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New Massachusetts eDiscovery Rules

By Jay C. Carle and Matthew C. Christoff

On January 1, 2014, certain amendments to the Massachusetts Rules of Civil Procedure will become effective bringing them more in line with the 2006 amendments to the Federal Rules of Civil Procedure.[1] These amendments seek to standardize discovery practices and procedures involving electronically stored information to address "the staggering growth of information in electronic form today."[2] The Massachusetts' Standing Advisory Committee on the Rules of Civil Procedure of the Supreme Judicial Court ("Advisory Committee") had the following goals in mind:

1. Creating a process for the parties, and the court if necessary, to deal with electronic discovery early in litigation, including the eventual format of production;
2. Addressing issues surrounding "inaccessible" electronically stored information;
3. The inadvertent disclosure of electronically stored information, including remedies associated with such disclosure; and
4. The loss of electronically stored information due to "good-faith operation of an electronic information system.[3]

Pre-Trial and Meet and Confer Conferences

Massachusetts' Rule 16 addresses issues that a court may direct the parties to discuss at a pre-trial conference. In order to ensure that the parties are considering electronically stored information as soon as possible, the Advisory Committee amended Rule 16 to add three discovery provisions to the listing of considerations at a pre-trial conference: "The timing and extent of discovery;" "The preservation and discovery of electronically stored information;" and "Agreements or proceedings for asserting claims of privilege or of protection as trial preparation material after information is produced."[4] The new items are consistent with topics added to Rule 16 of the Federal Rules of Civil Procedure in 2006.

Massachusetts' Rule 26(f) is new and addresses conferences regarding electronically stored information. This rule does not *require* mandatory conferences like those under Federal Rules, but they are strongly encouraged. Although one party may demand a conference with another party under Rule 26(f)(2)(A) by serving a written request for a conference within 90 days of a responsive pleading by a defendant, later conferences may be scheduled by agreement under 26(f)(2)(B).

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[1] *See* Notice of Change to Rules 16, 26, 34, 37 and 45 of the Rules of Civil Procedure, available *here*.

[2] Reporter's Notes to MASS. R. CIV. P. 26(f), available at *here*.

[3] *Id.*

[4] *See* MASS. R. CIV. P. 16, available at *here*.

New Rule 26(f)(2)(C) specifically outlines the topics to be addressed during a 26(f) conference, including any preservation issues, the format of production and any associated metadata, the timing of productions, the assertion and preservation of claims of privilege or confidentiality, the allocation of costs associated with the productions, and any other issues surrounding electronically stored information. Rule 26(f)(3) subsequently allows a court to enter an order governing any of these topics.

Limitations on the Discovery of Electronically Stored Information

New Massachusetts Rule 26(f)(4) addresses limitations on the discovery of electronically stored information. The philosophy behind Rule 26(f)(4)(A)-(D) is similar to that of Federal Rule 26(b)(2)(B), reflecting a two-tiered approach to electronic discovery. Upon request, electronic discovery shall be produced, unless limited under Rule 26(f)(4)(E) (discussed below). However, a party believing that electronically stored information is "inaccessible" because of undue burden or cost (as defined in Rule 26(f)(1)) may object to the discovery. In the event that there is a motion to compel the discovery, or a motion for protective order, the court will then determine whether to order the discovery, considering the likely benefit of its receipt as weighed against the likely burden of its production, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.[5]

Massachusetts' Rule 26(f)(4)(E) then follows, stating that a court may "limit the frequency or extent of electronically stored information discovery, even from accessible sources, in the interests of justice."[6] The factors the court will consider are defined in Rule 26(f)(4)(E)(i)-(iv) and largely mirror those found in Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure.

Inadvertent Disclosure of Privileged or Confidential Material

Due to the constantly growing volume of electronically stored information involved in many cases, the Advisory Committee recognized the "increased likelihood that privileged and protected material can easily be inadvertently produced."[7] To address this growing concern, the Advisory Committee adapted Federal Rule of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502 to craft its own clawback provision in Massachusetts' Rule 26(b)(5)(B) and Rule 26(b)(5)(C).

The Advisory Committee included the same factors identified within Federal Rule of Evidence 502(b)[8] to determine whether there has been a waiver of privilege:

1. The disclosure was inadvertent;
2. The holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. The holder promptly took reasonable steps to rectify the error.

Safe Harbor Provision

Finally, Massachusetts' Rule 37(f) adds a "safe harbor" provision that protects parties from sanctions for failure to produce electronically stored information "lost as a result of the routine, good-faith operation of an electronic information system." This language mirrors Federal Rule of Civil Procedure 37(e).[9]

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[5] See MASS. R. CIV. P. 26(f)(4)(A)-(D), available *here*.
[6] MASS. R. CIV. P. 26(f)(4)(E), available *here*.
[7] Reporter's Notes to MASS. R. CIV. P. 26(b), available *here*.
[8] FED. R. EVID. 502(b) ("[T]he disclosure does not operate as a waiver in a federal or state proceeding if (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).").
[9] FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.").

Notably, the Advisory Committee states that the amendments to Massachusetts' Rules of Civil Procedure, including Rule 37(f), are "not intended to change any existing law in Massachusetts on the obligation to preserve evidence when litigation is reasonably anticipated or has commenced. A duty to preserve may exist as a matter of common law, statutory law, or by reason of a court order."[10] Therefore, existing Massachusetts case law should be consulted and considered with regards to current and future preservation obligations.

Closing Remarks

Many of these amendments are long overdue and bring Massachusetts in-line with other states and the existing Federal Rules of Civil Procedure regarding discovery of electronically stored information. If you have any questions regarding the application or effect of Massachusetts' amendments, please contact the members of Seyfarth's eDiscovery and Information Governance practice group.

Jay C. Carle is an associate of Seyfarth's eDiscovery and Information Governance practice group. *Matthew C. Christoff* is an attorney in the firm's Chicago office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Jay C. Carle at *jcarle@seyfarth.com*, Matthew C. Christoff at *mchristoff@seyfarth.com* or Erik Weibust at *eweibust@seyfarth.com*.

[10] Reporter's Notes to MASS. R. CIV. P. 37, available *here*.