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NEW TOOLS FOR DISCOVERY OF ESI IN MASSACHUSETTS LITIGATION

Effective January, Massachusetts revised its Rules of Civil Procedure regarding the discovery of electronically stored information or “ESI” to bring the practice in state court more in-line with the federal court.

In the discovery phase of litigation, any party can be forced to collect and deliver to another party relevant ESI such as email, digital photographs, text messages, and saved electronic files. Responding to such a discovery request can be both burdensome and difficult because of the potentially large volume of these electronic records. Massachusetts courts recognized that litigants needed better tools to govern the rights of parties to demand, and the obligations of parties to respond to, these requests. The revisions encourage parties to reach agreements on the scope of ESI discovery at the outset of litigation in the hope of eliminating or at least reducing the potential for disputes.

The rules avoid a one-size fits-all approach to ESI by encouraging parties to work out particular issues, including the format for production, whether metadata will be provided and procedures for addressing privileged information. In light of the volume of potentially responsive ESI material, the new rules include a “clawback” provision to address inadvertent production of privileged material.

The new rules also provide a process to make the agreements an order of the court. A court order may impose formal limits to the scope of discovery of “inaccessible” ESI, such as data from backup tapes, or shift the cost burdens depending on the relative resources of the parties, the nature of the controversy and amount in dispute.

While most of the recent rule changes are directed at a party’s obligations during litigation, knowing your obligation in discovery and structuring internal systems to deal with litigation holds and preservation obligations before actions arise, will help companies tackle these obstacles in stride. Proper planning and utilization of these new rules can help companies navigate discovery burdens in a more cost-effective manner.

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