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State Reforms More Modest Than Federal Rule Changes

Several issues left open for future resolution

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Ever since new rules for e-discovery were issued for federal courts in 2006, Connecticut litigators have wondered when — or if — the Practice Book would be revised to address the new world of electronically stored information (ESI) and whether Connecticut would adopt the approach taken in the revisions to the Federal Rules of Civil Procedure.

It seemed just a matter of time, since more than 35 states have by now enacted new rules regarding e-discovery, with many adopting some version of the federal rules.

For those Connecticut practitioners worried about wholesale adoption of the Federal Rules on e-discovery for state court practice, the new Practice Book rules will come as a relief. The good news is that Connecticut has taken a much more modest route to reform and one much more suited to state court litigation.

The new rules, set forth in revised Practice Book § 13 and effective Jan. 1, 2012, define ESI; provide guidance regarding parties' obligations to produce ESI; and outline the circumstances in which protective orders are appropriate. Just as importantly, they permit a court to consider e-discovery issues in the context of what is at stake in a case.

The new rules do not, however, incorporate some of the more significant burdens imposed by the Federal Rules, such as compelling parties with inaccessible ESI to bear the burden and costs of showing that the information is not reasonably accessible or requiring parties to address ESI in a discovery plan at the outset of the case, before they have any meaningful information about the volume or accessibility of such information.

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The Chapter 13 changes begin by defining "electronic" and "electronically stored information" in general terms to include information stored in electrical, digital, wireless, optical or similar media. These broadly worded definitions are designed to encompass future developments in computer technology and explicitly add ESI to the types of information discoverable pursuant to § 13-2.

The revised protective order directives set forth in § 13-5 authorize judges to address the discovery of ESI in protective orders, including the allocation of related expenses. In determining whether to address ESI in a protective order, judges are encouraged to consider the amount in controversy, the parties' resources, the importance of the issues, and "the importance of the requested discovery in resolving the issues."

To the extent information is not reasonably accessible, production obligations will depend on whether the burden and expense of production can be justified under the circumstances of the case. Relevant factors may include: the specificity of the discovery request, the amount of information available from other and more easily accessed sources; the likelihood that a search of will produce relevant, responsive information that cannot be obtained from other, more easily accessed sources; and predictions as to the importance and usefulness of the further information. If, after balancing these factors, the court orders discovery of information that is not reasonably accessible, the court has discretion to allocate some or all of the expense of discovery.

Minimizing Burdens

Revised §13-9(d) attempts to minimize the burden of producing ESI by explaining that, if a request for production does not specify a form for producing ESI, the producing party can produce the information in the form in which it is ordinarily maintained or that is reasonably usable.

A party will not be required to produce the same ESI in more than one form. The new

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§13-9(d), which replaces a previous provision that allowed a receiving party to request the production of information in a different or alternative format, recognizes that different types of ESI may be suited to different production formats. The new rule allows a requesting party to specify the preferred production format, allows the producing party to object, and creates a default rule for production where no form is specified.

The rules changes also provide a "safe harbor" for parties that engage in the systematic "routine [and] good faith" destruction or deletion of documents. (Practice Book §13-14(d)). Where such a practice prevents a party from complying with a discovery request, and there is no evidence that the responding party acted intentionally to avoid known preservation obligations, that party may not be sanctioned for failure to comply with discovery requests.

Section 13-33 creates a formalized clawback provision by setting forth the proper procedure when a party realizes it has inadvertently produced privileged information. The producing party must first notify the opposing party of the inadvertent disclosure and the basis for the privilege. Upon receiving notice, the receiving party must immediately segregate the privileged material, then either return or destroy it or, if it wishes to challenge the privilege claim, present it to the court under seal for resolution. In either case, the receiving party may not use or disclose the information until the privilege claim is resolved. (To the extent the receiving party used or disclosed the information before it was notified of the privilege, it must take reasonable steps to retrieve the information.)

While the clawback provision applies to all forms of discovery, it recognizes that the increased volume of ESI and the difficulty of ensuring that all ESI has been reviewed significantly increase the risk of inadvertent disclosure. The new rule intentionally declines to address the questions of whether privilege was waived by the inadvertent production or the ethical implications of the use of the data. Again, these issues are reserved for the court's determination.

While the new Practice Book provisions on e-discovery will help Connecticut courts address the new realities in litigation, they still leave several issues open for future resolution. For instance, the new rules are confined to the production of ESI and do not discuss the affirmative duty to preserve data, or when that duty arises. Until those issues are addressed, litigants in state court must continue to rely on common sense and the handful of decisions by Connecticut state courts on e-discovery issues, and remain mindful of the pervasive influence of the Federal Rules. ■