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COMMENTARY

Even Small Banks Should Note Changes to Rules of Civil Procedure

By Stefan Jouret

ON DEC. 1, THE FEDERAL RULES OF CIVIL Procedure, which govern civil suits in federal court, were amended to address a litigation landscape that has changed dramatically in the last decade with the explosive growth of computer technology. Years ago, parties to litigation would exchange relatively small amounts of information in discovery, the process of learning about the facts of a case and the other side's legal theories. Now, because virtually all information is created or stored electronically, the volume of such "discoverable" information has grown exponentially, threatening to complicate and make more expensive the discovery process in nearly every case.

Regional community banks, which rarely get involved in federal lawsuits, should be mindful of these changes for two principal reasons. First, although most New England states have not yet adopted the federal rules changes in their own state rules of civil procedure, they may soon do so. Even if they do not, state courts will often look to the federal system for guidance on resolving similar state court issues. Second, community banks, with small or nonexistent internal legal staffs, may have more to fear than their large national counterparts, which have large legal departments that may have been focusing on electronic discovery issues for quite some time. Even the smallest community bank will have large volumes of "electronically stored information" or ESI – that it could be required to disclose in even a relatively minor state court lawsuit involving a fairly small sum of money.

Yet doing so could be expensive and complicated, and there are a variety of potential pitfalls involved with the process. They include potential sanctions for the spoliation, or destruction, of electronic evidence and potential waiver of the attorney-client privilege and the work product doctrine because of the inadvertent production of confidential



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information – a substantially greater risk with ESI because of the much greater volume. Further, financial institutions in particular need to give consideration as to how changes related to ESI may affect their privacy-related obligations with respect to financial information – especially for customers who may have opted out of information sharing.

Therefore, community bank executives should familiarize themselves now with the changes to the Federal Rules of Civil Procedure and attempt to understand their own

computer systems and think about how and what information may need to be produced in the event of a lawsuit. They also should be prepared to discuss such issues with their lawyers at the outset of a potential claim. It also may be advisable to update document retention policies, which are virtually certain to be requested in discovery in almost any lawsuit, to ensure that they reflect a changed reality concerning how documents are created and stored.

The Digital Revolution

At the federal level, changes to the way lawsuits are managed began as recently as a half-dozen years ago. Around 2000, the committees that address possible changes to the federal rules realized that modifications in the way information was created and stored were afoot. They also recognized that ESI likely would be discoverable in a lawsuit, including metadata, or information about information, such as invisible information in an e-mail concerning how and when the e-mail was routed through a server. The existence of this information, as well as the dramatically increased volume of discoverable information (it is routine for employees to send and receive dozens of e-mail communications per day as compared to 20 years ago, when the volume of written communications in memo format was dramatically smaller), led to issues associated with the costs of retrieving such information. Prior to the growth in ESI, lawyers defending a bank in a check-clearing lawsuit would gather the relatively small amount of information available about the check or checks at issue and would make that information available to the other side in a lawsuit in hard copy form. The costs associated with the process were minimal. Nowadays, the quantity of information about the same issue could include such things as employee e-mails about a check, a customer or an account, electronically updated account balances and other informa-

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tion in draft or final form.

Further, the committee acknowledged that information is changeable. In the past, conscious human effort was required to modify or delete information – think of dropping a document in a shredder. Now, the electronic information can be overwritten or modified by electronic processes without any direct human involvement. Among other examples, account balances may be updated without any paper trail regarding prior balances, e-mail presets could delete e-mails upon receipt or after a given period of time or e-commerce transaction journals can be overwritten or otherwise modified.

The revised federal rules address these issues in three main areas. First, they make parties discuss and consider e-discovery issues at the outset of a case, including the

possible waiver of the attorney-client privilege or the work product doctrine and how ESI will be produced (i.e. hard copy printouts or in one of a variety of electronic formats). Second, the rules specifically state that a party need not automatically provide discovery of ESI from sources that the party identifies as “not reasonably accessible because of undue burden or cost” (think of overwritten information on recycled backup tapes as a possible example). The rules do, however, order the production of such information under certain conditions for “good cause,” and may also shift the costs for such discovery from one party to the other depending upon the circumstances. Third, the revised rules address the possibility of privilege or protection waiver by establishing a process for how such claims

will be handled and creating a “safe harbor” for parties that fail to provide ESI that has been lost “as a result of the routine, good-faith operation of an electronic information system.” In assessing whether this safe harbor provision will apply, however, parties need to consider whether appropriate steps were taken to place information in a so-called “litigation hold” once litigation was “reasonably anticipated,” which could be well before a suit is filed.

As every good defense lawyer knows, preparation is the best defense. Community bank executives should make sure they are not caught unawares when litigation threatens, as it is all but certain to involve ESI issues, particularly as the “digital revolution” continues to transform the banking world into a less paper-dependent business. ■

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