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A Discussion of the Seventh Circuit’s Electronic Discovery Pilot Program and Its Impact on Early Case Assessment

TINA B. SOLIS*

| | |
|--|-----|
| I. INTRODUCTION | 563 |
| II. THE SEVENTH CIRCUIT’S ELECTRONIC DISCOVERY PILOT PROGRAM..... | 564 |
| A. AN OVERVIEW OF THE PILOT PROGRAM AND PRINCIPLES | 564 |
| B. THE PRINCIPLES EMPHASIZE COOPERATION AND PROPORTIONALITY | 565 |
| III. THE PRINCIPLES REQUIRE THAT THE PARTIES MEET AND CONFER PRIOR TO THE INITIAL STATUS CONFERENCE..... | 567 |
| A. TOPICS TO BE DISCUSSED PRIOR TO THE INITIAL STATUS CONFERENCE | 567 |
| B. THE PRINCIPLES REQUIRE EACH PARTY TO HAVE A LIAISON TO ASSIST IN RESOLVING E-DISCOVERY DISPUTES | 568 |
| IV. THE PRINCIPLES ALSO ADDRESS TOPICS TO BE DISCUSSED AT THE RULE 26 CONFERENCE..... | 569 |
| V. CONCLUSION..... | 572 |

I. INTRODUCTION

The Federal Rules of Civil Procedure were amended, effective December 1, 2006, to address issues regarding the discovery of Electronically Stored Information (ESI).¹ Rule 34 now authorizes requests for production of documents, including “electronically stored information.”² Such authority, however, can carry with it tremendous consequences. Since ESI can include voluminous amounts of data, e-discovery creates the opportunity to unduly burden opposing counsel with unrealistic discovery requests. As such, certain situations do not justify the sometimes over-reaching requests that seek to obtain ESI. Amended Federal Rule 26(b)(2)(B) addresses this issue and provides protection from unduly burdensome or expensive discovery requests.³ The rule “aspires to eliminate one of the most prevalent of

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1. FED. R. CIV. P. 16, 26, 33, 34, 37, 45.

2. FED. R. CIV. P. 34.

3. FED. R. CIV. P. 26.

all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party.”⁴ Rule 26 essentially codifies the court’s findings in *Zubulake v. UBS Warburg*, which was the seminal case on cost shifting in e-discovery prior to the amendments.⁵ Nonetheless, e-discovery costs have continued to increase.⁶

As a result, trial bars and local jurisdictions have performed studies on the actual effects of e-discovery. In 2008, the Sedona Conference issued a proclamation that cooperation is analogous to zealous representation.⁷ The Sedona Principles are well known in the profession for setting forth the best practices in the e-discovery arena. In 2009, the Institute for the Advancement of the American Legal System reported that “it costs between \$5,000 and \$7,000 to process, review, cull, and produce one gigabyte of data. A midsize case with 500 GB of data could cost \$2.5 to \$3.5 million on discovery alone.”⁸ The Sedona Conference’s Proclamation, along with the skyrocketing costs of e-discovery, led the Seventh Circuit to take action.

II. THE SEVENTH CIRCUIT’S ELECTRONIC DISCOVERY PILOT PROGRAM

A. AN OVERVIEW OF THE PILOT PROGRAM AND PRINCIPLES

The Seventh Circuit Court of Appeals’ Electronic Discovery Committee created a pilot program called the Principles Relating to the Discovery of Electronically Stored Information (“Principles”).⁹ The members of the Seventh Circuit’s E-Discovery Committee wanted to “reduce the rising burden and cost of discovery in litigation in the United States brought on primarily by the use of [ESI] in today’s electronic world.”¹⁰

The pilot program includes a set of guidelines, or principles, to assist parties in dealing with electronic discovery issues. During the program’s

4. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (citing Rule 26 Advisory Committee Notes).

5. *See Zubulake v. UBS Warburg, L.L.C.*, 217 F.R.D. 309 (S.D.N.Y. 2003).

6. Seventh Circuit Elec. Discovery Comm., *Seventh Circuit Electronic Discovery Pilot Program* 7 (Oct. 1, 2009), available at <http://www.7thcircuitbar.org/associations/1507/files/Statement1.pdf>.

7. The Sedona Conference, *The Sedona Conference Cooperation Proclamation 1* (The Sedona Conference Working Group Series, July 2008), available at http://www.thosedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

8. *7th Circuit Pilot Program Provides a New Approach to E-Discovery*, THE THIRD BRANCH, Nov. 2009, at 4, available at <http://www.uscourts.gov/News/TheThirdBranch/TTBviewer.aspx?doc=/usCourts/News/TTB/archive/2009-11%20Nov.pdf?page=4>.

9. Seventh Circuit Elec. Discovery Comm., *supra* note 6, at 11.

10. *Id.* at 7.

first phase, from October 2009 to May 2010, certain district court judges, magistrate judges, and bankruptcy judges in the Seventh Circuit have agreed to adopt the Principles in select cases through the entry of a standing order.¹¹

The Principles are divided into three categories. The first category is called "General Principles" and sets forth the program's purpose.¹² The second category involves "Early Case Assessment Principles" and identifies the issues the parties and their counsel should be assessing and discussing once litigation has been initiated.¹³ The third category is the "Education Provisions" and requests that parties and their counsel become familiar with the fundamentals of the discovery of ESI.¹⁴

Currently, there are approximately eighty-one cases that are guided by the Principles.¹⁵ After the first phase concludes, in May 2010, the Seventh Circuit's Electronic Discovery Committee will receive feedback from the lawyers and judges involved, and use this feedback to reassess and refine the Principles.¹⁶ "Phase Two [of the pilot program] will then proceed from June 2010 to May 2011. In May 2011, the Seventh Circuit's E-Discovery Committee will then [formally] present its findings and issue its final Principles."¹⁷

The Principles recognize the broad effect e-discovery has had on litigation. The Principles attempt, through cooperation and proportionality, to narrowly tailor e-discovery to the relevant issues in the dispute and thereby reduce litigation costs. This article discusses the Principles' impact on the tasks relating to ESI that must be identified and discussed not only with the client, but also with opposing counsel, prior to the commencement of the discovery process.

B. THE PRINCIPLES EMPHASIZE COOPERATION AND PROPORTIONALITY

The Principles are intended "to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Rule 26(f)(2)."¹⁸ In order to achieve this goal, the Principles focus on cooperation and proportionality. Specifically, the General Principles provide:

11. *Id.* at 10.

12. *Id.* princs. 1.01-1.03, at 11.

13. *Id.* princs. 2.01-2.06, at 11-16.

14. Seventh Circuit Elec. Discovery Comm., *supra* note 6, princs. 3.01-3.02, at 16.

15. Webinar: Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program (Law.com broadcast Feb. 17, 2010).

16. Seventh Circuit Elec. Discovery Comm., *supra* note 6, at 10.

17. *Id.*

18. *Id.* at 9.

Principle 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.¹⁹

Principle 1.02 (Cooperation)

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.²⁰

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.²¹

These General Principles reiterate the Sedona Conference's Proclamation and set forth the overarching theme for discovery. The days of crushing litigation tactics, overly broad requests, and standard discovery objections are gone. Principle 1.03 verifies that discovery requests must be specific and narrowly tailored.²² As a result, counsel must work with his or her

19. *Id.* princ. 1.01, at 11.

20. *Id.* princ. 1.02, at 11.

21. Seventh Circuit Elec. Discovery Comm., *supra* note 6, princ. 1.03, at 11.

22. *Id.*

client to identify the pertinent issues in the dispute so that he or she can speak intelligently with opposing counsel about how the client's information is stored and retrieved prior to the initial status conference. Oftentimes, this may be difficult early on in the litigation when issues continue to be investigated, but the Principles now require that counsel make every effort to focus on the issues that are at the crux of the dispute and then identify where ESI responsive to those issues is stored and how it is retrieved.²³

Counsel for the parties also must work together to ensure that e-discovery requests and costs are proportional to the amount at stake, the issues being litigated, and discovery does not unnecessarily prolong the case's efficient adjudication.²⁴ Discovery about discovery is discouraged under the Principles.²⁵ Instead, requests should be narrowly tailored.²⁶ Finally, opposing counsel need to work with one another in an attempt to resolve their discovery disputes before seeking court intervention, in an attempt to reduce the increasing costs of discovery.

III. THE PRINCIPLES REQUIRE THAT THE PARTIES MEET AND CONFER PRIOR TO THE INITIAL STATUS CONFERENCE

The second category of Principles, the Early Case Assessment Principles, identifies the topics that the parties and their counsel should discuss before the initial status conference.

A. TOPICS TO BE DISCUSSED PRIOR TO THE INITIAL STATUS CONFERENCE

Principle 2.01 of the pilot program requires counsel to meet *prior to the initial status conference* to discuss, among other things:

- (1) the identi[ty] of relevant and discoverable ESI; (2) the scope of discoverable ESI; (3) the formats for preservation and production of ESI; (4) the potential for conducting discovery in phases . . . as a method for reducing costs and burden; and (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues²⁷

According to the Principles, each party, including its attorneys and clients, must inventory its own data and retrieval processes when litigation

23. *Id.* at 12.

24. *Id.* at 14.

25. *Id.* princ. 2.04, at 14-15.

26. Seventh Circuit Elec. Discovery Comm., *supra* note 6, at 14.

27. *Id.* princ. 2.01, at 11-12.

is initiated. This must be done immediately as Principle 2.01 mandates that the parties meet and confer regarding ESI issues prior to the initial status conference, i.e., before the parties have even gone into court.²⁸ The meet and confer is of utmost importance because issues regarding the format, timetable, and scope of ESI will be determined.

At the meet and confer, both parties must discuss their entire discovery plan and must narrow and agree on the discoverable issues/topics.²⁹ Both parties should come to the meet and confer knowing the format and types of ESI they seek, their proposed discovery requests, and the timeline for production. After discussions with opposing counsel, the parties must cooperate and ultimately reach an agreed discovery plan to present to the court at the initial status conference.

The Principles provide that any disputes regarding ESI that parties are unable to resolve at the meet and confer must be brought to the court's attention at the initial status conference or as soon as practicable.³⁰ If the court concludes that a party failed to cooperate in good faith in the meet and confer process, it may require further discussions prior to the implementation of discovery and/or, if necessary, impose sanctions.³¹ The Principles also provide that if a dispute is not brought to the court's attention until it becomes advantageous for a party to do so, that party may be faced with cost shifting or sanctions.³² Thus, the Principles incentivize the parties to bring unresolved ESI disputes to the court's attention as soon as possible.

As noted herein, ESI issues have a profound impact on the entire case, and must be carefully analyzed from all aspects. If a detail about ESI is overlooked at the meet and confer, counsel risks waiving it.³³ Parties must therefore map out their entire discovery strategy, including the format of ESI sought and the method for dealing with production of privileged information, as soon as litigation commences.

B. THE PRINCIPLES REQUIRE EACH PARTY TO HAVE A LIAISON TO ASSIST IN RESOLVING E-DISCOVERY DISPUTES.

Principle 2.02 of the Seventh Circuit's Pilot Program requires each party to designate an e-discovery liaison to meet, confer, and attend court hearings on the subject.³⁴ The e-discovery liaison must generally be able to

28. *Id.* princ. 2.01(a), at 11.

29. *Id.*

30. *Id.* princ. 2.01(b), at 12.

31. Seventh Circuit Elec. Discovery Comm., *supra* note 6, princ. 2.01(d), at 12.

32. *Id.*

33. *See generally id.* princ. 2.04, at 14-15 (explaining the necessary procedures for preservation of ESI).

34. *Id.* princ. 2.02, at 12.

(a) participate in e-discovery dispute resolution, (b) know the party's e-discovery efforts, (c) be familiar with the party's electronic systems and capabilities, and (d) know about the technical aspects of e-discovery.³⁵

Counsel and their clients must plan appropriately to determine who will serve as the liaison. Prior to the implementation of the Principles, counsel oftentimes consulted with a client's in-house Information Technology (IT) Manager to assist in the identification and location of the client's ESI. While consulting with the client's in-house IT Manager is still an important step in the early case assessment, counsel should strongly consider retaining an expert to serve in the role of liaison. An expert in the field of e-discovery can assist counsel and his or her client in identifying where the client's electronic information is stored and what type of electronic information counsel should be requesting from his or her opponent. This information can then be discussed between the parties at the meet and confer. If a dispute arises, the liaisons can get involved to try to resolve it. Indeed, the intent of the liaison requirement is "to get the experts talking to one another" to streamline the process.³⁶ Moreover, if a dispute must be brought to the court's attention, having the parties' liaisons available to assist the judge in understanding the parties' ESI will be invaluable.

Electronic discovery represents thirty-five percent of the total cost of litigation.³⁷ That, coupled with the pilot program on e-discovery and the time in which ESI must be assessed, demonstrates that best practices require engaging an e-discovery expert to assess and implement an e-discovery strategy at the outset of litigation and to serve as the party's liaison. Moreover, experts in this field are oftentimes lawyers themselves and understand and appreciate the legal issues as well as the technical aspects surrounding ESI and e-discovery. An expert is therefore in the best position to serve as the liaison, so he or she can properly assess, strategize, and implement an e-discovery plan at the outset of the litigation.

IV. THE PRINCIPLES ALSO ADDRESS TOPICS TO BE DISCUSSED AT THE RULE 26 CONFERENCE

In addition to preservation requests and orders,³⁸ the Principles also provide guidance on the topics to be discussed at the Rule 26(f) conference or shortly thereafter. The Principles provide:

35. *Id.*

36. Webinar: Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program (Law.com broadcast Feb. 17, 2010).

37. OSTERMAN RESEARCH, INC., THE GROWING IMPORTANCE OF E-DISCOVERY ON YOUR BUSINESS 1 (2008).

38. Seventh Circuit Elec. Discovery Comm., *supra* note 6, princ. 2.03, at 13-14.

Principle 2.05 (Identification of Electronically Stored Information)

- (a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.
- (b) Topics for discussion may include, but are not limited to, any plans to:
 - (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;
 - (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
 - (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.³⁹

Principle 2.06 (Production Format)

- (a) At the Rule 26(f) conference, counsel or the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.
- (b) ESI stored in database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

39. *Id.* princ. 2.05, at 15.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text searchable electronic images that may be contemplated by each party.⁴⁰

Cost-saving measures are a topic for discussion at the Rule 26 conference.⁴¹ For example, the parties should, in good faith, attempt to agree on whether the production will eliminate duplicative material in its entirety or for just a particular subset of the production.⁴² If one custodian's data is almost identical to another, limiting or eliminating the discoverability of that data will save time and costs.

Another important topic of the Rule 26 conference is the type of searches that will be implemented for each party's production.⁴³ These searches can be based on keywords, concept clustering, or a number of other advanced culling technologies. Parties are strongly encouraged to work with one another and use their liaisons to develop and agree upon a search methodology, which may include defined search terms. It is advantageous for both parties to agree on their own list of terms as opposed to having the court impose its own methodology, which may benefit neither.⁴⁴

Finally, another area that must be addressed during the Rule 26 conference is the format(s) for production of ESI.⁴⁵ Typically, a party should seek the ESI in its native format. Obtaining documents in their native format allows counsel to review metadata.⁴⁶

40. *Id.* princ. 2.06, at 15-16.

41. *Id.* princ. 2.06(d), at 16.

42. *Id.* princ. 2.05(b)(1), at 15.

43. Seventh Circuit Elec. Discovery Comm., *supra* note 6, princ. 2.05(b)(3), at 15.

44. Webinar: Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program (Law.com broadcast Feb. 17, 2010).

45. Seventh Circuit Elec. Discovery Comm., *supra* note 6, princ. 2.06(a), at 15.

46. The Dictionary.com definition of metadata is "data about data." See Dictionary.com, <http://dictionary.reference.com/> (last visited May 6, 2010) (citing Wordnet 3.0 by Princeton University (2006)) (entry for "metadata," second definition). It includes information regarding prior versions of a document; deletions, additions, and changes to a document; dates and times of review and revision; and other historical information about a document. See Wikipedia.com, <http://en.wikipedia.org/Metadata> (last visited May 6, 2010).

The courts are undecided as to whether or not there is a presumption for, or against, providing metadata. Some courts find that because affirmative action must be taken to remove metadata from documents, it should be provided, unless the producing party objects.⁴⁷ Other courts, including in Illinois, see no need to provide metadata, unless it is specifically requested, because of the “undue cost and burden” of reproducing and recovering metadata.⁴⁸

The pilot program provides that “data in metadata fields that are frequently updated automatically, such as last-opened dates,”⁴⁹ are generally “not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable.”⁵⁰ The parties, therefore, should negotiate a mutually acceptable metadata discovery plan prior to the initial status conference, including the types of metadata they seek. With a plan, the parties can avoid being subjected to the court’s status quo, which again may benefit neither. Moreover, the parties may waive the issue if the format for production is not discussed.⁵¹

V. CONCLUSION

The discoverability of ESI has changed the entire course of litigation. To address these changes, the Federal Rules of Civil Procedure have been amended, and local jurisdictions, including the Seventh Circuit, have implemented programs to supplement the rules with the hopes of fostering cooperation, requiring proportionality, and reducing the costs associated with e-discovery. As required by the Seventh Circuit’s Principles, parties must “[f]amiliarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, . . . applicable State Rules of Procedure; [f]amiliarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, and [f]amiliarize themselves with [the Seventh Circuit’s] Principles.”⁵²

In the event of litigation, counsel and his or her client must carefully map out an e-discovery plan at the outset, which includes hiring a liaison and adequately preparing for the meet and confer prior to the initial status

47. *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 652 (D.C. Kan. 2005).

48. *Autotech Techs. L.P. v. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D. Ill. 2008); *Ky. Speedway, L.L.C. v. Nat’l Ass’n of Stock Car Auto Racing, Inc.*, 2006 WL 5097354, 8 (E.D. Ky. 2006); *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D.C. Del. 2006).

49. *Seventh Circuit Elec. Discovery Comm.*, *supra* note 6, princ. 2.04(d)(4), at 14.

50. *Id.* princ. 2.04(d), at 14.

51. *Id.* princ. 2.04(c), at 14.

52. *Id.* princ. 3.01, at 16.

conference. At the initial status conference, the parties must raise any disputes with the court that the parties' liaisons were unable to resolve. The failure to do so may result in a waiver of those issues. At the time of the Rule 26 conference, the parties must also be prepared to discuss cost-saving measures and the type of format for the production, among other issues.

The implementation of the Principles is forcing counsel and their clients to not only understand the identity and location of the client's ESI prior to the initial status conference, but also to meet and confer with opposing counsel prior to the initial status conference.⁵³ The intent of the Principles is that through cooperation and proportionality, the costs associated with e-discovery can be dramatically reduced by focusing the parties' attention on the issues that are at the crux of the dispute, thereby disallowing unfettered discovery.

53. *Id.* princ. 2.01, at 11-12.