E-DISCOVERY: YOU THOUGHT YOU HEARD THE LAST WORD

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2006 AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE RELATING TO E-DISCOVERY – EFFECTIVE DECEMBER 1, 2006

FRCP 16(b) – Scheduling and Planning

Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order also may include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) provisions for disclosure or discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production;

(7) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

FRCP 26(a)(1)(B) – Required Disclosures

A copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

FRCP 26(a)(1)(E) – Disclosure Exemptions

The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to proceedings in other courts; and

(ix) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

FRCP 26(b)(2) – Limitations

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) 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. On motion to compel discovery or for a protective order, the party from

whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

FRCP 26(b)(5) – Claims of Privilege or Protection of Trial-Preparation Materials

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

FRCP 26(f) – Conference of Parties; Planning for Discovery

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable

information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

> (1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
>
> (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
>
> (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
>
> (4) any issues relating to claims of privilege or of protection as trial-preparation material, including -- if the parties agree on a procedure to assert such claims after production -- whether to ask the court to include their agreement in an order;
>
> (5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
>
> (6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

FRCP 33(d) – Option to Produce Business Records

Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the

interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

FRCP 34 – Amended Heading: Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes.

FRCP 34(a) – Scope

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information -- including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained -- translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

FRCP 34(b) – Procedure

The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

FRCP 37(f) – Electronically Stored Information Safe Harbor

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

FRCP 45(a) – Form, Issuance of Subpoenas

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

FRCP 45(b) – Service of Subpoenas

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefore, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

FRCP 45(c) – Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(2)(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises -- or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(3)(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

FRCP 45(d) – Duties in Responding to Subpoena

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(1)(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(1)(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(1)(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows

good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(2)(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

FRCP 45(e) – Contempt

Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

Form 35, Subdivision 3 – Report of Parties' Planning Meeting

Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)

Disclosure or discovery of electronically stored information should be handled as follows: (brief description of parties' proposals)

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order).

All discovery commenced in time to be completed by _____ (date) _____. [Discovery on _____ (issue for early discovery) _____ to be completed by _____ (date) _____.]

Maximum of ___ interrogatories by each party to any other party. [Responses due ___ days after service.]

Maximum of ___ requests for admission by each party to any other party. [Responses due ___ days after service.]

Maximum of ___ depositions by plaintiff(s) and ___ by defendant(s).

Each deposition [other than of _____] limited to maximum of ___ hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:

from plaintiff(s) by (date)

from defendant(s) by (date)

Supplementations under Rule 26(e) due (time(s) or interval(s)).

E-DISCOVERY, COMPLIANCE, AND SANCTION AVOIDANCE TIPS

1. Consult the applicable federal and state rules of civil procedure, including any local rules, and comply with any existing court orders regarding discovery.

2. Prepare to gather data in an efficient and legally defensible way

A. Courts require that a party suspend any routine document retention/destruction policy and put in place a **"litigation hold"** to preserve relevant documents.

1. A party can make a system-wide backup of all data preserved on all hard drives and also retain all existing backup tapes that can be identified as pertaining to relevant personnel.

2. Backup tapes must be preserved where they are actively used for information retrieval or can readily be identified as storing information of "key players" in the litigation. Counsel can either take physical possession of the backup tapes or segregate them in storage.

B. Counsel handling the litigation must become familiar with the client's document retention policies, as well as the client's data retention architecture.

1. Counsel must speak with information technology personnel who can explain system-wide backup procedures and the client's recycling policy. Note: opposing counsel is likely to depose these key IT people. Also you should consider deposing your opponent's IT personnel.

2. Understand how the destruction of computer information occurs. Counsel must learn the framework in the electronic world by which information is destroyed and works in process are altered in the ordinary course of business, just as is the case with paper records.

3. Counsel must communicate with the "key players" in the litigation to understand how they store information. This communication must be sufficient to understand variances in individual storage practices, such as whether particular individuals retain only printed copies of e-mails or whether individuals retain electronic copies and, if so, through what storage and filing mechanisms.

4. To the extent the scope of the litigation and the size of the company makes this process not feasible, then counsel must explore alternative solutions, such as fashioning a keyword search to be run system-wide.

5. Merely notifying all employees of a litigation hold and expecting them to retain and produce all relevant information was deemed insufficient.

C. Counsel must take affirmative steps to monitor ongoing compliance.

1. The litigation hold instructions should periodically be reissued.

2. The key players should periodically be reminded that the duty to preserve remains in place. Effective communication is central to preservation.

D. DO NOT construe too narrowly the scope of the subject matter that is at issue in the litigation and as to which evidence should be preserved.

E. Communicate instructions on preservation to all appropriate persons.

F. Communicate instructions on preservation in writing and with sufficiently specific criteria.

G. Meet in person with key employees to explain criteria for preserving evidence. Merely sending an email is NOT enough.

H. Follow up on initial preservation instructions.

I. Address departing employees and closing offices in the course of gathering evidence.

J. Communicate sufficiently to gain a proper understanding of how evidence is stored and what evidence is available.

K. Implement a system of preservation when it is known that there is no document retention policy.

L. Take sufficiently prompt steps to investigate and report to opposing counsel and the court after learning of destruction of evidence.

M. Act promptly to stop the destruction of evidence after learning about it.

N. AVOID "purposeful sluggishness" in responding to requests for e-mail.

O. Document all processes used to gather and protect the data and keep it secure (chain of custody log).

P. Document your efforts as well as the responses you receive to your requests.

1. Nothing you do should change the original state of the data.

2. Get expert help before you need it to establish a process prior to a problem.

3. Dates and times may be irrevocably altered and cause specific data or the contents of the computer to be inadmissible.

Q. Remember to notify your opponents not to destroy or alter their clients' own electronic files. (A sample letter to opposing counsel is attached as Exhibit B.)

3. Recognize when the duty to preserve evidence begins

The federal rules, for example, impose a duty to preserve evidence at commencement of litigation, during the litigation itself and even prior to litigation if a party "knew or should have known" that evidence "was relevant to pending, imminent, or reasonably foreseeable litigation." Some of the many types of circumstances and events that have been held to have triggered a duty to preserve evidence are as follows:

A. Entry of a court order requiring the preservation of evidence.

B. Discovery requests.

C. A complaint identifying issues that are likely to be the subject of discovery.

D. Administrative complaints.

E. Demand letters and other correspondence.

F. Knowledge of circumstances making litigation likely.

G. The litigation-prone nature of certain businesses or actions.

H. Subjective knowledge that litigation was reasonably likely.

I. In employment cases, when an employee files an internal complaint.

This duty to preserve certain types of evidence related to specific incidents will typically lasts until the statute of limitations has run.

4. Know what types of evidence to preserve and to request from your opponent

Generally, court rules are interpreted to require that a party preserve all evidence that it knows or has reason to know is (i) relevant to the action, (ii) reasonably calculated to lead to the discovery of admissible evidence, (iii) reasonably likely to be requested in discovery, and/or (iv) the subject of a pending discovery request. The reasonableness of a party's steps should "be measured in at least three dimensions" — namely (i) the scope of permissible discovery, (ii) whether electronically stored information is "reasonably accessible;" and (iii) what the party knows about the nature of the litigation. In certain instances a party may also need to preserve electronically stored information that is not reasonably accessible "if the party knew or should have known that it was discoverable in the action and could not be obtained elsewhere." Information created or stored in electronic format and potentially subject to discovery includes:

A. Voice mail messages and files;

B. Backup voice mail files;

C. E-mail messages and files;

D. Word processing documents;

E. Spreadsheets;

F. Presentation documents;

G. Graphics;

H. Animations;

I. Images;

J. Instant messages and or IM logs;

K. Backup e-mail files;

L. Deleted e-mails;

M. Data files;

N. Program files;

O. Backup and archived tapes;

P. Temporary files;

Q. System history files;

R. Web site log files; and

S. Other electronically-recorded information.

5. The Discovery Conference

The parties should confer about electronic discovery and obtain a court order which addresses such issues as allocation of cost, the time period sought, the subject matter, the potentially responsive data, the format for production, data retention during litigation, the appropriateness of an independent agreed-upon information technology expert.

6. Become familiar with basic electronic discovery terms

A. *Active Data* – E-mail and electronic files such as word processing documents, spreadsheets, presentations, and databases that a person or business can presently access and which are kept readily available for future business purposes.

B. *Backup Data* – Less accessible systems backup and archival or legacy data. Backup data is typically not intended for everyday use, but rather as disaster recovery. Archival and legacy data is information that has been transferred from an old computer, database or application to some storage type (typically a tape), usually in compressed form.

C. *Deleted Data* – Data that, in the past, existed on the computer as live data and which has been deleted by the computer system or end-user activity. Deleted data remains on storage media in whole or in part until it is overwritten by ongoing usage or "wiped" with a software program specifically designed to remove deleted data. Even after the data itself has been wiped, directory entries, pointers, or other metadata relating to the deleted data may remain on the computer.

D. *Electronic Documents* – Any information created on an individuals' computer using a word processor or stored and shared with others on the company's file server. This information is typically found on individual desktops, laptops, network hard drives, removable media (e.g., floppy discs, tapes, and compact discs), and personal digital assistants (e.g., Palm Pilots and Blackberries).

E. *Electronic Evidence* – Any electronically stored information subject to pretrial discovery.

F. *Metadata* – Information about the document or file that is recorded by the computer to assist the computer and the user in storing and retrieving the document or file at a later date.

G. *Migrated Data* – Information that has been moved from one database or format to another, usually as a result of a change from one hardware or software technology to another.

H. *Paper Discovery* – The discovery of writings on paper that can be read without the aid of some devices.

I. *Replicant Data* – The user's system automatically makes these files. They include auto-backup files generated by operating systems, word processing applications, as well as system/audit logs, and cookies.

J. *Residual Data* – Deleted files and data fragments not yet overwritten.

K. *Legacy Data* - Data that is no longer accessible because the software and/or hardware used to retrieve it are out of date.

7. Investigate who has evidence that must be preserved and know where a party should seek evidence to be preserved

A. Identify potential sources of information. These individuals are likely to be deposed.

1. Determine as early as possible which persons are likely to have evidence that should be preserved and which locations are likely to be sources of evidence that should be preserved. One indicator that evidence in the possession of certain individuals should be preserved is the identification of those individuals in discovery requests or responses or in initial disclosures.

2. Absent pleadings or correspondence identifying specific individuals or locations, a party will have to look to the subject areas identified.

3. DO NOT rely on a self-serving interpretation of the pleadings to unduly restrict preservation efforts.

4. The search must include electronic information from former employees and offices are closed during the course of litigation.

B. Even though a party may not physically have possession of evidence, some courts have indicated that the duty to preserve extends to evidence under a party's control including evidence in the hands of a party's expert or insurer. At least one court has held that such a party can be sanctioned for failing to preserve where it could have notified the third party of the litigation and requested that the evidence be preserved but failed to do so.

C. Know where to look.

1. Individual computers, laptops;

2. Databases;

3. Email;

4. Servers;

5. Home computers;

6. Archives;

7. Networks;

8. Computer systems, including legacy systems;

9. Back-up tapes; and

10. Internet data

D. Maintain a log of your efforts—both your requests and the responses you receive.

8. Process the electronic data for efficient and cost effective review for relevance and for privilege

A. Establish a review procedure at the outset.

B. Remember that information should be reviewed prior to production for attorney-client privilege.

C. May need to do searches by key terms.

D. Seek a court order or intervention if necessary.

E. Some courts are encouraging parties to produce electronic data such to a proviso that the production will not constitute a waiver of the privilege. Privileged information that is produced under a specific procedure authorized by court order (a "clawback" arrangement) is not to be kept by the party receiving it or used or revealed.

9. Production of relevant electronic information.

A. Discuss options for forms of production.

B. Consider proposing options for a rolling production if the volume is significant.

10. Understand why a party should preserve evidence

A. When a party fails to discharge its duty to preserve evidence, that party runs the risk of being subjected to a variety of severe sanctions. These include the following:

1. Default or dismissal.

2. Exclusionary remedies.

i. Exclusion of witnesses.

ii. Exclusion of evidence on topics.

iii. Exclusion of particular items of evidence.

3. Orders establishing factual matters.

4. Instructing the jury that an adverse inference may be drawn against the party that failed to preserve.

5. Monetary sanctions.

6. Piercing the attorney-client privilege on matters relating to the spoliation.

7. Liability in tort. A handful of jurisdictions have recognized a cause of action for tortious spoliation of evidence.

B. Conduct which courts find is evidence of bad intent:

1. Failure to discharge a known duty.

2. Inadequate inquiries in the face of questions about preservation and continuing assertions of full compliance in the face of evidence to the contrary.

3. Following a document retention policy and destroying documents when a party knows that the type of evidence being destroyed was relevant to a "potential" claim.

EXHIBIT A

[DATE]

[NAME]
[ADDRESS]
[ADDRESS]

Re: [CAPTION OF LAWSUIT OR INVESTIGATION]

Dear [NAME OR IDENTIFY GROUP OF EMPLOYEES]:

Please be advised that the [OFFICE OF GENERAL COUNSEL] requires your assistance in preserving corporate information in the above-referenced matter.

Electronically-stored data may become an important and irreplaceable source of discovery and/or evidence in this matter. The lawsuit requires preservation of all information from [COMPANY'S] computer systems, removable electronic media, and any other locations relating to [DESCRIPTION OF SUBJECT MATTER AND RELEVANT TIME PERIODS].

You must immediately suspend deletion, overwriting, or any other possible destruction of electronic information. This includes, but is not limited to: email and other electronic communications; word processing documents; spreadsheets; databases; calendars; telephone logs; contact manager information; Internet usage files; offline storage or information stored on removable media; information contained on laptops or other portable devices; and network access information.

Employees must take every reasonable step to preserve this information until further written notice from the [OFFICE OF GENERAL COUNSEL].

Failure to abide by this request could result in extreme penalties against [COMPANY] and could form the basis of legal claims for spoliation.

If this correspondence is in any way unclear, please contact [DESIGNATED CONTACT] at [TELEPHONE NUMBER] immediately.

Sincerely,

[NAME]
[LAW FIRM AND, OR TITLE
OF IN-HOUSE ATTORNEY]

EXHIBIT B

[DATE]

[NAME]
[ADDRESS]
[ADDRESS]

Re: [CAPTION OF LAWSUIT OR INVESTIGATION]

Dear [NAME OF OPPOSING COUNSEL]:

By this letter, you and your client are hereby given notice not to destroy, conceal or alter any paper or electronic files, other data generated by and/or stored on your client's computer systems and storage media (e.g., hard disks, floppy disks, backup tapes), or any other electronic data, such as voicemail. This includes, but is not limited to: email and other electronic communications; word processing documents; spreadsheets; databases; calendars; telephone logs; contact manager information; Internet usage files; offline storage or information stored on removable media; information contained on laptops or other portable devices; and network access information.

Through discovery we expect to obtain from your client a number of documents and other data, including files stored on your client's computers and storage media. In particular, we will seek information related to [DESCRIPTION OF SUBJECT MATTER, RELEVANT TIME PERIODS AND RELEVANT DOCUMENT CUSTODIANS].

Although we [MAY BRING/HAVE BROUGHT] a motion for an order preserving documents and other data from destruction or alteration, your client's obligation to preserve documents and other data for discovery in this case arises independently from any order on such motion.

Electronic documents and the storage media on which they reside contain relevant, discoverable information beyond what may be found in printed documents. Therefore, even where a paper copy exists, we will seek all documents in their electronic form along with meta data or information about those documents contained on the media. We will seek paper printouts of only those documents that contain unique information created after they were printed (e.g., paper documents containing handwriting, signatures, marginalia, drawings, annotations, highlighting and redactions) along with any paper documents for which no corresponding electronic files exist.

The laws and rules prohibiting destruction of evidence apply to electronically-stored information in the same manner that they apply to other evidence. Due to its format, electronic information is easily deleted, modified or corrupted. Accordingly, your client must take every reasonable step to preserve this information until the final resolution of this matter. This may include, but would not be limited to, an obligation to discontinue all data destruction and backup tape recycling policies.

With regard to electronic data created subsequent to the date of delivery of this letter, relevant evidence should not be destroyed and your client is to take the appropriate steps required to avoid destruction of such evidence.

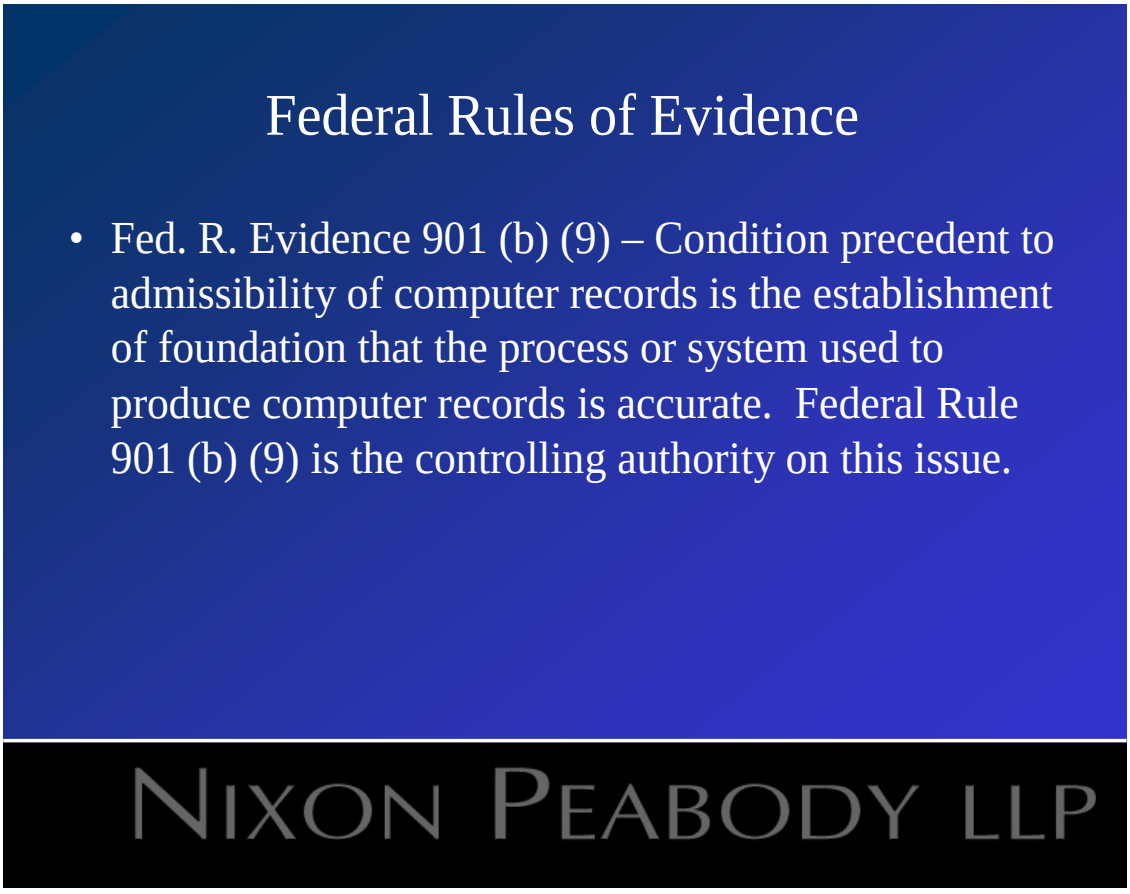
Please forward a copy of this letter to all persons and entities with custodial responsibility for the items referred to in this letter.

Failure to abide by this request could result in extreme penalties against your client and could form the basis of legal claims for spoliation.

If this correspondence is in any way unclear, please contact me immediately.

Sincerely,

[NAME]
[LAW FIRM]



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Practice Areas

Products Liability, Mass & Complex Tort | Litigation & Dispute Resolution | Automotive | Class Actions | Consumer Packaged Goods | Corporate Governance & Regulatory | Financial Services Litigation

Joseph Ortego has approximately twenty-seven years of litigation and business experience. Mr. Ortego has tried over 100 cases to verdict for major corporations ranging from automotive to chemical companies, including Fortune 100 commercial, environmental, and toxic tort cases. He focuses in the areas of commercial disputes, toxic tort, environmental, employment, intellectual property, and product liability matters. He serves as national trial counsel for a number of clients who desire a consistent approach to lawsuits filed in multiple states, and represents small, mid-size, and publicly traded companies.

A frequent author and speaker both domestically and internationally, as well as legal consultant on network television, Mr. Ortego heads a comprehensive American Bar Association academic and trial practice re-education session for some of the nation's top attorneys. He has authored numerous publications and has been the regular featured toxic torts columnist in "Mealey's Emerging Toxic Torts." By invitation of the American Board of Trial Advocates, Mr. Ortego was selected as a member of the faculty at the National Judicial College in Reno, Nevada, a diverse program combining the latest technology with the country's top trial lawyers as faculty members and personal mentors, along with Supreme Court justices, professors, and trial judges form state and federal courts. Mr. Ortego has earned the Martindale-Hubbell Law Director's AV rating, the Directory's highest accolade.

Mr. Ortego also served as a New York County (Manhattan) assistant district attorney from 1979 to 1983. Serving in the Felony Trial Bureau and Homicide units, he investigated and tried complex and high-profile felony and homicide cases to verdict.