

B&B REVIEW

Business Litigation Practice Group

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**ANNOUNCEMENT OF
BALCH BINGHAM JUNE
SEMINAR ON
ELECTRONIC
DISCOVERY**

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DISCOVERY OF ELECTRONIC EVIDENCE, SPOILIATION, AND THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE INVOLVING ELECTRONIC DISCOVERY

As businesses have come to rely almost exclusively on electronic communications and documents, its importance in litigation has expanded dramatically. The discovery rules and normal procedures of corporate America for responding to discovery have not always kept up. The result has sometimes been protracted battles over how (or whether) electronic data should be retrieved, reviewed, produced, and who will pay for such work.

Such electronic data is exponentially more voluminous than traditional paper documents, dynamic, and sometimes stored in incomprehensible forms (such as metadata or deleted file fragments). Not only have these disputes led to larger expenses and legal fees, but some very large plaintiff verdicts.

The Civil Rules Advisory Committee has recently published proposed amendments to the Federal Rules of Civil Procedure which aim to provide certainty and guidance for these issues. Last Wednesday, April 12th, the Supreme Court accepted these changes. Unless rejected by Congress, these rules will take effect on December 1, 2006.

I. EXAMPLES OF THE PROBLEMS DRIVING THESE RULE CHANGES

Perhaps the best illustration of the perils of electronic discovery is *Coleman Parent Holdings v. Morgan Stanley & Co.* There, the plaintiff brought a fraud/conspiracy case against Morgan Stanley, alleging that it knew of financial problems of Sunbeam – a corporation that CPH was purchasing with Morgan Stanley's assistance – before the sale was completed and failed to disclose the problems to CPH. In

response to initial discovery requests, Morgan Stanley produced only a handful of emails and refused additional production, claiming that such additional production would have cost hundreds of thousands of dollars. Based upon these representations, the parties agreed upon a limited electronic search of emails.

Morgan Stanley certified that it had completed its search, but produced only 1,300 emails. Months later, Morgan Stanley disclosed that it had discovered 2,000 additional tapes that had not been searched, and that the search "scripts" were in error. Discovery further showed that Morgan Stanley's earlier representations about the costs of retrievals were far too high.

As a sanction, the court granted a partial default judgment and ordered that a statement about Morgan Stanley's efforts to hide evidence be read to the jury. The jury awarded \$1.45 Billion.

One of the leading federal decisions on electronic discovery is *Zubulake v. UBS Warburg* (a sexual discrimination case), the subject of five separate reported opinions on electronic discovery. *E.g.*, 229 F.R.D. 422 (S.D.N.Y. 2004). Like Morgan Stanley, UBS produced virtually no emails in response to initial discovery. The plaintiff responded by requesting that backup tapes be searched and the Court set out a seven factor balancing test for shifting costs of such retrieval, and ordered a sample retrieved. After reviewing the results, the court shifted most costs to the defendant. 217 F.R.D. 309; 216 F.R.D. 280.

Later, the parties learned that some backup tapes had not been saved and that employees had not saved emails in their active email. The court

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ordered re-depositions. 220 F.R.D. 212. During the re-depositions, plaintiffs learned that UBS's outside counsel had failed give litigation hold instructions to every company witness and there had been no effort to enforce the litigation hold.

The court issued sanctions by providing an adverse inference and imposing of deposition and court costs on UBS. The jury returned a plaintiff's verdict for \$29.3 Million.

II. PROPOSED CHANGES

Among the proposed changes are amendments addressing the discovery of electronically stored information in five critical areas: (1) early attention to electronic discovery issues; (2) discovery of information not reasonably accessible; (3) new procedural provisions for asserting the attorney/client privilege and work product protection after production; (4) procedures for responding to interrogatories and requests for production regarding electronic data, and (5) sanctions for the loss or destruction of electronically stored information

A. EARLY ATTENTION TO DISCOVERY ISSUES

The Advisory Committee proposed amendments to Rules 16(b), 26(a), and 26(f) that will force courts and litigants to address electronic discovery issues early in the discovery process via initial disclosures and scheduling – hopefully minimizing the *Zubulake* type of situations where a litigation hold may not have been placed – and minimizing misunderstanding (and cost) over whether ongoing, newly created electronic documents must be maintained.

As amended, Rule 16(b) would permit the court to include provisions for discovery of electronic information into the scheduling order and/or incorporate any agreements between the parties for asserting claims of privilege or work-product protection after production.

Likewise, amended Rule 26(f) would direct parties to discuss such issues during their discovery planning conference and include them in their report to the court. Specifically, parties would be required to address the form and production of electronically stored information and discuss an approach to production that protects against waiver of attorney/client privilege or work-product protection.

Rule 26(a)(1)(B), governing mandatory initial disclosures would be amended to include “electronically stored information” as a separate category of required disclosure.

This codifies courts' existing proclivity to stretch the term “documents” to encompass electronic information such as email or word processing files, foreclosing some discovery battles over what constitutes a “document” for purposes of the rule.

B. DISCOVERY OF ELECTRONIC INFORMATION THAT IS NOT REASONABLY ACCESSIBLE

The proposed change to Rule 26(b)(2) authorizes a party to respond to a discovery request by refusing to produce electronically stored information that is not reasonable accessible because of undue burden or cost. The requesting party can then move to compel production. In response, the objecting party has the burden to demonstrate why the information sought is not reasonably accessible. Furthermore, if the requesting party shows good cause, a court may still require production if the other factors listed in Rule 26(b)(2) are satisfied – i.e. if the discovery is not unreasonably cumulative, if the requesting party has not had another opportunity to obtain the information sought, and if the expense of the discovery does not outweigh its potential benefit.

Some courts have employed a cost-shifting analysis to allocate the expenses of production between the parties based on factors such as: (1) the cost of production compared to the amount in controversy or the parties' resources, (2) the relative abilities and incentives of the parties, and (3) the importance of the issues at stake. *See Zubulake*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

C. PROCEDURE FOR ASSERTING CLAIMS OF PRIVILEGE AND WORK PRODUCT PROTECTION AFTER PRODUCTION

When a party produces electronic information, it may be so voluminous and/or complex that a full privilege/work product review is not feasible before production is due (for instance, a deleted document on a disk may be stored in fragments). Rule 26(b)(5) is amended to set up procedures to assert a claim of privilege or work product protection after production. After notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties pending resolution of the claim. The receiving party may also submit the information directly to the court under seal for a resolution. If the receiving party has disclosed information to a non-party prior to receiving notice, reasonable steps must be taken to obtain the return.

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Changes to Rule 26(b)(5) attempt to address the problems associated with the expense and delay of privilege review for voluminous electronic discovery and codifies the “clawback agreements” currently used by many attorneys, and is not a substantive amendment. It does not address whether privilege or work product protection has been waived or forfeited.

D. INTERROGATORIES AND REQUESTS FOR PRODUCTION RELATING TO ELECTRONICALLY STORED INFORMATION

In order to eliminate any uncertainty regarding whether the terms “business records” and “documents,” as they are used in Rules 33(d) and 34(a-b) respectively, included electronically stored information, the Advisory Committee added clarifying language to both rules. Amended Rule 34(a) would add electronically stored information as a separate and distinct category subject to production, making a clear distinction between this type of data and “documents” under the current rule. The Advisory Committee notes also make it clear that the term “electronically stored information” is to have identical, broad application for purposes of both rules.

Amended Rule 33(d) would provide that the option to produce business records explicitly includes electronically stored information (provided that the burden of deriving the answer will be substantially the same for either party).

Amended Rule 34(b) would allow, but not require, a requesting party to specify a form or forms for producing electronically stored information. If a party does not specify a requested form of production, the proposed rule would require that production be in a form or forms in which it is ordinarily maintained or that are reasonably useable. Where a form of production is specified, however, the responding party would be permitted to object to the requested form. Additionally, a responding party would be required to state the form or forms it intends to use for production in its written responses to requests for production.

E. SANCTIONS FOR LOSS OF ELECTRONICALLY STORED INFORMATION

Under amended Rule 37(f), limited protection would be provided against sanctions for a party’s inability to provide electronically stored information in discovery when that

information has been lost as a result of the routine operation of an electronic overwriting/deletion system, provided that operation is in good faith.

Limited sanctions may be appropriate, however, despite a responding party’s demonstration of good faith, when the court is satisfied that “exceptional circumstances” exist. The Advisory Committee’s notes to the proposed rule state that if “the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct, may be appropriate.” Severe sanctions are only appropriate where the party has acted intentionally or recklessly in destroying evidence.

III. MANAGING THE NEW DISCOVERY ENVIRONMENT AND COMPLYING WITH THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

In light of the changing discovery landscape, businesses should be proactive in document and discovery management – particularly at the very beginning of litigation (possibly even earlier depending upon the facts). Some businesses have begun to implement organized document retention systems that provide organized document retention (including emails, word processing documents, text and instant messages, and internet histories) in a readily searchable form. Counsel should be consulted on the extent and method for such document retention plans and in planning for discovery at the beginning of litigation or disputes.

IV. ANNOUNCEMENT OF BALCH BINGHAM JUNE SEMINAR ON ELECTRONIC DISCOVERY

The issues relating to electronic discovery and the new federal rules will continue to grow in importance. Therefore, Balch & Bingham is planning a seminar to discuss these issues and how clients can best prepare for them and address them when they arise. We anticipate presenting the seminar in Atlanta, Birmingham, Huntsville, Gulfport and Jackson in the June timeframe. Please be looking for your invitation (or simply contact us to express your interest by calling or emailing Nora Yardley at 205-226-3476; nyardley@balch.com).