E-Discovery Guidelines and the Seventh Circuit's Pilot Program

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Overbroad discovery requests and acrimony between parties add to litigation costs on both sides of a lawsuit. In an age in which litigants literally are able to produce terabytes of material—which can take thousands of man-hours to digest and analyze—e-discovery's rising prevalence in federal litigation amplifies the potential cost of discovery even further. And, as demonstrated in Judge Shira Scheindlin's scathing opinion against litigants' e-discovery methods in *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*,[1] courts expect litigants to preserve their electronically stored information ("ESI") and are willing to impose harsh penalties for a party's failure to meet its duties. Given this landscape, Chief Judge James F. Holderman of the United States District Court for the Northern District of Illinois directed the Seventh Circuit Electronic Discovery Committee to develop and implement principles to facilitate more focused and less costly discovery of ESI. In September 2009, the Committee released its Principles Relating to the Discovery of Electronically Stored Information ("Principles").[2]

The Principles provide guidelines to encourage cooperation between parties and ensure the proportionality of electronic discovery sought.[3] To this end, the Principles require that such requests are "targeted, clear, and specific as practicable."[4] Overall, the Principles promote targeted and effective electronic production, and help parties work through the most common issues and

[1] 2010 WL 184312 (S.D.N.Y. Jan. 15,2010) (recognizing a party's duty to preserve ESI and endorsing penalties for failing to satisfy such duty as including cost shifting, fines, special jury instructions, and default judgment).

[2] The Principles can be found online at http://www.7thcircuitbar.org/associations/1507/files/Statement%20-%20Phase%20One.pdf.

[3] Principles 1.02 and 1.03.

[4] Principle 1.03.

disputes that arise in e-discovery at an early stage. As the Committee recognized in its October 2009 "Statement of Purpose and Preparation of Principles":

> The goal of the Principles is 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). Too often these exchanges begin with unhelpful demands for the preservation of all data, which often are followed by exhaustive lists of types of storage devices. Such generic demands lead to generic objections that similarly fail to identify specific issues concerning evidence preservation and discovery that could productively be discussed and resolved early in the case by agreement or order of the court. As a result, the parties often fail to focus on identifying specific sources of evidence that are likely to be sought in discovery but that may be problematic or unduly burdensome or costly to preserve or produce. . . . The Principles are intended not just to call for cooperation but to incentivize cooperative exchange of information on evidence preservation and discovery. They do so by providing guidance on preservation and discovery issues that commonly arise and by requiring that such issues be discussed and resolved early either by agreement, if possible, or by promptly raising them with the court.[5]

In cases that require discovery of ESI, Principle 2.01 provides a helpful list of topics that parties should discuss before the Fed. R .Civ. P. 16 discovery conference. For instance, parties should identify relevant ESI, the scope of ESI preservation, the format of preservation and production of ESI, the potential for conducting discovery in stages, and procedures for handling inadvertent production of privileged information and other potential waiver issues. When e-discovery disputes arise, each party must appoint an e-discovery liaison, a person who is knowledgeable on her side's retention policies and capabilities.[6] In a February 2010 webinar discussing the Principles, Chief Judge Holderman and Magistrate Judge Nan Nolan explained that they expect these liaisons to be able to educate judges on the technical underpinnings of these disputes so that courts may resolve them quickly and effectively.

Although e-discovery guidelines have been devised in other jurisdictions, the Principles have been implemented in actual federal court cases in the Northern District of Illinois. The Committee has instituted a "Pilot Program," Phase One of which commenced in October 2009 and runs through May 2010, allowing judges and litigants to apply the Principles in selected cases by adopting the Committee's proposed standing order for e-discovery practice. Over 81 cases have adopted the standing order since October 2009. That the litigants in these cases have not filed a single

[5] See the Committee's "Statement of Purpose and Preparation of Principles" at page 9 of the October 2009 version of the Principles.

[6] Principle 2.02.

discovery-related motion is an early indication of the Principles' effectiveness at reducing discovery disputes.[7]

Once Phase One concludes in May 2010, the Committee will evaluate the results by issuing questionnaires to the participating judges and litigants. The Committee will use this information to appraise the efficacy of the Principles and refine them further. In May 2011, the Committee plans to issue its final Principles. During the February 2010 webinar, Chief Judge Holderman expressed his hope that the Principles will be adopted on a national level thereafter.

The Principles reflect the recognition among lawyers, judges, and litigants of the pitfalls and potentially exorbitant costs of electronic discovery. These guidelines seek to preclude such problems by requiring focused preservation and production of ESI. Increasingly, parties involved in litigation and their counsel must be mindful of the costs of e-discovery, the duties it creates, and the severe sanctions for non-compliance. These parties and their counsel must ensure that they conduct data preservation and e-discovery efficiently and within the requirements of ever-changing rules.

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[7] It remains to be seen whether this initial success and cooperation can persist generally to all cases. Although the Principles' record to date certainly is impressive, the cases selected for inclusion in the Pilot Program may not be a representative sample of all cases requiring e-discovery, especially considering that parties that agree with each other and the court to implement the Principles at the outset of litigation likely are less prone to acrimony than the broader universe of all litigants.