The Seventh Circuit Electronic Discovery Pilot Program – Hope for the Future

Introduction

What is the first thing you think of when you hear the term electronic discovery? “It’s just too expensive;” “It’s too complicated;” “I’m not a techie;” or maybe even my favorite, “How can I learn electronic discovery when my kids program our VCR at home?” Well, before you drive that ’68 Pontiac GTO off into the sunset of your legal career, I’m here to tell you help is on the way in the form of the SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM. The SEVENTH CIRCUIT E.DISCOVERY PILOT PROGRAM is available at http://www.7thcircuitbar.org/associations/1507/files/Statement1.pdf (“PILOT PROGRAM”).

Electronic discovery has introduced a whole new lexicon for lawyers. Hash values,1 de-duplication,2 native format,3 litigation holds,4 slack space,5 metadata,6 and OCR7 are just a few of the new terms of art that ediscovery has brought to the forefront of our legal consciousness. Instant messaging (“IM”) is no longer just for communicating with our kids; now we must learn if our clients’ information systems are capable of capturing instant or text messages sent or received by their employees.

Don’t get me wrong, I’m not suggesting that computer and email systems are not complex or that ediscovery is not technical, but it is no more complex or technical than many of the medical malpractice or product liability actions we defend on a daily basis. And, if I can learn it, so can you. The Seventh Circuit’s PILOT PROGRAM is a step in the right direction. The Seventh Circuit’s ediscovery principles attempt to bring a little bit of common sense to the unholy alliance of law and technology that ediscovery mandates.

How The Pilot Program Was Developed

Responding to complaints by lawyers and members of the business community that our civil justice discovery system was in need of reform, Judge James F. Holderman, the Chief Judge of the United States District Court for the Northern District of Illinois, appointed a group of lawyers, academics and ediscovery consultants to a committee, the purpose of which was to discuss how the process of electronic discovery could be improved. Magistrate Judge Nan Nolan chairs the Committee. Kenneth Withers, the Director of Education for the Sedona Conference, and Rebecca Kourlis, the Executive Director of the Institute for the Advancement of the American Legal System (“IAALS”) and a former Colorado Supreme Court Judge assisted the Committee in developing a set of electronic discovery principles. PILOT PROGRAM at 7-8. Those principles have been codified into a standing order that is now being applied in selected cases during Phase 1 of the Seventh Circuit’s PILOT PROGRAM. Id. at 17-24.

What makes the Seventh Circuit’s PILOT PROGRAM unique is that its ediscovery principles, which are now being applied in selected cases, will be evaluated during the program’s various phases by the litigants and
judges who participate in the program. *Id.* at 10. The ediscovery principles formulated by the Ediscovery Committee focus on three areas: preservation, early case assessment, and education. The principles emphasize education and cooperation as the means to obtain compliance rather than sanctions and punitive enforcement.

Phase 1 of the program runs from October 1, 2009 through May 1, 2010. Questionnaires have been developed by IAALS for both the litigants and judges participating in the program to evaluate the ediscovery principles. The findings will be presented to the Seventh Circuit at its annual meeting in May 2010, and later that month to the Standing Advisory Committee on Rules of Practice and Procedure in the federal courts. After the results have been presented, the principles will be reviewed, modified as needed and applied during Phase 2 of the program that runs from June 2010 to May 2011. *Id.*

**Highlights Of The Seventh Circuit’s Ediscovery Principles**

The Seventh Circuit’s principles are intended to serve as supplemental procedural guidelines in selected cases. *Id.* Principle 1.01 outlines their purpose succinctly: to assist in the administration of Fed. R. Civ. P. 1 and secure a “just, speedy and inexpensive determination” of every proceeding. The principles are also intended to promote early resolution of ediscovery disputes without court intervention. *Id.* at 11.

One of the unique features of the principles is its acknowledgement that an attorney’s zealous representation is not compromised by cooperating in discovery. *Id.* The principles also direct an even greater role for Rule 26(b)(2)(C)’s proportionality standard. Principle 1.03 provides that Rule 26(b)(2)(C)’s proportionality standard should be applied when formulating any discovery plan. It further provides that electronically stored information (“ESI”) production requests and responses “should be reasonably targeted, clear and as specific as possible.” *Id.* Shotgun production requests that seek “any and all” ESI relating to a given matter violate the spirit, if not the letter, of these principles. Moreover, attempts to overwhelm your opponent through a dump of electronic documents would similarly be prohibited.

Under Rule 26(b)(2)(C)(iii)’s proportionality standard, courts “must limit the frequency or extent of discovery otherwise allowed” when “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the requested discovery in resolving those issues.” Fed. R. Civ. P. 26(b)(2)(C)(iii).

The federal ediscovery rules require parties to meet and confer about the preservation and production of electronic information prior to the initial scheduling conference with the court. Fed. R. Civ. P. 26(f)(2); PILOT PROGRAM at 11-12. Another unique feature of the Seventh Circuit’s ediscovery principles is the concept of an “ediscovery liaison.” *Id.* at 12. Should a dispute over the preservation or production of ESI occur at that initial conference with opposing counsel, Principle 2.02 requires the parties to designate ediscovery liaisons. The liaison can be an in-house or outside counsel, a third-party consultant, or a company. The liaison must be: a) prepared to participate in ediscovery dispute resolution; b) be knowledgeable about the party’s ediscovery efforts; c) have access to those who are familiar with the party’s information systems and be able to answer relevant questions about those systems; and d) have access to those who are knowledgeable about the technical aspects of ediscovery. *Id.* at 12-13. The concept of an ediscovery liaison is to bridge the gap between lawyers who may not know technology and technologists who do not know the law. The principles contemplate that resolution of ediscovery disputes will occur early on in the case, before ediscovery costs are incurred by the party.

The principles also address pre-suit preservation requests and preservation orders. Principle 2.03 provides that vague and overbroad preservation requests are disfavored. It further provides that vague and overbroad preservation orders should not be sought or entered. *Id.* at 13. To the extent that counsel seeks the preservation of ESI through a pre-suit letter, Principle 2.03 explains that it should include “specific and useful information” such as the names of the parties; the factual background of the potential claim; the legal theories that will be raised, the identification of potential witnesses and those having relevant information; the timeframe at issue; and any other information that can assist in determining what information should be preserved. *Id.* The
principles, however, do not require either the sending of a preservation request or making a response. *Id.* at 14. If requested by a client to send a response to a preservation letter, remember that “litigation-hold” letters are privileged. Take care when responding not to disclose privileged information or to assume a duty for your client.

Principle 2.04 addresses the scope of electronic discovery preservation and again, incorporates notions of Rule 26(b)(2)(C) proportionality. Principle 2.04(a) explains that parties “are responsible for taking reasonable and proportionate steps to preserve relevant ESI “within its possession, custody or control.” *Id.*

One of the vexing issues surrounding electronic discovery is that courts have frequently permitted “discovery about discovery,” when sanctions motions are filed or when a question involving the potential spoliation of ESI has been raised. Principle 2.04(b) recognizes in some instances that discovery about preservation efforts may be appropriate, but that it can cause unnecessary expense and delay and can implicate attorney work-product and privileged matters. Principle 2.04(b) provides that before any such discovery occurs, the parties should meet and confer about the need for such discovery, its relevance to the issues likely to arise, and the suitability of alternative means to obtain that information. *Id.* at 14. That does not mean, however, that a deponent will be precluded from answering questions about how the client preserved and collected ESI. *Id.* Thus, in any matter where electronic discovery is contemplated, another area of deposition preparation involves what steps the deponent took to get information and what instructions or guidance was received.

Principle 2.04(c) suggests that the parties should be prepared to discuss “targeted discovery” that each anticipates requesting as well as “reasonably foreseeable preservation issues that relate directly” to the ESI the other is seeking. *Id.*

Under the federal ediscovery rules, a party need not produce ESI from sources that are not reasonably accessible because of undue burden or cost. *Fed. R. Civ. P. 26(b)(2)(B).* The problem, however, is attempting to determine when the cost and burden involved of preserving and producing information become undue within the meaning of *Fed. R. Civ. P. 26(b)(2)(B).* Neither the rule itself nor its accompanying Advisory Committee Note provide any insight into what sources of information might be considered unduly burdensome or costly. Indeed, the 2006 Advisory Committee Note Rule 26(b)(2)(B) explains: “[i]t is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information.” See *Fed. R. Civ. P. 26(b)(2)(B), advisory committee’s note, 2006 amendment.*

The difficulty in identifying and proving that a particular source of ESI was inaccessible under Rule 26(b)(2)(B) has resulted in decisions such as *Starbuck’s Corp. v. ADT Sec. Services, Inc.*, 2009 WL 4730798 at *6 (W.D. Wash. April 30, 2009), where one court concluded:

> The Court cannot relieve Defendant of its duty to produce those documents merely because Defendant has chosen the means to preserve the evidence which makes ultimate production of relevant documents expensive …. To permit a party to reap the business benefits of such technology and simultaneously use technology as a shield in litigation would lead to incongruous and unfair results.”

The task of identifying sources of ESI that are inaccessible has been at least partially streamlined by Principle 2.04(d). It identifies certain categories of ESI that are generally not discoverable in most cases:

1) Deleted, slack, fragmented or unallocated data;
2) Random access memory (RAM) or ephemeral data;
3) Temporary internet files, history, cache, cookies;
4) Metadata fields that are frequently updated;
5) Backup data substantially duplicative of data that is more accessible;
6) Other forms of ESI which require extraordinary measures to preserve and are not utilized in the ordinary course of business.

PILOT PROGRAM at 14-15. Principle 2.04(d) further explains that if a party intends to seek information from one of the sources noted above, it should make that request known as soon as practicable. Id. at 14.

Principle 2.06 explains that if ESI or other tangible or hard copy documents are maintained in a format that is not text searchable, when that information is produced, it need not be made text searchable. Id. at 15. It is important to recognize that the opposite is also true. The 2006 Advisory Committee Notes to Rule 34 explain that if ESI is maintained in a text searchable format by a party, it cannot be produced in a different form that eliminates or significantly degrades that feature. FED. R. CIV. P. 34(b), advisory committee’s note, 2006 amendment; Aguilar v. Immigration and Customs Enforcement Div. of the United States Dept. of Homeland Security, 255 F.R.D. 350, 355 (S.D.N.Y. 2008).

Principle 2.06 acknowledges that a requesting party is generally responsible for the incremental costs of creating its copy of the requested information. It also encourages the discussion of cost sharing between the parties when the addition of optical character recognition ("OCR") or other “upgrades” of paper documents or non-text searchable ESI is contemplated by the parties. PILOT PROGRAM at 16.

Educational Requirements And Resources

Principle 3.01 deals with educational requirements for federal court practitioners. Id. Principle 3.01 provides that in any “litigation matter,” all counsel are expected to become familiar with the federal rules on ediscovery, the 2006 Advisory Committee report concerning the federal ediscovery amendments, which are available at http://www.uscourts.gov/rules/ediscovery_w_notes.pdf, and the Seventh Circuit’s PILOT PROGRAM. Id.

There are a number of resources that are available to help practitioners in this area. The Sedona Conference® has promulgated a number of best practice guidelines that can be downloaded free from their website, which is: http://www.thesedonaconference.org. Another one of my favorite resources is Kroll Ontrack.® Kroll is a national ediscovery vendor and has a website with a resource page through which anyone can access over 200 pages of ediscovery decisions summarized and organized by topic and by jurisdiction. It can be found at: http://www.krollontrack.com/resources/. Various blogs have sprung up about ediscovery, including Practical Ediscovery, http://www.practicalediscovery.com. So, running a simple Google search on an ediscovery issue is a great way to begin your research on a particular topic.

The Seventh Circuit’s ediscovery principles should be consulted in any federal court matter in which electronic discovery is sought. Hopefully they will play an important role in shaping the future development of electronic discovery.

(Endnotes)

1 A “hash value” is a mathematical algorithm “that represents a unique value for a given set of data, similar to a digital fingerprint.” The Sedona Conference® Glossary: E-discovery & Digital Information Management May 2005 Version. “Hashing” is typically used to identify duplicative electronic documents or emails in a given data set to reduce the volume of ESI that needs to be produced.

2 “De-duplication” refers to a process where duplicative emails or electronic documents in a data set are identified. Typically, this is accomplished by hashing or “hash coding” the documents or emails in the data set.

3 “Native format” is the “default format of a file,” and is often designated in terms of the software application or program used to create an electronic document. In re Priceline.com Inc. Sec. Litg., 233 F.R.D. 88, 89 (D. Conn. 2005). When parties request ESI to be produced in its native state or native format, it simply means, for example, that if the document was created in WordPerfect, it should be produced in a WordPerfect format and if it was created by a Microsoft Word application, it should be
produced in a Microsoft Word format. Often, the same software used to create a document is needed to view it when it is produced in its native state, which can raise issues when documents or data are created in a unique or proprietary format.

4 “Litigation hold” refers to a process by which a party preserves all documents, ESI and tangible things potentially relevant to a lawsuit or governmental investigation. The “duty to preserve,” and thus, the responsibility to issue a written litigation hold is triggered when litigation is “reasonably anticipated.” The hold process includes the temporary suspension of any automatic or automated features of a client’s information or email systems that would result in the disposal or destruction of potentially relevant paper documents or ESI. A litigation hold typically involves written instructions to preserve information. Various decisions have concluded that a party must identify key personnel who have possession or control of potentially relevant information and ensure those key persons are notified of the duty to preserve and about the potential ramifications if they fail to do so.

5 “Slack space” is also known as “file slack.” It is the space on a section of a computer’s hard drive that is not allocated to actively store a file by the computer’s operating system. It is one location on a computer’s hard drive where previously deleted information or fragments of information may reside that can be found through a forensic examination of the computer.

6 “Metadata” is generally defined as “data about data.” It is information that a computer generates about files and programs on the computer. To see an example of document metadata, the next time you have a document open on your computer, go to your application menu and click on “properties.” There are various types of metadata including document metadata, application metadata, system metadata, and email metadata. For a discussion of the various types of metadata and the discoverability of different types of metadata, see *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 354-58 (S.D.N.Y. 2008). When an electronic document is produced in its native format, unless scrubbing software is used, any metadata associated with that document is automatically produced with it. When a document is produced in an “imaged format”— PDF or TIFF (Tagged Imaged File Format) — the metadata for the document does not accompany the image unless a “load file” containing various metadata fields accompanies the PDF or TIFF file.

7 “OCR” refers to Optical Character Recognition, which is a technological process that converts printed information on an imaged format so that the computer can manipulate the information, rendering it “text searchable.”

8 On the other side of the coin, however, are decisions such as *Rodriguez-Torres v. Gov’t Dev. Bank of Puerto Rico*, 2010 WL 174156 (D.P.R. Jan. 20, 2010) where the court held the defendant did not have to produce requested emails about the plaintiff in an employment discrimination claim, finding the emails were not reasonably accessible under Rule 26(b)(2)(B) after the defendant produced an estimate that the cost of producing them was $35,000.

About the Author

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Mr. Puiszis’ publications include: *Illinois Governmental Tort and Section 1983 Civil Rights Liability*, now in its Third edition published by Lexis/Nexis. He also is the author of his firm’s blog on electronic discovery called “Practical Ediscovery” found at http://www.practicalediscovery.com.

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