CLIENT ALERT

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eDISCOVERY – THE NEW FRONTIER

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Today's office environment is a new world compared to the work place of a dozen years ago. All of the devices which are now part of our day-to-day life—pda's, cell phones, voice mail, fax transmissions and, of course, email—leave behind a traceable digital communication record usually retained on large and efficient storage devices. The use of these tools—and the very existence of such records—raises many issues in the context of litigation. Over the years, the courts have struggled with how to proceed when asked to issue orders regarding the preservation, retrieval and production of electronic information. Welcome to the digital age and the world of eDiscovery.

As of December 1, 2006, the federal courts have adopted new rules ("New ESI Rules") establishing procedures for the discovery of electronically stored information. The purpose of the New ESI Rules is to address some of the practical issues already discussed and to reflect changes in the discovery practice that have been in progress for a number of years. The New ESI Rules also provide a framework for resolving disputes about ESI and its production amongst the parties.

SUMMARY OF NEW ESI RULES

- General Rule: ESI is now expressly subject to discovery. There is no limit as to what can fall within this simple phrase. If the information is otherwise discoverable under the very broad standard used in civil cases, i.e. information relevant to the claim or defense of any party, the information can be sought in routine discovery practice. The fact that it happens to be in digital format is of no consequence. Rule 26(a)(1)(B)
- Information Not Reasonably Accessible: There is now a category of ESI that is presumptively not discoverable. The New ESI Rules specifically provide that "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." This is a presumption—not a free pass! The party seeking the information can go to court and press its demand and the court will then have to sort it out. Rule 26(b)(2)(B)
- Safe Harbor: The New ESI Rules create a safe harbor that offers some protection against sanctions where ESI cannot be produced when the ESI is unavailable due to routine, good-faith operations of an

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electronic information system. This protection is limited and does not relieve a litigant from taking necessary steps to preserve evidence, such as safe-guarding back-up tapes, once it becomes clear that such evidence might be relevant to reasonably anticipated litigation. Rule 37(e)

- Privileged Information and Attorney Work Product: On one hand it's a whole new world in terms of the types and volume of responsive documents which might exist but, on the other hand, the old rules still apply. Otherwise privileged information need not be produced! Because of the sheer volume of ESI, the New ESI Rules recognize the possibility that otherwise legally privileged or attorney work product documents might be inadvertently produced. The New ESI Rules provide for that possibility by allowing the producing party to notify the receiving party and request the return of the inadvertently produced documents. Rule 26(b)(5)(B)
- Meet and Confer: For a number of years the federal rules have required counsel to meet privately and confer regarding discovery in the hope of narrowing issues and avoiding the necessity of court involvement. The New ESI Rules specifically require that the parties include ESI as part of this discussion. To effectively do so, lawyers must be sufficiently familiar with the client's information systems to be able to discuss the different types of ESI available as well as where it resides in the system and whether or not such information is "reasonably accessible." Rule 26(f)(3)
- Format: Under the New ESI Rules, the party requesting ESI may specify the format of production. If no such request is made, the responding party may either produce the ESI in the format in which the information is usually maintained or in some other reasonably usable form. Rule 34(b)(ii)

There are many stories regarding the costly consequences suffered by parties that have not taken their obligations regarding the production of ESI seriously. For example, in *United State v. Philip Morris USA*, the court sanctioned the defendants almost $3 million for improperly destroying emails. If a business finds itself involved in litigation, ESI is a legitimate—and likely—subject of discovery. Companies must review their current systems, establish protocols and implement effective document retention programs so that they are ready to respond to ESI requests before they arrive in the mail. The New ESI Rules have attempted to address some of the practical and problematic issues which ESI presents in litigation. As a practical matter, there is no substitute for a good document retention policy which will allow a company to routinely purge unnecessary documents, justify their non-production when requested and effectively respond to legitimate document requests.

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