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Pennsylvania Charts Its Own Path on Electronic Discovery

By Jonathan B. Stepanian, *Litigation News* Associate Editor – September 4, 2012

Pennsylvania has adopted [Rules of Civil Procedure](#) [PDF] relating to electronic discovery. The state [Supreme Court](#), however, has chosen to forge its own way in developing the law around that discovery by expressly rejecting federal electronic-discovery jurisprudence in the commentary accompanying the rule amendments.

Incorporation of “Electronically Stored Information” into Discovery Rules

On June 6, 2012, the Pennsylvania Supreme Court published amendments to the state’s civil procedure rules. The amended rules specifically recognize and permit the discovery of “electronically stored information.” Under the amendments, parties may request the production of electronically stored information and specify the format in which it is to be produced. A note accompanying the rules suggests that parties seeking electronic information “should be as specific as possible.” The note further states, “Limitations as to time and scope are favored, as are agreements between the parties on production formats and other issues.” The amended rules, however, do not compel the parties to meet and confer over electronic-discovery-related issues.

Federal practitioners are likely familiar with electronic discovery, which has been the subject of widely publicized litigation in federal courts. [Judge Shira Scheindlin](#) of the [U.S. District Court for the Southern District of New York](#) authored a series of opinions related to electronic discovery in *Zubulake v. UBS Warburg*. She revisited those issues in her 2010 decision in *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC* [PDF], captioning her decision “*Zubulake* Revisited: Six Years Later.” Similarly, in *Qualcomm, Inc. v. Broadcom Corp.* [PDF], the [U. S. District Court for the Southern District of California](#) levied \$8.5 million in sanctions and referred counsel to the state bar in connection with electronic-discovery violations.

Pennsylvania Distances Itself from Federal E-Discovery Rulings

In adopting its electronic-discovery rules, the Pennsylvania Supreme Court expressly rejected federal jurisprudence that has developed on this issue. In its [explanatory comment](#) [PDF], the court noted that “[t]hrough the term ‘electronically stored information’ is used in these rules, there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information.” The comment states that, instead, electronic-discovery issues are to be assessed on the basis of “traditional principles of proportionality under Pennsylvania law.”

The court’s explanatory comment also expands on the proportionality standard, which is applicable to all state-court discovery. The comment notes that the standard requires a consideration of factors, including “the importance and complexity of the issues and the amounts at stake,” “the cost, burden and delay that may be imposed on the parties,” ease of production, and other relevant factors.

Rejection of Federal Cases Reflects Diversity of State-Court Issues

The Pennsylvania Supreme Court’s rejection of “federal jurisprudence” appears to be focused on cases that follow the federal rules rather than the federal rules themselves, according to Richard S. Stockton, Chicago, cochair of the ABA Section of Litigation’s [Technology for the Litigator Committee](#). “I’m not sure that this is such a dramatic departure from the Federal Rules of Civil Procedure,” says Stockton, because “proportionality is something that has taken hold in the federal rules.” Although both the Pennsylvania and [federal rules](#) permit the discovery of electronic information in a way proportional to the case, “the Pennsylvania Supreme Court seems more sensitive to the concept that litigants may be using electronic discovery as a tool not to obtain information but to force a settlement for nuisance value,” according to Stockton.

Although Pennsylvania has expressly embraced electronic discovery, the state’s rejection of cases applying the federal rules is “a recognition of the different type of litigation that occurs in state courts,” according to Aaron H. Gould, Newark, New Jersey, cochair of the Section’s [Pretrial Practice & Discovery Committee’s](#) Electronic Discovery Subcommittee. The Pennsylvania Supreme Court appears cognizant of the diverse types of cases that are filed in

state court, often with lower monetary stakes. "It looks like the court doesn't want a separate branch of electronic-discovery cases, instead opting to keep electronic discovery issues in the framework of the normal discovery rules," Gould says. Creating a separate line of electronic-discovery cases, as the federal courts have done, could raise the cost of litigation in smaller disputes, according to Gould.

Stockton agrees, noting that the Pennsylvania amendments reflect "sensitivity to the costs of discovery more consistent with the types of cases that they see." Stockton does not believe that Pennsylvania is prepared to be tied to existing federal precedent in cases such as *Zubulake* and *Qualcomm*, both of which "threw the book pretty hard for not finding every nugget of electronic information that exists and disclosing it to the other side." Pennsylvania appears prepared, however, to scale up the permissible scope of electronic discovery by developing of its own precedent in appropriate cases through its own proportionality standards.

Keywords: e-discovery, proportionality

Related Resources

- » [Amended Pa.R.C.P. 4009.1, 4009.11, 4009.12, 4009.21, 4009.23 and 4011 \[PDF\]](#) (June 6, 2012).
- » [Explanatory Comment—Electronically Stored Information \[PDF\]](#) (June 6, 2012).
- » [Pennsylvania Supreme Court Order of June 6, 2012 \[PDF\]](#).
- » Kristine L. Roberts, *Qualcomm Fined for "Monumental" E-Discovery Violations—Possible Sanctions Against Counsel Remain Pending*, Litigation News (May 2008).
- » Lindsay M. Sestile, *Pension Committee and the New Standards for E-Discovery Shortfalls*, Litigation News (March 3, 2010).

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