Litigation Update - Rules of Civil Procedure Continue to Adapt to the Realities of Electronic Discovery

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Businesses are increasingly leveraging technology and moving to more paperless environments. For this reason, modern business litigation almost always requires some discovery of electronically stored information (ESI). Depending on the nature of the dispute, relevant ESI may be found on corporate servers, local hard drives, thumb drives, laptops, tablets, smart phones, or in the cloud.

Unfortunately, as some businesses know all too well, the process of collecting, reviewing, and producing ESI created and stored by different potential witnesses in so many different places can be incredibly expensive. For this reason, some lawyers choose to use ESI as a weapon, attempting to make ESI discovery as expensive as possible for the producing party in the hope of leveraging a favorable settlement.

Thankfully, the rules of the game are starting to change in order to address these realities and make the discovery process more efficient and cost-effective. In fact, new discovery rules in Minnesota and proposed changes to the Federal rules are intended to reign in the scope and cost of ESI discovery, which should help to ensure that disputes are resolved on the merits, and not by financial attrition.

Recent Changes to the Minnesota Rules of Civil Procedure

In July 2013, two amendments to the Minnesota Rules of Civil Procedure went into effect that will likely have an impact on ESI discovery disputes:

- First, under the new rules, parties and the court have an affirmative duty to ensure that the costs of a particular case are "proportionate to the amount in controversy and the complexity and importance of the issues." Minn. R. Civ. P. 1. Proportionality must be measured by balancing the "needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation." Id.
- Second, the new rules require that discovery be limited to "comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Minn. R. Civ. P. 26.02(b). Additionally, any party moving to compel the production of ESI bears the burden of demonstrating that its request meets the proportionality test. Id.

Proportionality is not a new concept in the ESI discovery world, but there is a movement afoot to bake the concept into the discovery rules. Now that the proportionality concept has found its way into the Minnesota rules, litigants faced with unreasonable and overly burdensome ESI requests in Minnesota courts will have another arrow in their quiver to fight back.

Proposed Changes to the Federal Rules of Civil Procedure

In August 2013, proposed changes to the Federal Rules of Civil Procedure were released for public comment.1 Proposed amendments that would have a meaningful impact on ESI discovery include the following:

- First, like recent amendments to the Minnesota rules, the Federal rules would be amended to limit the scope of discovery based on the concept of proportionality, specifically requiring that all discovery be "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs the likely benefit." Proposed change to Fed. R. Civ. P. 26(b)(1).
- Second, the proposed amendments would explicitly recognize that Federal courts have the power to issue protective orders allocating discovery related expenses to the requesting party. Proposed change to Fed. R. Civ. P. 26(c)(1)(b). Although this power is implicit in the current rules, explicitly authorizing courts with the power to shift costs will eliminate any dispute as to whether the court actually has this power and, hopefully, encourage courts to shift the costs associated with responding to overly broad and burdensome ESI requests to the requesting party more often.
- Third, at least by implication, the proposed amendments would introduce the concept of "cooperation" into the Federal rules by requiring that all of the rules be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Proposed change to Fed. R. Civ. P. 1. The underlined phrase would be new to the rules, and the official commentary to the proposed addition indicates that it is intended to foster cooperation and reduce the costs associated with hyper-adversarial behavior between opposing counsel, particularly in the context of ESI discovery.

The proposed amendments to the Federal rules would not become effective until at least 2015, and the ongoing public comment period is the first of many stages these proposed amendments must go through before final approval. At this early stage, however, it is clear that some of the proposed amendments are specifically intended to curb the use of ESI discovery as a cost-escalating weapon.

Unfortunately, even if the proposed amendments are approved as drafted, they will not eliminate the burden and significant expense associated with ESI discovery. For that reason, as we begin the new year, businesses would be wise to reevaluate their document management policies and procedures, minimize their ESI footprints to the extent possible, and have a plan in place to respond to ESI requests in the event of litigation.

[1] The public comment period will end on February 15, 2014. A link to the full text of the proposed rule changes may be found at: http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.