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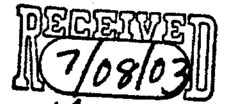

Via E-mail

From: James Lampkin
Sent: Tuesday, July 08, 2003 10:42 AM
To: 'Marcusr@uhastings.edu'
Subject: Proposed changes to Federal Rules concerning Electronic Discovery

Dear Professor Marcus:

I am writing to express my concerns over issues related to discovery of electronic information. My comments are based upon my own experiences in defending clients, who are faced with such requests. I would also like to bring to your attention a recent rule change adopted by the Mississippi Supreme Court on this issue.

On May 29, 2003, the Mississippi Supreme Court amended MRCP 26 to include electronic information. The amended rule allows the requesting party to request electronic data and specify the form for production. The responding party must produce the data that "is reasonably available . . . in its ordinary course of business." The rule allows the responding party to object, if the data cannot be obtained through reasonable efforts. If the court orders the responding party to comply, the court "may also order the requesting party to pay reasonable expenses of any extraordinary steps required to retrieve and produce the information." I believe that the Mississippi Supreme Court should have made the payment of reasonable expenses mandatory instead of discretionary. Such a provision would help ensure that the requesting party actually wanted the information instead of such discovery being used as a tactic to harass the responding party.

I have recently had two discovery issues concerning the production of electronic information and semi-electronic information. In one instance, the plaintiffs' counsel sought production of our client's claim files for a particular state for a five year period. This encompassed the production of more than 16,000 claim files. We were able to demonstrate to the trial judge the burdensome nature of such a production and he agreed with our request that the plaintiffs' counsel could review the documents in our client's offices. Even with this limitation, our client had to expend considerable employee-hours and costs to retrieve the files from their microfiche system as requested by plaintiffs' counsel.

On behalf of this same client, we faced an issue concerning the production of certain e-mails about a particular subject. We ultimately prevailed on privilege issues concerning this matter. The troublesome issue concerning production of e-mails is locating and retrieving e-mails from a computer network system. While I am not a computer expert, I know that e-mails are routinely deleted in the normal course of business. I do it on a regular basis myself. There are e-mails, however, that I may save to my computer hard drive or a network hard drive. If an e-mail has been saved to an employee's hard drive it could be difficult to discover the existence of the e-mail in the event that the e-mail has been deleted from the company's network e-mail system. Assuming a company was facing a situation with a disgruntled employee, who had saved e-mails that had subsequently been deleted from the company's computer system, the company could face sanctions for failing to produce e-mails that were not longer readily available to the company. There must be some sort of safe harbor for a responding party concerning production of electronic data.

I am confident that there are individuals that are more thoroughly versed with the intricacies and potential hazards of such discovery. I appreciate your consideration of my concerns about these issues.

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