

E-DISCOVERY

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

New Rules for E-Discovery Now in Effect

August 4, 2009

Given that the vast majority of documents are now stored in electronic format, the Tennessee Rules of Civil Procedure have been amended to reflect this reality. These amendments took effect July 1 and should provide much needed clarity to litigants, attorneys and judges. For those who have been involved in litigation in federal court, these new rules will be familiar as they are modeled after the 2006 amendments to the Federal Rules of Civil Procedure. Some notable provisions of the new rules are highlighted below.

While it is not specified, it is expected that these new rules will apply not only to cases filed on or after July 1, 2009, but also to those previously filed cases—unless a compelling reason exists to not apply them.

Early ESI discovery conference: Rules 16.01(2) and 26.06(1-4): Judges and parties are encouraged to have early discovery conferences to plan ESI discovery procedures and to agree on how to handle inadvertent disclosure of privileged information. These conferences are not mandatory, but if parties do not agree, a judge can, on his or her own initiative or on a party's motion, order a conference and issue discovery orders.

“Quick Peek” and “Clawback:” Rule 26.06: In the scheduling order, parties may make agreements that control discovery protocol in ways that minimize costs and prevent waiver. They may make a “quick peek” agreement, under which a party will provide certain requested materials for initial examination without waiving any privilege. The requesting party then identifies the documents that it wishes to have formally produced and the producing party screens only those documents to identify privileged information. Parties may also make “clawback agreements” in which a party must return and is prohibited from using privileged documents that have been inadvertently disclosed. If the parties do not agree, Rule 26.02(5) provides a procedure for the forced return of privileged documents, but under this procedure the claim of privilege can be challenged.

Not reasonably accessible data: Rule 26.02(1): A party is not required to provide discovery of ESI that is designated as “not reasonably accessible” because of the cost or burden of discovery. However, this designation can be challenged, and even if data is shown to be not reasonably accessible the court may compel discovery on a showing of good cause. Good cause exists when the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. If the documents are not reasonably accessible, but good cause for production is proven, the court may set the conditions of discovery by limiting the type or amount of data and by allocating some of the cost of discovery to the requesting party under Rule 26.06(6).

Form of data: Rule 34.02: Data can be stored in various forms such as pdf, tiff, native, or paper. Under this rule, a requesting party can designate the form in which the data should be produced. If no form is designated, or if the producing party objects, the producing party must state what form of production it will use. The producing party may use either the form in which the information is ordinarily maintained, or any form that is reasonably usable. Absent a court order, the producing party is not required to produce data in more than one form.

Loss of ESI due to routine deletion: Rule 37.06: This rule recognizes that routine alteration and deletion of information is a part of ordinary computer operations. As a result, the rule states that absent exceptional circumstances, the court may not impose sanctions for failure to produce ESI lost as a result of “routine, good-faith operation of an electronic information system.” However, if a duty to preserve information arises, allowing a routine process of your computer system to delete the information may not be considered a good-faith operation.

Feel free to contact any of our attorneys listed below regarding these developments.

Bass, Berry & Sims Attorneys

Michael A. Brady
(901) 543-5703
mbrady@bassberry.com

Michael L. Dagley
(615) 742-7729
mdagley@bassberry.com

Samuel Lanier Felker
(615) 742-6219
sfelker@bassberry.com

Jody E. O'Brien
(615) 742-7750
jobrien@bassberry.com

Brian D. Roark
(615) 742-7753
broark@bassberry.com

Overton Thompson III
(615) 742-7730
othompson@bassberry.com

Amy C. Worrell
(901) 543-5706
aworrell@bassberry.com

Robert L. Brewer
(615) 742-7760
bbrewer@bassberry.com

J. Page Davidson
(615) 742-6253
pdavidson@bassberry.com

John S. Golwen
(901) 543-5903
jgolwen@bassberry.com

Justin D. Pitt
(615) 742-7737
jpitt@bassberry.com

Todd J. Rolapp
(615) 742-6288
trolapp@bassberry.com

Kathryn Hannen Walker
(615) 742-7855
kwalker@bassberry.com

Kristen C. Wright
(901) 543-5907
kwright@bassberry.com

Matthew M. Curley
(615) 742-7790
mcurley@bassberry.com

Wallace W. Dietz
(615) 742-6276
wdietz@bassberry.com

Anthony J. McFarland
(615) 742-6250
amcfarland@bassberry.com

Stephen W. Ragland
(901) 543-5917
sragland@bassberry.com

John C. Speer
(901) 543-5919
jspeer@bassberry.com

Clarence A. Wilbon
(901) 543-5927
cwilbon@bassberry.com

Jeffrey P. Yarbro
(615) 742-7793
jyarbro@bassberry.com

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315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200
The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900
1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200