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Electronically Stored Information Target of New Rules

On December 1, 2006, amendments to Federal Rules of Civil Procedure 16, 26, 33, 34, 45 and revisions to Form 35 will take effect unless Congress enacts legislation to reject, modify or defer them. These amendments and revisions are all aimed at one particular area of discovery—electronically stored information, meaning all information in computers.

Discovery is the pre-trial exchange of information by parties in a case. During the past two decades, personal computers have become commonplace, generating and containing enormous amounts of information. The average personal computer hard drive today can easily store 60 gigabytes of data—or 60 stacks of paper 85 feet tall—and large organizations' computer networks commonly store information in terabytes, each equivalent to 500 million typewritten pages. All this information can be subject to discovery. Members of the bar and public have complained that producing this information in discovery has become increasingly time-consuming, burdensome and expensive.

One study found that the cost of discovery represents approximately 50 percent of the litigation costs in all cases, and as much as 90 percent of the litigation costs in the cases where discovery is actively employed. A "cottage industry" of forensic specialists has emerged with the sole purpose of assisting law firms comply with their electronic discovery obligations.

Developing case law on discovery of electronically stored information has helped provide guidance, but it is inconsistent and incomplete. Disparate local rules have filled the gap between the existing discovery rules and practice, treating litigants differently depending on the jurisdiction. National rules are necessary to provide uniformity and prevent a patchwork of local rules and requirements that would otherwise grow.

The proposed amendments to the federal rules address these issues and more. In its report to the Judicial Conference, the Advisory Committee on Civil Rules said that the proposed amendments address five related areas: (1) requiring parties to give early attention to issues relating to electronic discovery, including the form of production, preservation of information and problems reviewing electronic information for privilege; (2) relieving parties from searching for inaccessible electronic information, *e.g.*, information on backup tapes; (3) retaining privilege protection for documents inadvertently disclosed; (4) requiring parties to agree on the form of production of electronic information or present the issue promptly to a judge for determination; and (5) limiting sanctions for loss of electronic information as a result of routine operation of computer systems, *e.g.*, automatic purging of e-mails.

The rule changes have had their critics, but the Committee observed, "in general, there is a high level of support for rules changes to recognize and accommodate electronic discovery." The American Bar Association Section on Litigation, the

Federal Bar Council and the New York State Bar Association Commercial and Federal Litigation Section, all submitted comments generally supporting the proposed electronic discovery amendments. The Department of Justice also favors the proposals. The Committee notes in its report that "to achieve a larger consensus, specific aspects of the published proposal that had been criticized during the public comment period were revised."

For more on the specific changes in the rules aimed at discovery of electronically stored information, visit <http://www.uscourts.gov/rules/Reports/ST09-2006.pdf>.

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