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New E-Discovery Rules for Tennessee

March 31, 2009

Civil litigation practice in Tennessee is going to change on July 1, 2009, which is when new rules on electronic discovery will go into effect. If you or your business store information on a computer or you use e-mail (who doesn't these days), and if you ever find yourself in a lawsuit, the new rules will be very important.

Several years ago, it was recognized that the widespread use of computers was creating some unique issues when it came time to sort out disputes in court. More and more information is being stored electronically, and it has become very expensive to find the information that is relevant to the dispute. Sometimes, information has become lost because the computer system automatically deleted it. Technology is a boon to business but can be a big headache for the parties who find themselves in court.

The Tennessee Supreme Court has developed a set of rules of procedure for dealing with electronic information in cases filed in state court. The new rules are patterned after similar rules in the Federal Rules of Civil Procedure. Basically, the new Tennessee rules provide:

- Electronically Stored Information (ESI) is defined as "information that is stored in an electronic medium and is retrievable in perceivable form."
- There will be some limits on the scope of discovery of ESI. Rules 26.02(1) and 45.08(1)(D) create two levels of discovery - "reasonably accessible" information and "not reasonably accessible" information. The first must be produced when requested, while the second does not have to be produced in the absence of a court order. If the court goes through a "good cause" analysis and determines that "not reasonably accessible" ESI does have to be produced, the court must also determine what portion of the cost is to be paid by the requesting party. Rule 26.06(6) spells out the cost shifting factors the court is to consider.
- There will be new protections for ESI producers. First, Rules 26.02(5) and 45.08(2)(B) state that inadvertently disclosed privileged information can not be used against, and must be returned to, the producing party. Second, Rules 34.02 and 45.08(1)(C) provide that ESI does not have to be provided in more than one form. Third, Rules 45.02 and 45.07 provide that a nonparty must be protected from undue burden and expense in producing ESI, something that was not clear before. Fourth, Rule 37.06 provides potential cover for the failure to produce ESI because it was altered or deleted.
- The new rules encourage litigants and the courts to give early attention to ESI discovery issues. However, unlike the FRCP, there is no requirement that the parties meet and confer about ESI at the beginning stages of the litigation.

This is an unusual conjunction of technology and the law, and not everyone is ready to deal with the unique problems involved. One thing you can do to be better prepared for litigation in today's world is to reduce the volume of electronic information that must be sorted through to find what you need. This can be accomplished with a well thought out document retention plan. Another thing you can do is plan for litigation by knowing where your information is stored and being able to take a "snapshot" of your data so you can continue to operate your computer system without losing important information or being sanctioned.