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Rules Designed To Be Forward-Looking, Flexible

Courts given added powers to apportion e-discovery costs

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The significant disparity that has existed between Connecticut's state and federal courts with regard to electronic discovery is about to end. A series of amendments to the Practice Book, and one new section, will become effective Jan. 1, 2012, and mirror in large part the revisions made to the Federal Rules of Civil Procedure in 2006. See *Connecticut Law Journal* at 92PB-118PB (July 5, 2011). Reviewed below, these Practice Book amendments give Connecticut practitioners guidance for the first time on a number of important ediscovery issues.

Defining, Preserving ESI

Amended Practice Book §13-1 defines "electronically stored information" (or ESI) as "information that is stored in an electronic medium and is retrievable in perceivable form." In turn, "electronic" is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."

Reflecting the forward-thinking efforts of the Rules Committee, the commentary explains that these definitions are based, in part, on the 2006 amendments to the Federal Rules, but also were "intended to encompass future developments in computer technology" and to be "sufficiently broad to cover all types of computer-based information" and "sufficiently flexible to encompass future technological changes and development." Also, the term "electronically stored information" expressly has been added to Practice Book §§13-2 and 13-9 defining the scope of discovery.

An important issue that has not been addressed by the new amendments is when a party's obligation to preserve ESI arises. Instead, this occasionally elusive and contentious issue has been left to the courts, where it has been held that "parties to a pending or impending civil action . . . have a legal duty to retain evidence relevant to that action." *Rizzuto v. Davidson Ladders Inc.*, 280 Conn. 225, 250-51 (2006). Under this common law standard, actual notice of litigation, demand letters for preservation, and perhaps even knowledge of an incident probable to result in litigation can trigger the obligation to preserve relevant ESI. See, *e.g., Doe v. Norwalk Community College*, 248 F.R.D. 372, 377 (D. Conn. 2007); *Rizzuto,* 280 Conn. at 234, 250-51.


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Another important and often-litigated issue is the form in which ESI must be produced. Revised §13-9 addresses this issue by creating a default. When the requesting party has not specified a particular format, the new rule requires electronic information to be produced "in a form in which it is ordinarily maintained or [that] is reasonably usable." However, the rules otherwise allow the requesting party to specify a desired format for the electronic material, and the responding party to object to the requested format, in which case judicial intervention may be necessary. In all events, the amended §13-9 makes clear that a party "need not produce the same electronically stored information in more than one form."

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Safe Harbor

Amended Practice Book §13-14 does not allow a party to be sanctioned for a failure to preserve ESI, so long as the electronic material is "lost as the result of routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations."

It is important to bear in mind, however, that to benefit from this safe harbor, a party may have to "intervene to modify or suspend features of the routine operation of a computer system to prevent loss of information if that information is subject to a preservation obligation."

Cost Shifting

Addressing what is arguably the most pressing issue in e-discovery — cost — amended §13-5 permits a court, for good cause shown, to enter orders concerning "the allocation of expense of the discovery of electronically stored information, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues."

However, the commentary elaborates that this amendment does not necessarily alleviate the burden of producing "reasonably accessible" ESI, and that a court's decision whether to compel the production of other, inaccessible electronic material depends "not only on the burden and expense of doing so, but also on whether the burden and expense can be justified in the circumstances of one case."

To that end, the commentary suggests six considerations: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; and (6) a party's willingness to voluntarily bear the cost of discovery.

If the court compels production after weighing these factors, the court "may allocate, in its discretion, the expense, in whole or in part" of the discovery.

Inadvertent Disclosure

In addition to the cost of e-discovery, the risk of inadvertently disclosing privileged material substantially increases when producing ESI because it is often voluminous. New §13-33 has been added to address this concern by allowing a producing party to notify others of a claim of privilege or work product protection after the materials have been produced. Once notified, the receiving party must return or destroy the material, or present it to the court under seal for a determination of the claimed protection. The commentary explains that, although applicable to "all forms of discovery," this clawback provision is considered particularly important to ESI "because of the volume of electronically stored information and the difficulty of ensuring that all information to be produced has in fact been reviewed."

Importantly, however, the rule does not address "whether the privilege or protection that is asserted after production was waived by the production or ethical implications of use of such data." These issues are "left to resolution by other law or authority." ■