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E-Discovery: Amendments Add Clarity and Consistency

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January 2007

As the world progresses into the 21st century, companies are increasingly confronted with the reality that their employees are talking amongst themselves and to outsiders electronically. While many of these conversations are benign in nature, some may contain information, opinions or accusations that directly or indirectly implicate the employer in wrongdoing. Although companies generally recognize the danger such communications present, most do not appreciate that these same communications are discoverable in litigation.

The Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure (FRCP), as well as state rules of civil procedure, provide that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." The very wording of this rule extends coverage to any and all materials relevant to a case that are "reasonably calculated" to lead to the discovery of admissible evidence. Of particular importance to this rule is FRCP 34 (and its state law counterparts), which governs the production of documents. FRCP 34(a) states that "documents" include "writings, drawings, graphs, charts, photographs, phonorecords and other data compilations from which information can be obtained and translated into usable form." Taken together, Rules 26 and 34 stand for the proposition that relevant information, regardless of the means utilized to store it, is discoverable. Given the broad definition of "relevance," almost everything is discoverable.

What is E-Discovery?

E-Discovery essentially applies to all forms of electronic communication, including:

> E-mail and other electronic communications as well as drafts of documents and spreadsheets or revisions/versions of spreadsheets which reside on hard drives or in back up tapes, and as to both e-mail and documents, the underlying user data, which reveals the dates documents were accessed and/or modified and information related to access to the documents or message.

Amendments to Federal Rules of Civil Procedure Regarding E-Discovery

On April 12, 2006, the U. S. Supreme Court approved certain revisions to the Federal Rules of Civil Procedure that address the preservation and discovery of electronic media. These rules, as revised, went into effect on Dec. 1, 2006.

Five specific areas were addressed by the amendments, including: (1) early attention to issues relating to electronic discovery, including the form of production, preservation of electronically stored information, and the problems of reviewing electronically stored information for privilege; (2) the discovery of electronically stored information that is not reasonably accessible; (3) the assertion of privilege after production; (4) the application of Rules 33 and 34 regarding the production of electronically stored information and (5) a limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine operation of computer systems. The expectations are high that these amendments will clarify and add some consistency to e-discovery disputes within the court system.

While many aspects of the amendments can be covered, the following will highlight those areas that are of particular interest.

FRCP 34, as amended, expands discoverable information to include all "electronically stored information," which inevitably includes information which would not have met the traditional concept of a paper "document." Rule 34 also allows the requesting party to specify the form in which it wants data produced, including production of paper copies and/or the different modes of production for differing types of data. Ultimately, the parties must produce data in forms that are reasonably usable.

Amendments to Rule 16 and 26 require that the parties "meet and confer" to address electronic discovery needs very early during litigation. Such a meeting allows the parties to discuss a number of discovery related issues, which must then be submitted to the court for consideration by the judge by way of a scheduling order.

This includes disclosing the sources of potentially responsive information being searched or produced and providing detail about these sources. This is necessary so that the requesting party can evaluate burdens, determine the likelihood of finding responsive information, and decide whether to challenge the party for production of such information.

Ultimately, the court can limit or modify the extent of otherwise allowable discovery if the burdens outweigh the likely benefit. This is to discourage costly, speculative, duplicative or unduly burdensome discovery of computer data systems.

Another area of interest is the "safe harbor" provision in Rule 37(f) as amended, which attempts to address the major question asked by companies utilizing electronic information: how does the law deal with automatic deletions and/or purges? Specifically, the rule states:

> Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

This "safe harbor" provision applies if a company can show that electronic information was lost or destroyed as a result of the routine operation of the company's computer system, and the party took reasonable steps to preserve the information after it knew the information was relevant to the matter at hand.

Obviously, the amendment to Rule 37 is a potential "saving grace" for companies who utilize electronic information and who are large enough to have processes in place for the scheduled deletion of such information. However, this provision serves to continue the threat of sanctions, monetary and in the form of adverse jury instructions, where a party fails to take affirmative steps to protect data it reasonably anticipates may be subject to discovery in anticipated litigation. This proposed rule should be the last "fall back" position in the event that a "best practice" procedure fails.