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THE FEDERAL RULES AMENDMENTS AND E-DISCOVERY: PART 1

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On December 1, 2015, amendments to the Federal Rules of Civil Procedure took effect, altering provisions for Electronically Stored Information (ESI), including e-mail. Two changes are quite significant. First, the amendments emphasize “proportionality” and factors relating to discovery burdens. Second, the amendments require “bad faith” before imposing sanctions for failures regarding ESI preservation.

The immediate lessons to take away are also two:

- First, schools should still follow pre-amendments lessons and trainings with respect to implementing litigation holds and preserving ESI.
- Second, reaping the full benefits flowing from the amendments, however, will require schools to work even more closely with their counsel, particularly as your legal team formulates proportionality-based positions, and to better avoid a finding of bad faith.

According to Supreme Court order, the amendments apply to all proceedings pending on or commenced after December 1, 2015: http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf (last accessed Jan. 27, 2015). See also *Mckinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, Civ. A. 3:14-2498-B, 2016 WL 98603 (N.D. Tex. Jan. 8, 2016).

So from now on, a school attempting to resist an ESI discovery request “bears the burden of...showing that the discovery fails the proportionality calculation...by coming forward with specific information to address” the proportionality factors identified in the federal rules. *Mckinney/Pearl Rest. Partners*, 2016 WL 98603, at *4 (N.D. Tex. Jan. 8, 2016). Those factors are:

- the importance of the issues at stake in the action,
- the amount in controversy,
- the parties’ relative access to relevant information,
- the parties’ resources,
- the importance of the discovery in resolving the issues, and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

But the *Mckinney/Pearl Rest. Partners* decision points out the proportionality cuts both ways. It is not just a burden imposed on the party resisting discovery. The *Mckinney/Pearl Rest. Partners* decision explains that each party in a discovery dispute needs to do its best to demonstrate their respective positions on proportionality, pointing out that the requesting party must certify under threat of sanctions that the discovery request complies with proportionality, among other items. *Id.* at *4.

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Proportionality has been a concept in the discovery rules since at least 1983, but amendments over the years tended to “soften” the original provision; the 2015 Amendments “restores the proportionality factors to their original place,” both literally within the rule and conceptually as a positive obligation. See Cmte. Notes on Rules—2015 Amend. <http://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a/node85/titleV&edition=prelim> (last accessed Jan. 29, 2016). Counsel needs to work closely with the school’s tech team in order to assess and formulate arguments based on these proportionality factors (particularly the third and the last ones listed).

Finally, as to a school’s preservation obligations, the means to assure ESI preservation and production have not changed. But the lens through which a school’s (and its counsel’s) actions are viewed has changed. The amendments impose sanctions for “bad faith,” where ESI is not preserved, or is lost, based on intent. Negligence and mere mistakes may not be sanctionable, but ignoring a need to improve known problems, for example, could be sanctionable.

Schools officials and counsel must understand the school’s digital infrastructure and have appropriate policies and practices in place, and follow those policies in order to avoid sanctions, as has long been the case.

Part 2 of this article will address how the *Mckinney/Pearl Rest. Partners* decision treated obligations regarding the “format” for producing ESI, such as native format and in a form ordinarily kept by the school.

Please remember that SSKW offers Tech Pool services as well as litigation hold services that can help work through this 21st Century mine-field.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

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