

SIGNIFICANT CHANGES COMING TO MISSOURI TRIAL PRACTICE: HOW SENATE BILL 224 FALLS SHORT

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Tag: [Missouri Trial Practice](#)



In this final installment of our four-part series, we analyze areas in which the Missouri Supreme Court Rules do not align with the Federal Rules of Civil Procedure and the implications on Missouri trial practice.

Significant Changes Coming to Missouri Trial Practice Series

Expert Discovery

Unlike [FRCP 26\(b\)\(4\)](#), the existing Missouri rules do not require expert reports or limit the scope of expert discovery. Rather, the current [Rule 56.01\(b\)\(4\)](#) permits disclosure of experts expected to testify at trial and “the general nature of the subject matter on which the expert is expected to testify.” A party may take a deposition of the expert to discover “the facts and opinions to which the expert is expected to testify.” Missouri rules remain silent on whether report drafts and correspondence between expert and counsel are protected.

An earlier draft of Senate Bill 224 would have aligned Rule 56.01(b)(4) with FRCP 26(b)(4) by requiring any interrogatory identifying an expert witness be accompanied by a written expert report that

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included:

- a complete statement of all opinions the witness will express and the basis and reasons for them;
- the facts or data considered by the witness in forming them;
- any exhibits that will be used to summarize or support them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years;
- a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- a statement of the compensation to be paid for the study and testimony in the case.

This earlier draft of Senate Bill 224 would have also protected drafts of any report or disclosure. Reportedly, these proposed amendments to Rule 56.0.1(b)(4) were removed during the final stages of debate due to concerns expressed about the costs associated with expert reports.

The scope of expert discovery permitted in Missouri remains ambiguous. On one hand, Rule 56.01(b)(4) could be read as limiting the scope of expert discovery to what is identified in the plain language of the rule. An alternate reading would allow discovery into report drafts and correspondence between an expert and counsel consistent with the current practice in Missouri.

Electronically Stored Information

The amendments proposed by [Senate Bill 224](#) fall short in some respects with regard to electronically stored information ("ESI").

FRCP 26(f) Conference

Under the [Federal Rules](#), parties are directed to conduct a Rule 26(f) conference "as soon as practicable. As part of that conference, parties must discuss any issues about preserving discoverable information" and develop a proposed discovery plan. In 2015, FRCP 26(f)(3) was amended to require parties to include in their discovery plan issues about preserving ESI and court orders under Federal Rule of Evidence 502. Sanctions may be awarded against a party or its attorney if they fail to participate in good faith in the development and submission of a discovery plan.

Absent from the Missouri Supreme Court Rules is any requirement that the parties participate in the equivalent of a Rule 26(f) conference and prepare a discovery plan. Requiring parties to engage in these processes early on can mitigate against ESI-related issues throughout the course of litigation. *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing electronic Document Production*, 19 Sedona Conf. J. 1, 71 (2018) ("the Federal Rules (since 2006), most district courts, and an increasing number of state court rules require that at the outset of a matter parties consider, discuss, and attempt to agree upon what ESI, if any, will be the subject to discovery, and issues that may attend such discovery.").

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Preservation of ESI

[FRCP 37\(e\)](#) authorizes and specifies measures a court may employ in the event ESI is lost provided (1) the ESI should have been preserved in the anticipation or conduct of litigation and (2) the party failed to take reasonable steps to prevent it. While [Rule 61.01\(d\)](#) does provide for the imposition of sanctions if a party fails to produce documents under Rule 58.01, the existing Missouri Supreme Court Rules do not expressly address the preservation of ESI in anticipation or conduct of litigation.

While enactment of Senate Bill 224 would make significant progress in bringing the Missouri Supreme Court Rules into alignment with the Federal Rules of Civil Procedure, the legislation would have better achieved its goal of making discovery more efficient and economical by conforming the Missouri Supreme Court Rules with the Federal Rules of Civil Procedure in the areas of expert discovery, preservation of ESI, and Rule 26(f) conferences.

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