The Burdens of E-DISCOVERY: IS A SOLUTION ON THE HORIZON?

The term "e-discovery" often sends a shudder down the spine of IT managers and in-house counsel, not to mention outside litigation counsel. This concern is well-founded, as *The Wall Street Journal* and *ABA Journal* both recently reported that e-discovery sanctions for lawyers have reached an all time high and companies have been hit with massive sanctions for e-discovery violations. Notwithstanding the risk and cost of sanctions, simply responding to e-discovery requests in the course of litigation can be a huge burden.

E-discovery refers to the preservation, collection, review, and production of electronically stored information (ESI) in the course of litigation. Almost two years ago, the Seventh Circuit E-Discovery Committee met for the first time in an effort to stem the tide of rising burdens and costs associated with e-discovery. This resulted in the Seventh Circuit E-Discovery Pilot Program in October 2009 and the issuance of the program's "Statement of Purpose and Preparation of Principles."

The principles cover three areas: (i) general discovery principles, (ii) early case assessment principles, and (iii) education principles. All of these principles were incorporated into a Standing Order Relating to the Discovery of ESI, which has been applicable for cases pending before 13 judges in the U.S. District Court for the Northern District of Illinois.

GENERAL DISCOVERY PRINCIPLES

The general discovery principles reflect the objectives of Rule 1 of the Federal Rules of Civil Procedure (the Federal Rules), which encourages the "just, speedy, and inexpensive determination of every action." To meet these goals, the principles seek increased cooperation between counsel and more rigorous application of the proportionality standard set forth in Federal Rule 26(b)(2)(C).

EARLY CASE ASSESSMENT PRINCIPLES

The early case assessment principles provide more concrete guidelines for addressing the discovery issues that typically come before the courts in the form of motions for sanctions. These principles require the parties to meet and confer and specifically address discovery of ESI. Prior to the initial status conference, the principles require the parties to discuss:

(1) The identification of relevant and discoverable ESI

(2) The scope of discoverable ESI to be preserved by the parties

(3) The formats for preservation and production of ESI

(4) The potential for conducting discovery in phases or stages as a method for reducing costs and burden

(5) The procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence

If any of these issues cannot be resolved, the parties must present the issue to the court.

EDUCATION PRINCIPLES

The education principles acknowledge the overall impact of discovery of ESI on the litigation process. Due to this impact, the principles require all judges, counsel, and parties to familiarize themselves with "the fundamentals of discovery of ESI." This means being familiar with the e-discovery provisions of the Federal Rules and the Advisory Committee Report on the 2006 Amendments to the Federal Rules and The Sedona Conference publications and those of other e-discovery organizations.

THE RESULTS OF PHASE 1

The Seventh Circuit issued a report in May 2010 regarding the perceived impact of the principles on e-discovery. The survey of both judges and practitioners revealed that, overall, the perception was that the principles "increased" or "greatly increased" both the level of attention paid to the e-discovery process and to the fairness of the discovery process itself. The program is now entering Phase 2, during which the geographic scope of the program will be extended to all federal cases in Illinois, Indiana, and Wisconsin and more data will be gathered regarding the program's effectiveness.

If you have any questions about the Pilot Program or e-discovery in general, please give us a call.

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