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ELECTRONIC DISCOVERY ALERT

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Amendments to Federal Rules of Civil Discovery Take Effect on December 1

Unless Congress takes some action in the next few weeks, the new amendments to the Federal Rules of Civil Procedure will take effect on December 1. While discovery of electronic data and documents is certainly not new, *see Anti-Monopoly v. Hasbro*, 94 Civ. 2120, 1995 Dist. LEXIS 16355, *4, (S.D.N.Y. Nov. 3 1995) (“[I]t is black letter law that computerized data is discoverable if relevant.”), the new rules are the latest efforts by the federal courts to standardize discovery of the vast amount of electronic information being created every day.

Until courts start construing these new rules, our predictions must be based upon the text of the rules, the advisory notes and vast amount of academic and practitioner commentary that has accompanied the enactment of these new rules. One question that is not clear from the face of these new rules is how courts are going to apply them in cases that span the gap from the “old” era to the “new.” One can expect not only contradictory results as district courts are compelled to decide this issue without instruction from the Appeals Courts, but also results that are very case and fact sensitive. As always, strategic parties and their counsel will attempt to negotiate solutions with opposing counsel as much as practically possible and, in any event, narrow issues until the law becomes more settled.

The new amendments explicitly do *not* modify any substantive law including (1) the obligations of litigants and counsel to preserve documents they believe are reasonably relevant; and (2) the parameters of inadvertent waiver of privilege and work product protections. The amendments change only procedures with respect to these areas of law, including, for example, the ability of district courts to impose sanctions under the rules (*See* New Rule 37).

While the new amendments do not completely overhaul the procedure for discovery in the federal litigation, they do comprise significant changes to the rules that will certainly effect most litigants with computer systems of any size. This *Electronic Discovery Alert* provides highlights of the eight most significant changes to the Federal Rules of Civil Procedure with respect to electronic discovery. It does not cover every amendment and counsel and litigants are advised to thoroughly read and analyze these new amendments.

I. THE SCHEDULING ORDER

RULE 16

Rule 16. Pretrial Conferences; Scheduling; Management

(b) Scheduling and Planning. . . .

The scheduling order also may include . . .

- (5) provisions for disclosure or discovery of electronically stored information;
- (6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

SYNOPSIS

Rule 16(b)(5) is simply intended to alert the Court to the need to consider issues related to the discovery of electronically stored information early in the litigation. The new rule is supposed to allow the court to identify and resolve

disputes before costly and time-consuming production occurs. Early consideration of electronic discovery might be necessary because electronic data may be routinely deleted by computer systems.

Rule 16(b)(6) addresses agreements of the parties that are designed to avoid inadvertent waiver of privilege and to eliminate or reduce some of the costs and delays created by the need to preserve privilege or work product protection during discovery. Under what is known as a “Quick Peek” agreement, the responding party can provide certain requested materials for initial examination without waiving any privilege or protection. The requesting party then designates, under Rule 34, the documents it wishes to have produced. This can limit the volume of documents that must be reviewed for privilege. Other agreements, called “Clawback” agreements, allow for the return of documents inadvertently produced without waiver of privilege or work product protection. Such agreements may now routinely be included in the Court’s scheduling order. The Advisory Committee Note, however, makes it clear that the amendment does not provide the Court with authority to enter such a case management order without the agreement of the parties.

Moreover, because the amendments only affect procedural rules, these changes do not resolve the open question as to whether these agreements are effective as to third parties (i.e. can a third party argue that a litigant’s production of a privilege document waived any protection regardless of the agreement between parties?). *See Hopson v. Baltimore*, Civ. No. AMD-04-3842, 2005 U.S. Dist. LEXIS 29882 (D.Md. Nov. 22, 2005).

II. THE DISCOVERY CONFERENCE

RULE 26(f)

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(f) Conference of Parties; Planning for Discovery. . . . the parties must, as soon as practicable . . . confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), **to discuss any issues relating to preserving discoverable information**, and to develop a proposed

discovery plan that indicates the parties’ views and proposals concerning: . . .

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order; . . .

SYNOPSIS

Requiring the parties to “discuss any issues relating to preserving discoverable information” at the Rule 26(f) conference is a significant rule change. Because computer systems may routinely delete and overwrite stored data, the Committee explains that the parties should balance the need to preserve relevant information against the need to “continue routine operations critical to ongoing activities.” The Committee emphasized the need to preserve potentially relevant evidence but also recognized that “[c]omplete or broad cessation of a party’s routine computer operations could paralyze the party’s activities.” The new rule is designed to encourage the parties to agree on *reasonable* preservation steps, but the Advisory Committee did not intend for courts to *routinely* enter preservation orders.

Rule 26(f)(3) is an entirely new provision designed to be consistent with Rule 34(b), which is amended to address the form or forms in which electronically stored information should be produced. Rule 26(f)(4) provides that the parties should discuss any issues relating to assertions of work product protection and privilege. The amendment hopes to facilitate discovery by encouraging the parties to agree on procedures for asserting claims of privilege or work product protection *after* production and to consider whether to ask the court to enter an order that includes any such agreement. The Advisory Committee believes that costs and delays can be reduced by protocols that minimize the risk of waiver.

III. TWO-TIERED DISCOVERY

RULE 26(b)(2)(B)

Rule 26(b)(2)(B):

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

SYNOPSIS

This Rule recognizes that some forms of computer data can be searched or restored only with considerable effort and expense. Examples include, but are not limited to, disaster recovery systems, legacy data that remains from obsolete systems, and data that was “deleted” but remains in fragmented form. The Rule adopts what has frequently been referred to as a “two-tier” system. Rule 26(b)(2)(B) 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.” Thus, in response to opposing parties’ discovery, litigants and their counsel must be prepared to describe which portions of a litigant’s computer system are “not reasonably accessible.” This may require a level of IT due diligence beyond what some parties and counsel have conducted under the old rules.

If the requesting party nonetheless seeks this discovery, the responding party has the burden to show that the sources are not “reasonably accessible.” Even if that showing is made, the court may nonetheless order discovery if the requesting party shows good cause. The Committee Note explains that appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that

seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.

Rule 26(b)(2)(B) also provides the court with the authority to set conditions for the discovery of electronically stored information that is not reasonably accessible. The Committee Note explains that these conditions “may take the form of limits on the amount, type, or sources of information required to be accessed and produced.” The conditions may also include cost-shifting to the requesting party. But the requesting party’s willingness to assume or share the costs of retrieving information may be considered by the court in determining whether there is good cause, provided that the producing party’s burden of reviewing for relevance and privilege can weigh against permitting the requested discovery.

The Advisory Committee Note also contains this caution: “A party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common law or statutory duties to preserve evidence.” Moreover, information identified as not reasonably accessible must be difficult to access by the producing party for all purposes, not just for litigation. A party cannot make information “inaccessible” because it is likely to be discoverable in litigation.

IV. ASSERTING PRIVILEGE AND WORK PRODUCT AFTER PRODUCTION

RULE 26(b)(5)(B)

Rule 26(b)(5)(B):

Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until

the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

SYNOPSIS

Reviewing a large document production for privilege significantly increases the cost and delay of production. Even after careful review, the production of some privileged material is a substantial risk. Acknowledging this unavoidable risk, the amendments to Rule 26(b)(5) creates a procedure for asserting privilege and work product protection claims after production. The rule does not, and *cannot*, address the substantive question of whether the production of privileged documents waives the privilege. The amendment parallels the amendments made to Rule 26(f), directing the parties to discuss “any issues relating to claims of privilege” and Rule 16(b), allowing the parties to agree to assert claims of privilege or work product after production. The Committee Note makes it clear that an agreement of the parties, or an order of the court, will control if they adopt procedures different from the rule.

The Committee Note explains that the party asserting a claim of privilege or work product after production must give notice to the receiving party in writing, unless circumstances preclude it, and the notice should be sufficiently detailed to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. After receiving this notice, each party that received the information “must promptly return, sequester, or destroy the information and any copies it has” and “it must take reasonable steps to retrieve the information” from third parties. The receiving party may file the information *under seal* with the court for resolution of a dispute over the claimed protection.

V. INTERROGATORIES & DIRECT ACCESS

RULE 33(d)

Rule 33. Interrogatories to Parties

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, **including electronically stored information**, of the party upon whom the interrogatory has been served . . .

SYNOPSIS

Rule 33(d) is amended to allow a responding party to substitute access to “electronically stored information” for an answer if the burden of deriving the answer will be substantially the same for either party. The rule makes it explicit that the option to produce business records, or make them available for examination, audit, or inspection, includes “electronically stored information.” The Committee Note explains that a party invoking the rule “may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.” The Committee Note suggests that if the party needs to protect confidentiality or privacy, then the responding party should derive or ascertain the answer to the interrogatory itself rather than invoke Rule 33(d).

VI. REQUESTS FOR PRODUCTION OF DOCUMENTS

RULE 34(a)

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor’s behalf, to inspect, copy, **test, or sample** any designated documents or **electronically stored information** — including writings, drawings, graphs, charts, photographs, **sound recordings, images**, and **other data or data compilations stored in any medium** from which information can be obtained — translated, if necessary, by the respondent into reasonably

usable form, or to inspect, copy, test, or sample **any designated** tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

SYNOPSIS

The Committee Note explains that not all forms of electronically stored information fit within the traditional concept of a “document.” Rule 34(a) is, therefore, amended to confirm that discovery of electronically stored information “stands on equal footing with discovery of paper documents.” Nonetheless, the Committee Note explains that a Rule 34 request for production of “documents” should be understood to include electronically stored information “unless discovery in the action has clearly distinguished between documents and electronically stored information.” The rule requires the producing party, if necessary, to translate electronically stored information into a reasonably usable form. The amendment also allows the parties to “test or sample” documents or electronically stored information. The rule, however, is not intended to routinely allow direct access to the responding party’s computer system, although such access might be justified in some cases. The Committee Note instructs courts to “guard against undue intrusiveness resulting from inspecting or testing such systems.”

VII. RESPONDING TO DOCUMENT REQUESTS

RULE 34(b)

Rule 34:

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. **The request may specify the form or forms in which electronically stored information is to be produced....** The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, **including an objection to the requested form or**

forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. **If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use....**

Unless the parties otherwise agree, or the court otherwise orders:

...

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

SYNOPSIS

Rule 34(b) is amended to permit the requesting party to designate the form or forms in which it wants electronically stored information produced. The rule, however, does not require the requesting party to choose a form or forms of production. In a written response to the production request, the responding party must state the form it intends to use for production if the requesting party has not specified its preference or if the responding party objects to a form or forms that the requesting party has specified. The rule also provides for two default forms of producing electronically stored information. If the form of production is not established by agreement or a court order, the responding party must produce either (1) in a form or forms in which the information is ordinarily maintained—native format, or (2) in a form or forms that are “reasonably usable.” The rule does not require a party to produce electronically stored information in native format, as long as it is produced in a “reasonably usable form.” The Committee Note, however, explains that the option to produce in a reasonably

usable form does not allow a responding party “to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.” This means that if the responding party ordinarily maintains the information in a way that makes it searchable by electronic means, “the information should not be produced in a form that removes or significantly degrades this feature.” In other words, voluminous paper print-outs of otherwise searchable electronic data will likely not be considered “reasonably usable.”

VIII. SAFE HARBOR FROM SANCTIONS

RULE 37(f)

Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

(f) Electronically stored information. 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 an electronic information system.

SYNOPSIS

More easily than the average paper document, electronically stored information can be routinely modified, overwritten, and deleted by computer systems in the ordinary course of business. The proposed rule provides some limited protection against sanctions when information has been lost as a result of the routine operation of an electronic information system, as long as that operation is in “good faith.” The Committee Note makes it clear that “good faith” means that a party is not permitted to “exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.” The Note explains that “good faith” may involve a party’s implementation of a “litigation hold.” Good faith may require a party to modify or suspend the routine operation to prevent the loss of information, if that information is subject to a preservation obligation. The rule, however, does not create a preservation obligation. Rather, the duty to preserve evidence can arise from common law, statutes, regulations, an agreement of the parties, or a court order in the case.

The Committee Note also explains that “whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case.” One factor, in this regard, is whether the party reasonably believes that the information is likely to be discoverable and not available from reasonably accessible sources. The Advisory Committee also explained that bad faith is more than mere negligence but less than recklessness.

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