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LITIGATION DEPARTMENT NEWSLETTER

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## E-DISCOVERY AND ITS IMPACT ON FUTURE RECORD KEEPING

### The concept of E-discovery

As technology advances, commercial enterprises increasingly conduct their ordinary course of business on-line. E-mail, text messaging, and other types of electronic exchanges have become the fastest and most convenient way to communicate both within a company itself, and with outside parties. Moreover, storing such information has become easier and more inexpensive, leading to the "store everything" mentality. Thus, the existence of backed-up electronic data, and the possibility that the production of such data may be requested continues to increase.

Prior to December 1, 2006, the Federal Rules of Civil Procedure ("FRCP") already envisioned that electronically stored data was discoverable. Thus, for example, federal courts had already concluded that a computer database was encompassed within the definition of a discoverable "document," and that the computer database could not be withheld on the argument that it was not in "document form." See, *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993). Moreover, requests for discovery of electronically stored information were already common practice in both federal and Puerto Rico court proceedings.

Nevertheless, the recently enacted amendments to the FRCP explicitly provide for such discovery, set forth particular rules on how such discovery is to be coordinated, and may have a potential impact on a company's record keeping policies in the future.

### The Key Federal Rule Amendments:

The Amendments to the FRCP affecting electronic discovery became effective on December 1, 2006. Important among those amendments are the following:

*Rule 16(b)- Pretrial Conferences*-The parties are required to discuss e-discovery, as well as any agreements the parties may reach for asserting claims of privilege or protection of documents, at their initial conference with the Court. This, as well as other amended rules discussed below, expressly acknowledges that the parties may agree that production of privileged materials will not entail a waiver of the privilege; and for the prompt return or "clawback" of such privileged materials upon request.

*Rule 26(b)(2)(B)- Discovery Scope*- Under amended Rule 26(b)(2)(B), electronically stored data that is not "reasonably accessible because of undue burden or cost" is generally deemed **undiscoverable**, unless the requesting party can establish "just cause." If the Court agrees that "just cause" is present, the Court may require that the requesting party bear some of the expenses of production.

*Rule 26(b)(5)(B)- Privilege Clawback*- One of the potential pitfalls of producing data in electronic form is that it increases the likelihood of the unintentional disclosure of privileged or protected documents. New Rule 26(b)(5)(B) provides a mechanism to address promptly such inadvertent production. While the new rule does not address whether privilege is deemed waived by the production itself, it prevents further dissemination of the pertinent information pending a decision on whether the privilege claim has survived and/or whether an existing "clawback" agreement

between the parties covers the particular situation.

*Rule 26(f)-Initial Discovery Conference-* The amendments add two key topics to those that should be discussed during the parties' initial discovery conference: "issues relating to disclosure or discovery of electronically stored information, including the forms in which it should be produced"; and "any issues relating to claims of privilege or of protection as trial preparation material, including—if the parties agree on a procedure to assert such claim **after** production—whether to ask the court to include their agreement in an order." Thus, this amended rule also appears to support the enforceability of "clawback" agreements.

*Rules 33, 34 and 45 – Interrogatories and Requests for Production to a Party or to a Third-Party Via Subpoena-* FRCP rules 33, 34 and 45 were amended to **expressly** provide that a party may request the production of electronically stored data. A responding party or a subpoenaed non-party may also reply to a request for information or documentation by referring to specific information stored in electronic format. The amended rules provide that the requesting party may specify the preferred format in which the electronic data should be produced, and the mechanism by which the producing party may object to the specified format.<sup>1</sup>

*Rule 37(f)- Safe Harbor for Good-Faith Failure to Disclose-* Electronic data may be destroyed by a simple "click of the mouse." Until now, courts have been called to intervene and decide when and what types of sanctions were appropriate for the destruction of electronic information. To address this type of situation, new subsection (f) to Rule 37 explicitly provides that "[a]bsent extraordinary circumstances, a court may **not** impose sanctions on a party for failing to produce electronically stored data lost as a result of the routine, good faith operation of an electronic information system." While the scope of this new

regulatory safe harbor has yet to be determined, it provides specific regulatory standards for all federal courts to apply in analyzing the issue.

### The potential impact of the amendments

These amendments have only been in effect for three months. Thus, it is hard to predict the full impact they may have in the future of e-discovery and common business practices. Nevertheless, past experience and commentators already identify some foreseeable consequences. The following have been adapted from the recommendations by the American Bar Association<sup>2</sup> for the future management of electronically stored data:

- Know your electronic-data storage system so that, when required, you know where to look for particular information. Having to start anew with every production request is ineffective, costly, and likely to result in contradictory positions.
- Inventory back-up electronic data. Properly label back-up tapes, disks, or other storage media. Develop a system and maintain it. Your company's "routine, good faith operation" of its electronic information system should be well-established **before** it comes under scrutiny within the context of a discovery request.
- Periodically ask whether the stored data is needed or even accessible under current software. Don't keep what you don't need, or what is only recoverable by extraordinary expenditure.
- Develop a storage media policy for your employees. Consider your employees' habits and if you want them to change in view of your litigation risks. Have a policy regarding e-mail archives, e-mailing office documents to home accounts, use of laptop or home computers, etc. Make sure those protocols are followed.
- Evaluate whether to segregate what you view as privileged, confidential, or business-sensitive documents. While "clawback"

<sup>1</sup> Similarly, Law No. 297 of December 26, 2006, amended the Puerto Rico Rules of Civil Procedure, applicable in the local courts, to authorize a litigant to require that the opposing party produce and present for inspection pertinent electronically stored information.

<sup>2</sup> See, *E-Discovery: A Special Publication on Discovery*, Section of Litigation, American Bar Association (2007).

agreements may be reached and deemed enforceable, the goal is not to retract already disclosed information, but to prevent disclosure altogether. Having readily identifiable sensitive documents may prevent inadvertent disclosure, and reduce the costs of having them reviewed by counsel for privilege purposes.

- If a third-party contractor is involved in the storage of your electronic data, consider its possible role in future litigation and whether to articulate such responsibilities in the pertinent contract.
- Stay current. Make sure you understand how computer data systems operate, and what impact future upgrades and additions will have on the accessibility of already-stored data and data to be stored in the future.
- The filing of a complaint, the likelihood that such a complaint will be filed, or the receipt of a discovery subpoena should trigger prompt implementation of a strategy to segregate and preserve key electronic data. If counsel is not involved already, you should promptly contact counsel to discuss the scope of probable electronic discovery, preservation methods, and production methods.

By keeping track of your electronic data, and controlling your storage system for such data, you will be better prepared for possible future discovery requests, and will be in a better position to limit them to reasonable parameters. You may consider that if you are not prepared to swiftly address your company's e-discovery boundaries, the courts are likely to intervene and set them for you.



*Because of the general nature of this newsletter, nothing herein should be considered as legal advice or a legal opinion. The impact of other regulatory record retention obligations upon a particular business is also beyond the scope of this newsletter. For further information about the contents of this newsletter, or should you need further assistance in connection with these matters, please contact the firm's Litigation Department.*



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