. With additional time and experience with the amendments, perhaps the percentage of attorneys raising these issues at the Rule 26(f) conference will increase? There is clearly some reluctance. One plaintiff attorney, interviewed by FJC researchers said, "At Rule 26(f) conferences, I have never met an attorney who wants to get into the electronic issues."[32]

Many attorneys may not have a choice; "the electronic issues" simply cannot be avoidable in certain kinds of cases. It is possible that these issues are being discussed in cases where electronic discovery disputes are more likely to arise. In cases in which the respondent did not report discussing electronic discovery issues at the Rule 26(f) conference, there was a reported dispute over ESI in 21 percent of plaintiff attorneys' cases and in 9.9 percent of defendant attorneys' cases (before and after the effective date). In cases in which such issues were discussed, there was a reported dispute in 31.3 percent and 29.7 percent of cases, respectively. The percentage of cases with one or more reported disputes, in other words, is higher for both plaintiff and defendant attorney respondents in cases in which electronic discovery issues were discussed at an early stage in the case.

This finding is, again, open to discussion. It is possible that discussing electronic discovery issues at the Rule 26(f) conference actually makes future disputes over the same more likely. But it is also possible, as suggested above, that attorneys are more likely to discuss electronic discovery issues in cases in which, even at an early stage of the case, they think that a dispute over the same is likely to occur. In other words, the discussion and the dispute have a common cause—the one does not cause the other. It would be useful to know more about *why* attorneys raise electronic discovery issues at the Rule 26(f) conference, when they do, and why they do not, even in cases in which there is a request for production of electronically stored information.

The discussion at the Sedona Complex Litigation Conference revealed a great deal of consensus that the "early attention" rule amendments have been effective. A similar result was obtained from the magistrate judges' survey, which is also discussed in this issue.[33]

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31 The percentage of respondents answering "I can't recall" was higher for the cases filed prior to December 1, 2006, than for the cases filed after, as one might expect. The survey also asked whether the discovery plan (if one was adopted) included provisions related to ESI. Overall, plaintiff attorneys in electronic discovery cases reported that the discovery plan included provisions related to ESI in 29 percent of electronic discovery cases and defendant attorneys reported the same in 32.2 percent. Plaintiff attorneys were more likely to report such provisions after the amendments' effective date, but defendant attorneys were not.

32 Quoted in THOMAS E. WILLGING & EMERY G. LEE III, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 16 (Federal Judicial Center, Mar. 2010).

33 Emery G. Lee III & Kenneth J. Withers, *Survey of U.S. Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure,* 11SEDONA CONF. J. 201 (2010).

III. E-DISCOVERY DISPUTES

Have the 2006 amendments reduced the number of electronic discovery disputes requiring intervention by the court? Under the heading, "E-discovery Disputes in Court," a 2009 report from Fulbright & Jaworski states:

> Respondents reported that over time they were less likely to have had an e-discovery dispute become the subject of a hearing. In 2006, 58 percent of respondents reported some incidence—from "rarely" to "always"—of an e-discovery matter becoming the subject of a motion, hearing, or ruling from a tribunal. For the largest companies [with annual gross revenues over $1 billion], however, the figure was 75 percent.
>
> In 2007, the figure for the total sample declined slightly to 56 percent, while the large company sample rose slightly to 78 percent. But by 2008, the corresponding figures were down dramatically—to just one third of the total sample and 40 percent of the largest companies. Although we didn't survey respondents on the reasons for this decline, commentators have suggested it resulted from respondents' increased readiness, deeper understanding, and successful use of a well-informed meet-and-confer process.[34]

In 2008, 67 percent of all respondents indicated that no e-discovery issue became the subject of a motion, hearing, or ruling from a tribunal, and 22 percent indicated that this "rarely" happened. Nine percent indicated that this happened "sometimes," two percent answered "frequently," and zero percent answered "always." For U.S. respondents only, 37 percent of respondents indicated at least one such dispute in 2008.[35] The takeaway would be that a majority of respondents had not had an electronic discovery issue or dispute that was the subject of a motion, hearing, or tribunal ruling in the last year.

This may indicate that early attention to electronic discovery issues is having the desired effect. The 2008 Fulbright & Jaworski report gave some credit to the 2006 amendments: "[t]his most likely reflects the efforts of the judiciary to update and clarify rules concerning e-discovery, as well as the desire of many litigants to resolve e-discovery issues through the 'meet and confer' process rather than in the courtroom."[36]

These figures are not difficult to square with the FJC's finding that disputes over electronically stored information occurred in less than 30 percent of cases in which one or more request for its production was made.[37] Few cases involved multiple types of disputes over electronic discovery.[38] The most common type of dispute, reported by about one in 10 respondents in electronic discovery cases, was one over the burden of production of ESI that could not be resolved without court action.[39]

Even if disputes over ESI are not the norm in the general run of electronic discovery cases, when they occur, they are expensive. The FJC found that each reported type of dispute over ESI increased a party's overall litigation costs by 10 percent, even after

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34 FULBRIGHT & JAWORSKI L.L.P., E-DISCOVERY TRENDS: E-DISCOVERY FINDINGS FROM THE 2005–2009 FULBRIGHT & JAWORSKI LITIGATION TRENDS SURVEYS 3 (2009) (internal citations omitted).
35 *Id.*
36 *Id.* at 123.
37 Preliminary Report, *supra* note 28, at 24, Fig. 11.
38 *Id.*
39 *Id.* at 23, Fig. 10.

controlling for other case factors (including stakes and time to disposition).[40] So a case with a dispute over cost or burden, a dispute over the reasonable accessibility of requested information, and a dispute over spoliation, for example, would be 30 percent more expensive than a similar case without those disputes. To the extent that disputes are declining—and we really don't have that much information on this, to be blunt[41]—then costs in electronic discovery cases should be trending down, as well.

IV. SURVEYS

Another way of assessing the effectiveness of the 2006 amendments is to simply ask attorneys or judges whether, in their opinion, the amendments have been effective in achieving their goals. In addition to the magistrate judges' survey, discussed elsewhere in this issue, there are a few relevant surveys.

In its 2007 survey, Fulbright & Jaworski asked corporate in-house counsel (U.S. only), "How have the new federal e-discovery rules affected the ease of your company's handling of issues in federal litigation?" This question, at a minimum, gets at the disruption in corporate practices that the 2006 amendments may have caused. Overall, 27 percent of respondents (U.S. residents) answered that "It's more difficult now," 55 percent answered "Not much change," 13 percent answered "It's somewhat easier now," and 5 percent answered "It's much easier now."[42] On the one hand, more than half of respondents said that the rules had not affected them, and almost twice as many respondents answered "Not much change" as answered "more difficult," suggesting that, as of 2007, in-house counsel were not seeing much impact of the amendments. On the other hand, the percentage of respondents answering "It's more difficult now" was *much higher* for those from companies with annual gross revenues of more than $1 billion (35 percent) and of between $100 and $999 million (31 percent) than for those from companies with gross revenues of less than $100 million (two percent).[43] In 2007, at least, it was the biggest firms reporting the most difficulty with the new Rules. Fulbright & Jaworski have not repeated that particular question on subsequent surveys, however.

Three recent surveys of attorneys (one of the fellows of the American College of Trial Lawyers (ACTL), one of members of the American Bar Association Section of Litigation ("ABA Section"), and one of the members of the National Employment Lawyers Association ("NELA") have addressed the effectiveness of the 2006 amendments.[44] All three surveys asked respondents (limited to those who had dealt with electronic discovery cases since December 1, 2006), "[d]o the 2006 e-discovery amendments provide for efficient and cost-effective discovery of electronically stored information?" The response options were "No," "Yes, most of the time," and "Yes, some of the time." Interpreting the results, one should probably take "No" to mean that, in the respondent's view, the amendments *never* provide for efficient and cost-effective discovery of electronically stored information, "most of the time" to mean that the amendments provide for efficient and cost-effective discovery of electronically stored information *in a majority of cases*, and "some of the time" to mean that the amendments provide for efficient and cost-effective discovery of electronically stored information *in less than a majority of cases*.

40 EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 5, 7 (Federal Judicial Center, Mar. 2010). The effect was similar for both plaintiffs' and defendants' reported costs.

41 The FJC data does not speak directly to whether disputes have been less likely over time. To the extent that disputes cause cases to take longer to terminate, it is possible that the sampling frame (cases terminated in the last quarter of 2008) does not include the many dispute-ridden cases filed after the amendments' effective date.

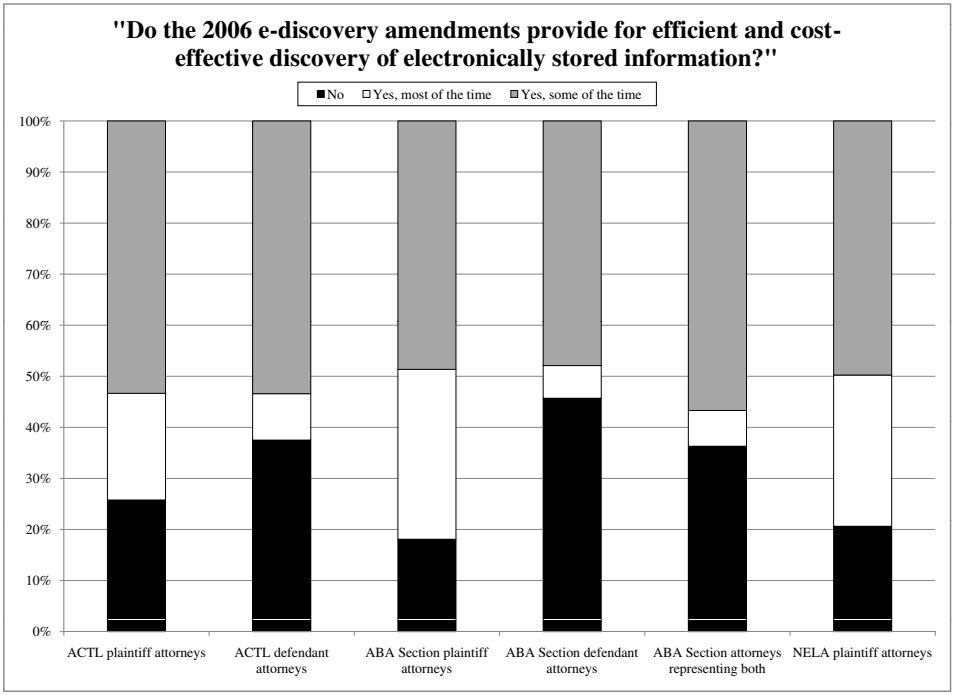
42 E-Discovery Trends, *supra* note 33, at 108, Table 54.

43 *Id.*

44 For more information on the surveys, *see* EMERY G. LEE III & THOMAS E. WILLGING, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE (Federal Judicial Center, Mar. 2010).

The distribution of responses is summarized in Figure 1. Almost half of the ABA Section defendant attorneys (45.7 percent) responded "No," that the amendments never provide for effective and cost-effective discovery of ESI, a view shared by more than a third of ACTL defendant attorneys (37.5 percent) and ABA Section attorneys representing both plaintiffs and defendants (36.3 percent). The percentage of respondents answering "Yes, most of the time" ranges from 33.3 percent of ABA Section plaintiff attorneys, 29.6 percent of NELA plaintiff attorneys, and 20.9 percent of ACTL plaintiff attorneys, to 9.1 percent of ACTL defendant attorneys, seven percent of ABA attorneys representing both plaintiffs and defendants about equally, and 6.4 percent of ABA Section defendant attorneys. The percentage of respondents answering "some of the time": 56.7 percent of ABA attorneys representing both plaintiffs and defendants about equally, 53.4 percent of ACTL plaintiff and defendant attorneys, 49.7 percent of NELA plaintiff attorneys, 48.7 percent of ABA Section plaintiff attorneys, and 47.9 percent of ABA Section defendant attorneys. "Yes, some of the time" was the most common response for every group—accounting for roughly half of all responses.

The pattern here is suggestive, if not surprising. Attorneys primarily representing defendants tend to have a more negative view of the effectiveness of the 2006 amendments than do those primarily representing plaintiffs. Those representing both plaintiffs and defendants tended to respond like defendant attorneys, although they were the group most likely to respond "some of the time."



V. CONCLUSION

It is probably too soon to determine whether the 2006 amendments have been effective in achieving their goals in any kind of global sense. There is, however, some empirical support for the proposition that the effort to get the parties to pay early attention to electronic discovery issues has been at least a limited success. Moreover, disputes over electronically stored information do not appear to be the norm. Still, especially on the defendants' side, there is continuing dissatisfaction with the costs and burdens associated with electronic discovery. These difficulties, as seen in the 2007 Fulbright & Jaworski survey, may be more common for the largest companies.