Oklahoma Rules of Civil Procedure – Amended November 1, 2010

Despite amendments to the Federal Rules of Civil Procedure (December 1, 2006), some lawyers whose practices are limited to state court may not have had to consider electronically stored information ("ESI") in their cases. The Oklahoma Rules of Civil Procedure, however, which parallel the Federal Rules, have now been amended and are effective November 1, 2010. Depending on their practices, more lawyers may now be exposed to ESI management and production.

Only Reasonably Accessible Data to be Produced - Section 3226 (12 O.S. § 3226) explicitly adds ESI to the list of obtainable discovery. That ESI, however, must be "reasonably accessible" or else good cause must be shown for a court order to require its production. The court retains its authority to limit discovery, specifically the length of depositions or the number of discovery requests. The court is required on its own or by motion to limit discovery in certain circumstances such as when there is an imbalance in the proportionality of the expense versus the benefit of production given the case needs, the parties' resources, the amount in controversy, etc. Assuming the ESI sought is not unreasonably cumulative and cannot be obtained more conveniently and less expensively elsewhere, parties will be required to produce ESI.

ESI Category Added and Can Specify Form of Production - Although using 12 O.S. § 3234 to request ESI has been well established, this rule is amended specifically to list electronically stored information as data that can be requested. Further, a requestor may, but does not have to, specify the form in which ESI is to be produced. If an objection is made to the form of production or if no form is specified, the responding party must state the form(s) it intends to use. If an objection is made only to part of a request, the responding party must so specify and grant inspection of the remaining parts. If the responding party does select its own form of production, it must be in a form in which it is ordinarily maintained or reasonably useable. And, generally a party is not required to produce the same ESI in more than one form, i.e., both electronically and on paper.

The form of production is important because it affects the electronic searchability of documents and affects the extent of information received, i.e., including metadata or not. Native files or pdf files created electronically will be text searchable, which can increase efficiency of document review. Scanned images are not text searchable which would lead to a more manual, less automated review. There is also metadata ("data about data") including author, recipients, edits made, etc. that can be obtained from native or converted files but which would be lost with a scanned image or paper production. There are no requirements on whether metadata is always discoverable, so addressing this and other issues in your discovery plan early and before costly production re-do's is recommended.

The option to produce business records in lieu of answering interrogatories pursuant to 12 O.S. § 3233 remains in effect and now includes the option to produce ESI. In some circumstances, however, in order for the burden of deriving or ascertaining the answer to be substantially the same for the producing and requesting party, as required, a producing party may have to provide proprietary software or technical support to make the ESI useable to the other side. To the extent the producing party does not want to do this, it may be better to answer the interrogatory instead of providing the business records, provide the ESI in a format that does not require proprietary software, or use a program that has a free reader, e.g., Adobe Acrobat.

Must Address ESI in Mandatory Meet & Confer - In discovery planning under 12 O.S. § 3226, lawyers must confer to address discovery issues, including issues concerning ESI, but making a report to the judge is optional, unless so ordered. Cooperation and planning have become much more important in discovery given all the issues that arise with electronic discovery, e.g., sheer volume, data locations, preservation issues, file types, costs, review options, production options, etc. Conferring early, planning up front, and addressing questions and concerns before they become problems can ease the electronic discovery process.

Confidentiality & Privilege Can Be Asserted After Unintentional Production - Given, among other things, the volume of ESI, there may be occasions when potentially privileged or confidential material is accidentally produced to the other side. Section 3226 addresses this issue by allowing for a procedural hold on using any such material until a determination is made about its privileged status and whether or not privilege has been waived. Once a producing party discovers it may have disclosed privileged information, it must notify the recipient of the claim and the basis for the privilege. The recipient must “return, sequester, or destroy” the information until the claim is resolved. For this “clawback” provision not to waive privilege, generally steps must have been taken to prevent the production of potentially privileged material in the first place. Federal case law has shown that lawyers retain responsibility for ensuring their clients’ privileged or confidential information is not disclosed to the other side and have generally not argued successfully (to escape sanctions) that a vendor company, not the law firm, is at fault. Lawyers must, at all times, manage the process of ESI production and be aware of what steps their vendors are taking to ensure confidentiality and to promote error-free production.

Same Application to Third Party Subpoenas - Many of the same provisions outlined in 12 O.S. §3234 and 3226 also apply to third-party subpoenas. In 12 O.S. § 2004.1, electronically stored information is explicitly referenced; the subpoena may state the form of production; if no form of production is stated, ESI should be produced in the form it is ordinarily maintained or in a reasonably usable form; a person responding to a subpoena is not required to produce information in more than one form; a party can object to production showing undue burden or cost and the court may specify conditions for discovery; and the “clawback” rule applies if documents subject to privilege are inadvertently produced.

Protection from Sanctions for Document Destruction from Good Faith Procedures - Finally, Section 3237 (12 O.S. § 3237) is the “safe harbor” provision which states that under most circumstances, a court may not impose sanctions against a party for not providing ESI lost as a result of the routine, good-faith operation of an electronic information system. A party is, however, required to take reasonable steps to implement a “litigation hold” when the duty to preserve arises, which may include suspending some of these routine operations.

Conclusion - Failure to implement a proper litigation hold to prevent spoliation of evidence, through routine operations or otherwise has been the subject of much case law. Key custodians of information who routinely delete email in their inboxes may cause spoliation issues to arise in a case. For this and many other reasons, early case management among attorneys and clients is key in handling cases involving electronically stored information.

From the onset of the hold, through document production and review, and ultimately to settlement or trial, more and more cases are being changed by the presence of electronically stored

information. Oklahoma's amendments to its rules to parallel the Federal Rules of Civil Procedure more closely will expose more attorneys and more clients to issues that until now were primarily addressed in federal courts.

Litgistix handles both big and small e-discovery matters and would be happy to assist you at any phase of the process. Please call us for more information and help with your next project.

Reagan DeWitt-Henderson, ACP
LITGISTIX
Advanced Certified Paralegal &
Litigation Support Analyst
Office: (918) 585-1131
reagan@litgistix.com or
litsupport@litgistix.com

(Reagan is an advanced certified trial practice paralegal with over 10 years experience. She has focused on complex business litigation and medical malpractice defense, while specializing in the efficient use of litigation support software).