

**Update on Status of Proposed Changes
To Rules of the Supreme Court of Virginia
To Address Discovery of Electronically-Stored Information**
[As of September 9, 2008]

The proposed rule changes regarding e-discovery have continued to move forward through the rule change process. A summary of the previous history of these proposed rule changes should be helpful. In 2007, acting in response to a direction by the Chief Justice of the Supreme Court of Virginia that the topic of e-discovery be studied, the Virginia Supreme Court Judicial Council's Advisory Committee on Rules (the "Advisory Committee") prepared an initial and unapproved "discussion draft" of possible rule amendments regarding discovery of electronically stored information ("e-discovery"). Detailed comments were provided and considered by the Advisory Committee. On October 1, 2007, the Advisory Committee issued a report which stated that the Advisory Committee had considered the comments and unanimously decided to publish a Tentative Draft of the proposed rule changes. The Tentative Draft was published with comments sought by March 15, 2008. A copy of the October 1, 2007 report and the Tentative Draft is attached as Exhibit A. It will be noted that the Tentative Draft divided Rule 4:9 into Rule 4:9 [addressing discovery from parties] and Rule 4:9A [addressing discovery from non-parties]. You will recall that this was a change that some members of the Subcommittee and the Conference felt might be useful.

The Advisory Committee met again in April of 2008 and considered the comments that had been received regarding the Tentative Draft. The Advisory Committee resolved to recommend to the Virginia Supreme Court Judicial Council that the proposed rule changes in the Tentative Draft should be adopted, with these changes:

In Rule 4:1(b)(6)(ii) -- took out the dashed "inadvertent" reference so any claim that privilege still applies can be resolved under the procedures of that rule.

The **Tentative Draft language as revised by the Advisory Committee** thus reads [the language deleted by the Advisory Committee is stricken out]:

(ii) If a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected ~~—but the material has been produced inadvertently—~~the producing party may notify the other party of such claim and the basis for the claimed privilege or protection. Upon receiving such notice, any party holding a copy of the designated material shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement or upon motion by any party. If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must take reasonable steps to retrieve the designated material. The producing

party must preserve the information until the claim of privilege or other protection is resolved.

In Rule 4:9(b)(iii) -- added subheads A and B such that the first paragraph is directed to "documents" and the rest of that subsection relates to electronic discovery. The repetitive iteration of the 10 lines about a party deeming material not reasonably accessible has been replaced with a one-line cross reference to the place in 4:1 where that same language appears.

In that same subparagraph [Rule 4:9(b)(iii)(C)], a few words are added to the "form" provision, so it reads: "(2) If a request does not specify the form or forms for producing electronically stored information, _or if a responding party objects to the requested form or forms of production,_ a responding party must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably usable. A party need not produce the same electronically stored information in more than one form."

The **Tentative Draft language as revised by the Advisory Committee** thus reads [the language added by the Advisory Committee is shown in bold:

(c) If a request does not specify the form or forms for producing electronically stored information, **or if a responding party objects to the requested form or forms of production**, a responding party must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably usable. A party need not produce the same electronically stored information in more than one form.

In Rule 4:9A(c) the same headings are added as in the parallel spot in 4:9(b) so that the first paragraph relates to paper documents and the rest to electronic production.

Rule 4:13, language is added to (5) so it reads: (5) Avoiding unnecessary proof by exploring the possibility of obtaining admissions of fact and of documents **and regarding documents and information obtained through electronic discovery [adding language shown in bold]**.

Finally, adding "meet and confer" requirement tracking existing protective order provisions, such that a motion must be accompanied by such a certificate: "Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court . . . may make any order which justice requires to protect a party."

The Judicial Council met in mid-June of 2008, and approved the Tentative Draft (as revised above by the Advisory Committee) except the Judicial Council deleted the proposed so-called "safe harbor" provision of Rule 4:12(e) relating to sanctions. The proposed safe harbor provision regarding e-discovery as originally contained in the Tentative Draft had provided:

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

That provision was deleted by the Judicial Council. My understanding is that the Judicial Council felt that trial court's already could exercise discretion with respect to imposing sanctions and this special provision was not needed.

The Judicial Council forwarded its recommendation for adoption of the Tentative Draft as revised by the Advisory Committee (with Rule 4:12(e) deleted) to the Virginia Supreme Court in mid-June of 2008. At the time this summary was prepared, the Virginia Supreme Court was expected to discuss the proposed rule changes at its next business meeting in September of 2008 or possibly thereafter in the Fall of 2008.

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