

Pennsylvania Supreme Court Adopts New E-Discovery Amendments to Pennsylvania Rules: Focus on Proportionality

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Authors: David R. Cohen, Anne S. Peterson, Caitlin R. Gifford

On June 6, 2012, the Pennsylvania Supreme Court announced the adoption of new procedural rules to regulate the e-discovery process. *Order No. 564 (Pa. 2012)*. The new rules, effective August 1, 2012, provide that discovery of electronically stored information (“ESI”) should be guided by principles of proportionality and facilitated through cooperation among parties.

The Order amends Rule 4009.1 of the Pennsylvania Code to include ESI as a distinct category of discoverable information, and provides guidance about its production:

A party requesting electronically stored information may specify the format in which it is to be produced and a responding party or person not a party may object. If no format is specified by the requesting party, electronically stored information may be produced in the form in which it is ordinarily maintained or in a reasonably usable form. *17 Pa. Code § 4009.1(b)(2012)*.

The rule is now substantially similar to Federal Rules of Civil Procedure Rule 34(b)(2)(D). In a note to Rule 4009.11, the court instructs parties to make ESI requests “as specific as possible” and encourages “limitations as to time and scope,” as well as voluntary discovery agreements between parties.

The Civil Procedural Rules Committee’s Explanatory Comment cautions that, although the amendments incorporate elements of the federal rules, the move signals “no intent to incorporate” the attendant federal jurisprudence. Instead, the new rules and comments emphasize the need for proportionality in the name of “just, speedy and inexpensive” resolutions at trial. Thus, in evaluating ESI requests, courts are instructed to focus their analyses on (1) the nature and scope of the litigation, (2) the relevance of the ESI and its importance to successful adjudication, (3) the cost and time burdens associated with producing the ESI, and (4) the relative “ease of producing” the ESI and whether some adequate substitute would be sufficient, among other factors. *CPRC Explanatory Comment § B*.

The Pennsylvania rules do not include counterparts to all of the federal rules relating to e-discovery. Reed Smith Records & E-Discovery Practice Group Leader David Cohen, who served on the subcommittee that drafted the rules, noted that was quite intentional. “The majority of cases on Pennsylvania county court dockets don’t require broad e-discovery, and there was sensitivity to not imposing extra procedures or burdens that may not be needed in most state court cases.” In opting for fewer rules and procedures than the federal courts have adopted, the subcommittee leaned significantly on the experience and expertise of the Subcommittee Chair, the Honorable Judge R. Stanton Wettick of the Allegheny County Court of Common Pleas. Judge Wettick has presided over the discovery process for the second-most active docket in Pennsylvania for more than 30 years. In addition to Wettick and Cohen, other members of the e-discovery subcommittee included Laura Ellsworth and Matthew Divelbiss of Jones Day, and Jack Stover and Jayson Wolfgang of Buchanan, Ingersoll & Rooney.

Notably, the rules do not mandate that parties meet prior to discovery to come to terms on a uniform protocol for e-discovery—as does FRCP Rule 26(f)—nor do they adopt any new provisions comparable to FRCP Rule 37(e)’s “Safe Harbor” provision, which discourages sanctions for the loss of ESI “as a result of the routine, good-faith operation of an electronic information system.” Judge Wettick noted that no similar state rule is needed, because routine good-faith actions should not expose parties to sanctions in any event.

With these amendments, Pennsylvania becomes the 36th state to adopt procedural rules specific to e-discovery. Twenty-nine of those states enacted rules substantially similar to the 2006 Federal Rules amendments. Notably, Pennsylvania is only the seventh state to adopt e-discovery rules that do not predominantly follow the 2006 Federal Rules amendments.

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