SIGNIFICANT CHANGES TO MISSOURI TRIAL PRACTICE: SENATE BILL NO. 7 AND SENATE BILL NO. 224

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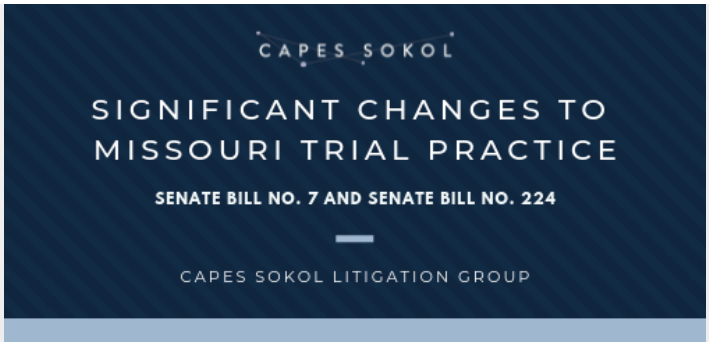

Tag: Missouri Trial Practice

On Wednesday, Governor Parson signed into law Senate Bill 224, which will bring the Missouri Supreme Court Rules into closer alignment with the Federal Rules of Civil Procedure. In addition, he signed into law Senate Bill No. 7 which places limitations on Missouri's existing joinder and venue rules.

Significant Changes Coming to Missouri Trial Practice Series

Missouri Supreme Court Rule 56.01

Notably, the Missouri Supreme Court Rules will expressly recognize for the first time the role of electronically stored information ("ESI") in discovery.

1. **Rule 56.01(b)(1)** will limit the scope of discovery to that which is proportional to the needs of the case. As in FRCP 26(b)(1), the rule will provide that the court may consider six proportionality factors: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense

of the proposed discovery outweighs its likely benefit.

Rule 56.01(b)(1) will retain its broader definition of relevancy as compared to its federal counterpart: "Parties may obtain discovery regarding any manner, not privileged that is *relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party…." (emphasis added).

2. In **Rule 56.01(b)(3)**, the Legislature adopted FRCP 26(b)(2)(B) providing a party is not required to provide ESI from sources the party identifies as "not reasonably accessible because of undue burden or cost." A court may nonetheless order the discovery upon a showing of good cause.
3. The addition of **Rule 56.01(b)(9)** will provide a procedure for clawing back attorney-client privileged or trial preparation materials consistent with FRCP 26(b)(5)(A)-(B):

he party making a claim that has been produced may notify any party that received the information and the basis for the claim. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.

Drawing from FRE 502(b), Rule 56.01(b)(9) will provide "he production of privileged or work-product protected documents, electronically stored information or other information whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in the proceeding."

Unlike FRE 502(b), Rule 56.01(b)(9) would not require the holder of the privilege or protection to have (1) taken reasonable steps to prevent disclosure and (2) promptly taken reasonable steps to rectify the error in order for the disclosure to not operate as a waiver in a federal or state proceeding.

The protection afforded by Rule 56.01(b)(9) would also appear to be limited in its protection to the current proceeding. However, FRE 502(c) does provide, in part, that a disclosure made in a state court proceeding that is not subject to a state-court order concerning wavier the disclosure does not operate as a waiver in a federal proceeding if the disclosure "is not a waiver under the law of the state where the disclosure occurred."

Rule 56.01(b)(9) would also be distinguishable by placing affirmative and immediate responsibilities on an attorney who receives privileged information; the attorney would be required to: (i) not read the information, (ii) to notify the attorney whose communications are contained therein, and (iii) to promptly return or delete the information.

4. A party may per **Rule 58.01(b)(1)(C)** request ESI be produced in native format.

These amendments will go into effect on August 28, 2019.

Implications on Missouri Discovery Practice

In analyzing these amendments, we were reminded of the adage "better late than never." Missouri courts and litigators have encountered ESI for years, albeit with no guidance from the Missouri rules. Yet, FRCP 26(b)(2) – the basis for proposed Rule 56.01(b)(3) – was amended in 2006 to address issues raised by difficulties in locating, retrieving, and producing ESI.

Due to the exponential growth of ESI in litigation, parties need tools that enable them to produce ESI more efficiently and economically. The addition of Rule 56.01(b)(9) will place parties in a better position to do so as it enables parties to reduce their costs in conducting privilege review and to produce documents sooner, while providing them an additional layer of protection should Protected Information be inadvertently produced.

Absent from the Missouri Amendments

Even with the Senate Bill 224 going into effect on August 28th, there are several areas in which the Missouri rules fall short. Absent from the rules is any requirement that the parties participate in the equivalent of a Rule 26(f) conference or prepare a discovery plan. Requiring parties to engage in these processes early on can mitigate against ESI-related issues throughout the course of litigation. Nor do the existing rules address the preservation of ESI in anticipation or conduct of litigation like FRCP 37(e).

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