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Pennsylvania Announces eDiscovery Amendments to Rules of Civil Procedure

Last week, the state of Pennsylvania announced that it was amending its Rules of Civil Procedure to incorporate the discovery of Electronically Stored Information (ESI). While the amendments do use the term ESI, Pennsylvania remains one of the few states that still has not adopted the federal rules governing eDiscovery. In fact, the explanatory comments specifically state, “Though the term ‘electronically stored information’ is used in these rules, there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information.” Instead, the state will employ a “proportionality standard.” As set forth in the explanatory note, the “proportionality standard” governing discovery disputes requires a court to consider five factors in determining the scope of discovery:

- (i) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake;
- (ii) the relevance of the ESI and its importance to the court’s adjudication;
- (iii) the cost, burden, and delay that may be imposed on the parties to deal with ESI;
- (iv) the ease of producing ESI and whether substantially similar information is available with less burden; and
- (v) any other relevant factors.

Additionally, “[p]arties and courts may consider tools such as electronic searching, sampling, cost sharing, and non-waiver agreements to fairly allocate discovery burdens and costs.” Despite the non-adoption of the federal rules language, the Pennsylvania rules share the common framework of proportionality, as well as encouraging cooperation and active judicial management. Thus, it is likely that federal jurisprudence will remain informative despite the caveat otherwise.

The amendments affect rules 4009.1, 4009.11, 4009.12, 4009.21, 4009.23, and 4011, and are effective as of August 1, 2012.

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