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Resolving e-discovery issues early can be big financial benefit, panel advises

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As a young attorney, Steven M. Puiszis often went to warehouses to comb through boxes to gather relevant documents for discovery.

Today, similar documents can be stored electronically in dozens or hundreds of computers and servers, leading to a virtual rabbit hole in the search for information that may or may not be relevant to a case.

"E-discovery is the unholy alliance of lawyers who don't know technology and technologists who don't know the law," said Puiszis, a partner at Hinshaw & Culbertson LLP.

At "Electronic Discovery in Illinois," a seminar Thursday hosted by the Illinois Association of Defense Trial Counsel and the Illinois Judges Association, Puiszis and other panelists discussed new e-discovery rules in Illinois and strategies for working with clients, opposing counsel and judges to make the process smoother.

While some states have adopted proposed federal rules for e-discovery, Illinois established its own set of rules in July as amendments to Supreme Court Rule 201, which covers general discovery provisions.

It added a definition for electronically stored information (ESI), which are any "writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations in any medium" that is stored digitally.

The new rules also include a clause for proportionality, in which a judge looks at several factors to determine whether the burden or cost of producing proposed discovery outweighs the benefits of resolving the legal issues.

There is also a clawback provision for ESI, requiring an attorney who receives privileged information to notify opposing counsel and return it.

When judges encounter an e-discovery request, Puiszis said, there are a number of questions to consider in proportionality, such as how much a case is worth, cost involved in the controversy, resources of the party and how relevant the requested discovery is to resolving the case.

"Does the discovery relate to a key witness? Does it relate to a key time period? Does it relate to a core issue in the case?" he said. "If it does, then it should be permitted. If not, maybe it shouldn't be."

Puiszis said lawyers need to discuss e-discovery issues with clients early, including asking them to disable any programs that routinely discard or destroy electronic information.

During an initial status conference on a case, lawyers should give judges an idea of the volume of e-discovery, where it's located and stored, the time range for documents of interest and the potential time and cost involved in retrieving the information.

Lawyers should also discuss details involved in e-discovery production with opposing counsel, he said, such as format, eliminating keywords or file types in searches that may be irrelevant.

Resolving other issues, such as explaining why a particular time frame of documents the plaintiff is seeking is too long, can also go a long way in reducing time and costs and make the process more efficient before the court.

"The one thing you don't want to do is look like you're being unreasonable when you appear in front of the judge," Puiszis said. "Because it's going to cost you, and it's going to cost your client big time."

Puiszis said lawyers should also be mindful of proposed Federal Rule of Civil Procedure 37(e), which has sanctions for a failure to preserve information.

If reasonable steps are taken to preserve or retrieve that lost information, then there are no penalties, he said. But if the other side can demonstrate prejudice, then the court can impose curative measures.

Panelist and 1st District Appellate Justice Maureen E. Connors said Illinois' Rule 219 for refusal to comply with orders related to discovery also covers e-discovery and negligence for spoliation.

She said judges should learn basic e-discovery terminology and take it upon themselves to ask attorneys if e-discovery is part of the case. If it doesn't come up, she said, lawyers should remind the judge about it.

Retired Kane County circuit judge F. Keith Brown, now of counsel at Meyers & Flowers in St. Charles, said judges are usually slow to learn about technology, and lawyers should work together to resolve issues and provide background on case law to help a judge understand the issues at hand.

"In a case management situation, give the judge a little memorandum about the e-discovery issues," he said.

Joseph R. Marconi, chair of the business litigation and professional liability groups at Johnson & Bell Ltd., said he has referred to white papers and documents from the Federal Rules of Civil Procedure Committee's website to state his position on e-discovery issues to judges.

The panelists also discussed other data types that arise in e-discovery requests, including metadata — hidden information on content and context that is saved in digital files.

Metadata is always requested, said HeplerBroom LLC partner William Jason Rankin, but its relevance depends on case type.

Rankin said he usually discusses its scope and merits

with the requesting party, because while metadata can show a document's author and when it was created, it's usually not beneficial to a case.

One instance where it could make a difference, Marconi said, is when metadata shows files that were modified or deleted after litigation was initiated.

"It's a small percentage of cases where it's relevant," he said. "And to require its production in all cases, I think, is too much."

Rankin said text messages on employees' personal cellphones are also considered ESI. Some text messages are automatically deleted from some devices after a certain period of time, he said, and in some cases, severe sanctions have been applied against defendants who haven't saved texts.

Rankin said that's one reason why identifying employees with potentially relevant information and moving to preserve it at the outset of a case rather than years later during depositions is critical.

IADTC President David H. Levitt said e-discovery is difficult, expensive and changes the dynamics in the resolution of cases.

One time, he read a federal court opinion in which both sides spent hundreds of thousands of dollars litigating e-discovery issues before addressing the merits of a case.

"That is something to be avoided for everyone," he said. "We need to get to the merits of cases and not let discovery be a side issue."