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LITIGATION ALERT

PRACTICAL IMPACTS OF FEDERAL RULE CHANGES RECENTLY APPROVED BY SUPREME COURT

The Supreme Court recently approved a variety of proposed changes to the Federal Rules of Civil Procedure, Appellate Procedure and Evidence.[1] The new rules will go into effect on December 1, 2006, unless Congress enacts legislation to reject, modify or defer the amendments.

CIVIL PROCEDURE CHANGES (FRCP AMENDMENTS)

Several Federal Rules of Civil Procedure were amended and one rule was added. The new rule, Rule 5.1, authorizes courts to require electronic filing. Generally, the amendments address the following areas:

1. Early attention to issues relating to electronic discovery, including production, preservation and review for privilege
2. Discovery of electronically stored information not readily accessible
3. Assertion of privilege *after* production
4. Application of Rule 33 (Interrogatories), Rule 34 (Requests for Production) and Rule 45 (Subpoenas) to electronically stored information
5. The limit on sanctions under Rule 37 for the loss of electronically stored information
6. Judgments as a matter of law.

EARLY ATTENTION TO ELECTRONIC DISCOVERY ISSUES

Amended Rules 16 and 26(f) now provide a framework in which to address the disclosure of electronically stored information. The parties' counsel will need to know the extent to which electronically stored information will be an issue in the case early on, so that they may address the issue during the initial Rule 26(f) conference.

[1] The Court also approved the proposed amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims, Bankruptcy Rules, and Criminal Rules, not addressed here.

Under the new rule, at the Rule 26(f) conference, counsel must be prepared to discuss (1) how electronically stored information will be preserved for discovery, (2) the accessibility of the information, (3) the form of the production and (4) privilege review and waiver given the anticipated burden of reviewing certain kinds of electronic information such as e-mails and/or meta data. This is a significant change from current practice in most cases, because it imposes affirmative burdens on parties to marshal their electronic evidence *before* receiving a discovery request.

DISCOVERY OF ELECTRONICALLY STORED INFORMATION THAT IS NOT "REASONABLY ACCESSIBLE"

Amended Rule 26(b)(2) clarifies the obligations of a responding party to disclose electronically stored information that is not reasonably accessible. While the rule does not define what is "reasonably accessible," the committee notes explain that it would be information routinely accessed or used, easily located and retrieved. Information stored only for disaster recovery, legacy data and/or deleted data, which is expensive to restore and organize, is not likely to be treated as "reasonably accessible."

Amended Rule 26(b)(2) requires a party to produce reasonably accessible electronically stored information without a court order. If the requesting party moves to compel such information, the responding party has the burden to demonstrate that it is not reasonably accessible and the requesting party has the burden of demonstrating good cause for the production of inaccessible information.

PROCEDURE FOR ASSERTING PRIVILEGE AFTER PRODUCTION

Amended Rule 26(b)(5) provides a procedure, similar to the "snap back" provisions in some state courts, by which a responding party can assert privilege after production and require the return, sequestration or destruction of documents pending resolution of the privilege claim. A party wishing to assert a belated privilege must notify the receiving party within a "reasonable time" that it has inadvertently produced privileged material. The Rule does not specify what a reasonable time is but leaves it to the court to decide given the surrounding circumstances.

RULES 33, 34 AND 45 (INTERROGATORIES/REQUESTS FOR PRODUCTION/SUBPOENAS)

Rules 33, 34 and 45 were modified to address the discovery of electronically stored information. Under Rule 33, just as a party may opt to produce business records in lieu of responding to an interrogatory, a party may produce electronically stored data in lieu of responding if, as with business records, the burden of deriving the answer will be substantially the same for each party.

Rule 34 makes an express distinction between electronically stored information and "documents," thereby requiring a party to specify whether they are seeking electronically stored information, documents or both. If the requesting party does not specify the form required, the responding party may produce the information in one of two ways: the form in which it is ordinarily maintained or an electronically searchable form.

Amended Rule 45 adapts the requirements for the issuance of subpoenas to allow for the production of electronically stored information.

SANCTIONS

Amended Rule 37 provides a narrow "safe harbor" to a party that fails to provide electronically stored information. The rule protects a party from sanctions if the information was lost because of the routine operation of the party's computer

system. This protection does not apply if the party failed to preserve the information under court order or if the party failed to take reasonable steps to preserve information it knew or should have known was discoverable. Like the other amendments this rule encourages counsel to familiarize themselves as early as possible with the electronic discovery a case is likely to involve.

JUDGMENTS A MATTER OF LAW

Amended Rule 50 permits the renewal of a motion for judgment as a matter of law 10 days after entry of the judgment and deletes the requirement that a motion for judgment be made at the close of all evidence.

APPELLATE PROCEDURE CHANGES (FRAP AMENDMENTS)

Amended Rule 25 now authorizes courts to adopt local rules to require electronic filing.

Rule 32.1 is a new rule allowing parties to cite to unpublished opinions. The party need not show that a published opinion on point is unavailable before citing an unpublished opinion. The new rule is very limited in that it takes no position on whether designating opinions as "unpublished" or "non-precedential" is constitutional or what precedential and/or persuasive value these opinions are to have, if any. It merely allows parties to cite to these opinions and increases the sources of information a party can bring to the court's attention.

The new rule also requires that the party attach a copy of any such opinions/orders but only if not readily accessible on a public database. If an unpublished case, order and/or opinion is available on Lexis, Westlaw and/or a free Web site, which most "unpublished" opinions are, the party is not required to provide the court a copy.

RULES OF EVIDENCE CHANGES (FRE AMENDMENTS)

Four Rules of Evidence were amended: Rule 404, 408, 606 and 609.

Amended Rule 404 limits the admissibility of character evidence to criminal cases. Rule 404 now clarifies that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment reinforces the original intent of the Rule — to permit a defendant to introduce character evidence to defend against criminal charges.

Rule 408 clarifies the circumstances in which compromise evidence is admissible. For example: (1) statements and conduct during civil settlement negotiations can be used in a criminal case (unless excluded by another rule), (2) compromise evidence can be used when offered to prove something other than the validity, invalidity or amount of a disputed claim, (3) compromise evidence cannot be used to impeach by prior inconsistent statement or through contradiction, (4) compromise evidence cannot be waived unilaterally and (5) pre-existing information is not protected from disclosure simply because it is presented during compromise negotiations.

Amended Rule 606 allows juror testimony to prove that the verdict reported was the result of a "clerical mistake." The amendment rejects the broader exception, adopted by some courts, which allow testimony that jurors were operating under a misunderstanding about the verdict they rendered. The amended rule merely addresses the situation in which information was recorded incorrectly (e.g., "guilty" as opposed to "not guilty," or "$10,000" as opposed to $100,000").

Rule 609 originally allowed evidence of conviction of a crime for impeachment purposes if the conviction merely "involved" dishonesty or false statement. The amended rule requires that an act of dishonesty or false statement be the basis of the conviction before it can be used for impeachment purposes (i.e., a murder conviction would not be admissible for impeachment purposes even if the witness acted deceitfully in committing the murder). Convictions for perjury, subornation of perjury, false statement, criminal fraud, embezzlement or false pretense are examples of admissible convictions under Amended Rule 609.

CONTACT INFORMATION

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