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Electronic Discovery and the Federal Rules of Civil Procedure

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The increasing presence of electronic discovery and its accompanying distinctive problems spurred a need for the Federal Rules of Civil Procedure to specifically address such discovery. In August 2004, the Committee on Rules of Practice and Procedure published for public comment the December 2006 proposed rule amendments addressing some of the most troublesome aspects of electronic discovery, including the exponentially greater volume of production associated with electronic discovery as compared to paper discovery, privilege review and waiver, and preservation of electronically stored information.

As compared to conventional document production, the sheer volume of electronic data can be staggering. Some companies store data in terabytes, each terabyte representing the equivalent of 500 billion pages of text. Requiring the production of such quantities of data, some of which may be stored in archaic formats, could cripple a business. Furthermore, the privilege review associated with such a production could take months, or even years. Besides the sheer volume of data, the informality of electronically stored information makes privilege review more difficult, costly and burdensome than traditional paper discovery. Some electronic information even includes embedded data and metadata not apparent to the reader, but that may be subject to a claim of privilege. Another problem associated with electronic discovery is the unintentional creation and destruction of this information. The simple act of turning on or off a computer can create or destroy electronic information. Parties need guidance in determining how to proceed with ordinary operations while maintaining electronic information once the possibility of litigation is real.

The proposed amendments attempt to limit the problems associated with electronic data discovery by requiring parties to discuss potential issues at the Rule 26(f) discovery conference. The amendments require conferring parties to discuss and include in the discovery plan the form of production, issues relating to preservation of electronically stored information and a production approach to protect against privilege waiver. Parties may agree during the conference to the production of electronic information without a complete privilege review and without waiving claims of privilege. If a party then inadvertently produces privileged information without intending to waive a claim of privilege, privilege will not be waived as long as the producing party acts within a reasonable time to correct the error.

Once discovery is under way, proposed revisions to Rules 34(b) and 26(b)(2) work in tandem to allow the requesting party to specify the form in which electronically stored information should be produced, but the revisions do not allow the requesting party to discover electronically stored information that is not reasonably accessible absent a showing of good cause. The burden is on the

responding party to show that the information requested is not reasonably accessible. "Reasonably accessible" refers to information that the party routinely accesses or that is easily located and retrieved, and typically does not include information stored for disaster recovery and legacy data, which is expensive to restore, disorganized or maintained on an obsolete system. If the responding party meets this burden, the court may order discovery of this information on a showing of good cause by the requesting party. Good cause balances the party's need for the discovery with the burden on the responding party, taking into account the parties' resources, the need for the information and what is at stake in the litigation.

The proposed amendment to Rule 34 defines documents as separate from electronically stored information. Therefore, parties seeking discovery of electronic information must take care to specify whether they seek documents, electronically stored information, or both. In responding to interrogatories, the responding party may substitute access to electronically stored information as an answer as long as the burden of ascertaining the answer is the same for the requesting party as for the responding party. To meet this equal burden standard, a party wishing to answer an interrogatory in this way may have to provide to the requesting party a combination of technical support, information on application software, and access to pertinent computer systems.

The dynamic nature of electronic information creates a greater potential for its inadvertent destruction than that associated with paper discovery. Proposed Rule 37 provides a "safe harbor" provision protecting parties from sanctions for failing to provide electronically stored information lost due to the routine operation of the party's computer system. This "safe harbor" provision applies only if the party did not violate a court order to preserve the information and so long as the party took reasonable steps to preserve the information once the party knew or should have known it was discoverable in the action.

It is difficult to know in any given case whether the benefits of electronic discovery will outweigh its accompanying burdens, but these proposed amendments to the Federal Rules of Civil Procedure provide a good start for limiting some of the most common issues associated with electronic production.

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