Missouri Passes Law Bringing Discovery Rules More in Line with Federal Rules

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During the 2019 session, the Missouri legislature passed Senate Bill 224 (SB 224),[i] which was designed to bring the Missouri Rules of Civil Procedure (Rules) in line with the Federal Rules. SB 224 was signed by Governor Parsons on July 10, 2019 and took effect on August 28, 2019.[ii] These changes were intended to streamline and expedite the discovery process. The bill was introduced by Senator Tony Luetkemeyer, who described the bill as "a win-win for everyone" as it will lead to lower costs and quicker court proceedings.[iii]

Below is a summary of the changes:

Rule 56

- Rule 56.01(a): Explicit reference to electronic discovery added
- Rule 56.01(b)(1): Substantial language regarding proportionality added
- Rule 56.01(b)(1): Language added noting that discoverability does not equal admissibility
- Rule 56.01(b)(2): Section regarding limitations added – including limitations on burdensome electronic discovery
- Rule 56.01(b)(9): Section containing safe harbor for privileged materials and non-waiver for production of privileged materials added
- Rule 56.01(c)(2): Language added allowing protective order for allocation of expenses
- Rule 56.01(d): Language added allowing parties to stipulate to the timing of discovery

Rule 57

- Rule 57.01(a): Language added limiting number of Interrogatories to twenty-five, including subparts
- Rule 57.03(a): Language added limiting number of depositions to ten per party, and prohibiting depositions in other circumstances without leave of court
- Rule 57.03(b): Language added limiting deposition to one day of seven hours and allowing sanctions for party who impedes deposition
- Rule 57.04(a): Similar limiting language as Rule 57.03(b) added for written depositions

Rule 58

- Rule 58.01(a)(1): Language added specifically contemplating electronic discovery; language added requiring production only for items in a party's possession, custody, or control; language added permitting production of designated tangible things
- Rule 58.01(b)(1)(A): Language added requiring that responses specify the item or category of items produced
- Rule 58.01(b)(1)(C): Language added allowing a party to require production of electronic discovery in native format
- Rule 58.01(c): Language added requiring objections to each individual part of the request

Rule 59

- Rule 59.01(a): Language added limiting number of Requests for Admission to twenty-five without leave of court or stipulation of parties, but allowing more than twenty-five Requests for Admission regarding genuineness of documents

E-Discovery

One key change to the Rules was the recognition of the prevalence of e-discovery and the additional of language allowing limitations on this discovery. E-discovery is the discovery of electronically stored information (ESI). Prior to SB 224, Missouri rules were silent on e-discovery and case law limiting such discovery was scant. Unsurprisingly, attempts to limit burdensome e-discovery under the prior landscape were often unsuccessful. E-discovery has become an extremely time consuming and expensive aspect of litigation. The more ESI that is sought, the more ESI must be collected, processed, reviewed, and produced. Discovery costs can represent between 50% to 90% of total litigation costs.[iv] A study from the RAND Corporation in 2012 found that document review consumed, on average, 73% of document production costs – $0.73 of every dollar spent on e-discovery is spent on ESI review.[v] The revisions to the Rules will hopefully aid parties in limiting the amount of attorney time and money spent on review and production of e-discovery.

Below are some practical tips for employing these new e-discovery Rules in litigation:

- The Rules now specifically address the discovery of ESI.[vi] Rule 58.01 specifically allows parties to request production of ESI, and states that requests may specify that ESI be produced in native format.[vii] Practitioners should be aware of the requirement to produce ESI in native format where requested, and plan their document production accordingly. This may require different methods of document production. For example, counsel might want to utilize an e-discovery software or working with an e-discovery vendor in order to comply with requests for native files. Moreover, the savvy litigant will

think carefully about the format he/she prefers for reviewing and utilizing documents (searchable PDF, native, etc.) and draft discovery requests accordingly.

- Like the Federal Rules, the scope of discovery is now limited to discovery that is proportional to the needs of the case. Rule 56.01 states: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . provided the discovery is proportional to the needs of the case considering the totality of the circumstances, including by not limited to, 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 expenses of the proposed discovery outweighs its likely benefit."[viii] Practitioners would be wise to use this language to object to overly broad discovery requests that seek information and documentation that is not proportional to the needs of the case. In pressing these issues with a Court, a party should leverage the new language of the Rules emphasizing that a Court should consider the issues in the case, the damages sought, and the parties' access and ability to produce such documentation, etc.

- The Rules include limitations on the production of ESI where the information is "not reasonably accessible because of undue burden or cost."[ix] A similar provision exists in the Federal Rules, and is frequently used to limit the production of ESI stored in relatively inaccessible forms, such as back-up tapes or when a request requires an undue burden.[x] The party from whom discovery is sought will bear the burden of showing that the ESI is not reasonably accessible. Again, a smart practitioner will use this language to limit burdensome e-discovery. For instance, if a request for keyword searches to be performed on a particular email account yields hundreds of thousands of pages of emails, a party could use this new Rule language to argue that the amount of attorney time required to review these hundreds of pages would constitute an undue burden.

- Rule 56.01(b)(9) offers stronger protections for attorney-client and work-product privileged materials and clearly states that production of privileged or work product in documents or ESI is not a waiver of the privilege. The Rule requires that if a party makes a claim that information produced in discovery is protected by privilege or as work-product, the receiving party must return, sequester, or destroy such material and may not use or disclose the information until the claim is resolved. Further, the Rule requires an attorney who discovers privileged communications of another party to not read (or stop reading) such communications, to notify the producing party, and to delete or return the information. While not specific to e-discovery, this provision is particularly useful in cases with a large quantity of ESI, where the risks of inadvertent disclosure are inherently higher. Practitioners should keep this language in mind should they need to request inadvertently produced documents be returned under this new safe harbor provision.

- Parties may now seek a protective order to shift the cost of discovery to the requesting party. Rule 56.01(c) now includes language allowing courts to enter an order "that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses"[xi] As noted above, e-discovery is time consuming and costly. Now, in cases where the requesting party is broadly seeking ESI that would subject the producing party to undue burden or expense, the producing party can (and should!) argue that the requesting party should bear the cost of the e-discovery.

Although SB 224 went into effect August 28, 2019, it remains to be seen when and if the Missouri Supreme Court will promulgate new rules in line with SB 224. Article V, Section V of the Missouri Constitution notes that any rule may be "amended in whole or in part by a law limited to the purpose." Typically, the Supreme Court issues any new rules or rule amendments every six months.[xii] In the past, the Court has issued new rules upon passage of legislation to conform to the new language. In this instance, the Missouri Supreme Court has noted on its website under the relevant rule, that "SB 224 (2019) *purports* to amend this Rule." Thus, it is unclear if the Supreme Court intends to adopt the language of SB 224. Additionally, it is unclear if the Court will entertain challenges to SB 224. Counsel for the Missouri Supreme Court indicated that, at this point, all citations to the Rules should clearly note which version is being cited.

The updates to bring the Missouri Rules more in line with the Federal Rules should benefit producing parties attempting to bring reasonable parameters to the scope of e-discovery in litigation. Although it remains to be seen how Missouri courts will interpret the updates to the Rules, practitioners should utilize the Rules to argue for limitations on burdensome e-discovery. Moreover, given the now parallel language between the Missouri Rules and Federal Rules, litigants should argue for the application of federal case law limiting discovery based on the proportionality requirement and allowing for cost shifting where there is undue burden and expense.

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[i] Senate Bill No. 224, https://www.senate.mo.gov/19info/pdf-bill/tat/SB224.pdf.

[ii] Actions Regarding SB 224, https://www.senate.mo.gov/19info/BTS_Web/Actions.aspx?SessionType=R&BillID=1055374.

[iii] "Parson signs several lawsuit, court reform and business-related bills," News Tribune, July 11, 2019, available online at http://www.newstribune.com/news/local/story/2019/jul/11/parson-signs-several-lawsuit-court-reform-and-business-related-bills/786162/.

[iv] John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, n 5 (2010), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1482&context=dlj.

[v] "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery," Nicolas M. Pace and Laura Zakaras, RAND Corporation, available online at https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

[vi] Rule 56.01(a) includes the production of ESI within the acceptable methods of discovery.

[vii] Rule 58.01(a)(1)(A); Rule 58.01(b)(1)(C).

[viii] Rule 56.01(b)(1). The factors included in this rule to determine proportionality are the same factors included in Federal Rule of Civil Procedure 26(b)(1).

[ix] Rule 56.01(b)(3). The same provision in the Federal Rules of Civil Procedure is located at Rule 26(b)(2)(B).

[x] *See Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003) (finding that backup tapes are generally considered an inaccessible data format).
[xi] Rule 56.01(c)(2) (very similar language is used in Rule 26(c)(1)(B) of the Federal Rules of Civil Procedure).
[xii] *Id*. (The Supreme Court "shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication.").