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Highlights of civ pro rule amendments concerning 'ESI'

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The Supreme Judicial Court recently adopted amendments to the Massachusetts Rules of Civil Procedure to address the extraordinary increase in information created and stored in electronic form.

The amendments, which take effect on Jan. 1, provide ground rules for the management, preservation and discovery of electronically stored information, or ESI. ESI is information that is created and stored in digital form, such as emails, voicemails, instant messages, word processing files and electronic databases.

The rule changes largely are consistent with the 2006 amendments to the Federal Rules of Civil Procedure and reflect trends in the discovery of ESI that have been developing over the past decade, including early disclosure and discussion among counsel and assertions of privilege after production.

Amendments have been made to rules 16, 26, 34, 37 and 45 and are applicable to all trial courts in Massachusetts. Below is summary of some specific changes to the discovery process in state court litigation as a result of the amendments.

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Conferences regarding ESI

A major focus of the rule changes is to encourage early attention to ESI issues in the course of litigation. A new sub-section added to Rule 26 addresses conferences between counsel regarding ESI.

Though not mandatory, the ESI conferences are encouraged as a means to foster communication between counsel on issues of electronic discovery, ranging from the preservation of digital information to what data must be produced.

ESI conferences under the new rule come in two forms: as of right and by agreement.

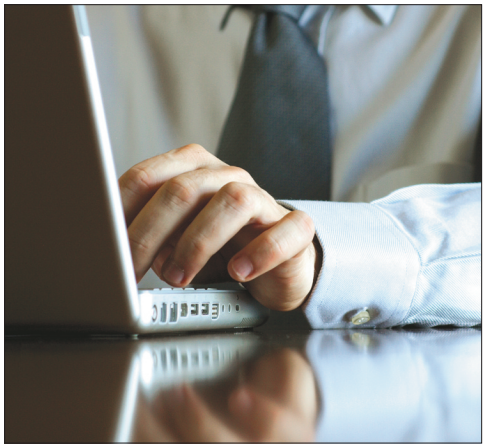
Under Rule 26(f)(2)(A), a party has a right to demand an ESI conference by serving a written request on the other party "no later than 90 days after the service of the first responsive pleading." If there is no ESI conference demanded within the 90-day period, Rule 26(f)(2)(B) allows a party to request a conference at a later point.

If the other parties to the case do not agree to an ESI conference, a party may file a motion requesting that the court conduct such a conference under the provisions of Rule 16.

Although Rule 26 itself does not define the word "conference," the Reporter's Notes suggest that a conference by telephone or through electronic communication is sufficient.

The purpose and scope of the ESI conference is explained in detail in Rule 26(f)(2)(C), which sets forth a variety of topics to be discussed.

In summary, the goal is for the parties to develop a plan that relates to the discovery of ESI, taking into account issues such as the form in which information is to be produced,



Developing state caselaw has provided some guidance, but is largely incomplete. The changes help to bridge the gaps between the existing discovery rules and the realities of litigation in the digital age.

the timeframe for production, the preservation of confidentiality, and the allocation of the expense of production.

Within 14 days of the conference, whether convened by right or by agreement, the parties must file with the court a plan relating to the discovery of ESI and a statement concerning any issues upon which they cannot agree.

The Massachusetts rule on ESI conferences differs in some respects from the cognate federal rule, reflecting a court system that hears matters that may not require court management of discovery in all instances.

Under Federal Rule 26(f), a discovery conference is required. Under the new state Rule 26(f), a discovery conference is discretionary, but can be compelled at the election of the parties, or ordered by the court, as appropriate.

Inadvertent waiver of privilege

The sheer volume of information contained in electronic form often makes it difficult (and expensive) for counsel to ensure that electronic material is adequately reviewed for privilege before it is produced to the other side.

As a result, it is not uncommon that privileged or protected information is inadvertently disclosed in the course of electronic discovery. Such a scenario raises issues regarding privilege waiver.

Fortunately, Rule 26(b)(5) now includes a "clawback" provision to deal with information that is mistakenly produced and subject to a claim of privilege. The rule provides a procedure for a party to assert a claim of privilege even after information is produced in discovery.

Once a party who has produced protected information notifies the receiving parties of the claim of privilege and the grounds for it, the receiving parties must promptly return, sequester or destroy the specified information.

If the privilege claim is contested, the receiving party may present the matter to the court under the impoundment procedure for a determination of the claim of privilege.

In resolving such a claim, the court will consider whether the disclosure was inadvertent and the extent to which the holder of the privilege took reasonable steps to prevent it.

Because the "clawback" provision in Rule 26(b)(5) allows the waiver of an otherwise applicable privilege if the production is found not to have been inadvertent, parties still would be wise to consider entering into a stipulated clawback agreement addressing the waiver issue at the outset of the case to minimize subsequent disputes.

Notably, the "clawback" provision in Rule 26(b)(5) is not restricted in application to ESI and applies to the inadvertent production of privileged or protected material in any form.

Spoliation 'safe harbor'

ESI can, by nature, be unwieldy. The routine operation of computer systems creates a risk that a party to litigation inadvertently may alter or delete discoverable information without any ill-intent. Changes to Rule 37 provide some protection for parties for truly inadvertent spoliation of ESI.

A "safe harbor" provision added to the rule precludes the imposition of sanctions when ESI "is lost as a result of the routine, good-faith operation of an electronic information system."

As the Reporter's Notes point out, however, the "safe harbor" does not lessen a party's duty to preserve electronic evidence, nor does it give license to a party to sit idly by while ESI is destroyed through the normal operation of its computer system.

Rather, when a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of the system still is required as one aspect of what often is called a "litigation hold."

Other changes

Reflecting that information today is more likely to be stored on thumb drives than in file cabinets, the title of Rule 34 now includes a reference to "electronically stored information," in addition to the familiar "documents" and "tangible things."

Also, language was added to Rule 34(b)(1) to the effect that a request for production "may specify the form in which electronically stored information is to be produced."

Thus, a party may request the production of ESI in native format, TIFF format, PDF format or other form.

Rule 16 was amended to include a specific reference to consideration at the pre-trial conference of matters relating to ESI, including "the preservation and discovery of electronically stored information." That change complements the changes to Rule 26(f) discussed above, which entitle a party to request a Rule 16 conference on matters relating to ESI.

Rule 26(f)(1) provides that a party need not produce ESI that is "not reasonably accessible because of undue burden or cost." The task of proving that a certain source of information is "inaccessible" is not an easy one, and the rule provides little guidance.

Nonetheless, the rule offers at least some protection to parties called on to take extraordinary measures not utilized in the ordinary course of their business to preserve and produce ESI.

Finally, recognizing the time and expense involved in producing ESI, especially for a non-party with no stake in the outcome of litigation, language was added to Rule 45(b) requiring a party issuing a subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."

The rule also provides that a person subpoenaed need not prepare a privilege log. Notably, the additions to Rule 45 are not expressly limited to subpoenas seeking ESI.

As the exchange of electronic information in litigation has become routine, developing state caselaw has provided some guidance, but it is largely incomplete. The amendments to the Massachusetts Rules of Civil Procedure help to bridge the gaps between the existing discovery rules and the realities of litigation in the digital age.

The changes provide some clarity, while maintaining the flexibility that litigators need to conduct e-discovery efficiently, and cost-effectively, under many different factual scenarios. MLW