7th Circuit E-Discovery Pilot Program Could Have Wide-Ranging Impact

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The abundance of electronic information now available makes it more important than ever that litigators understand how to prepare their clients for e-discovery without letting prohibitive costs influence their clients' litigation decisions. Judges and lawyers in the 7th U.S. Circuit Court of Appeals understand this predicament and have taken preventive action by drafting e-discovery principles and implementing them, on a test basis, in hundreds of pending cases in the 7th Circuit.

HISTORY OF THE PILOT PROGRAM

Chaired and encouraged by Chief Judge James F. Holderman and Magistrate Judge Nan R. Nolan of the U.S. District Court for the Northern District of Illinois, the 7th Circuit E-Discovery Pilot Program Committee was formed in 2009. Its mission was to develop pretrial litigation principles governing electronic discovery to reduce its cost and burden.

Written largely by practicing attorneys who have handled actual

cases with e-discovery issues, the 7th Circuit's e-discovery principles are intended both to be flexible and to create discovery obligations proportional to the value of the case. The principles seem largely consistent with the Sedona Conference approach and less inflexibly rigorous than obligations imposed by *Pension Committee v. Banc of America Securities*, the *Zubulake v. UBS Warburg* decisions and the like. Those decisions are mostly reactive and one of the main goals of the 7th Circuit's pilot program is to be proactive in identifying potential e-discovery problems and creating solutions, rather than allowing courts to impose rigid frameworks through case law.

Perhaps most importantly, the program's principles are in the process of a substantial test drive by the judges and lawyers in the 7th Circuit.

The first phase of the pilot program ran from October 2009 to March 2010. Thirteen Northern District of Illinois judges participated (five district judges and eight magistrate judges). The participating judges implemented the principles in 93 civil cases pending on their respective dockets.

Phase Two began in May 2010 and will run until May 2012. The pilot program has been greatly expanded for this current phase and more than three dozen judges from several districts in the 7th Circuit are now implementing the principles in hundreds of pending cases. Moreover, lawyers familiar with the 7th Circuit's principles are asking judges in cases pending across the country to make the principles part of their scheduling orders.

THE PRINCIPLES

"The committee focused on proportionality and flexibility in its creation of the principles," according to Arthur Gollwitzer, a partner at Floyd & Buss in Austin, Texas, and the National Outreach Subcommittee Chair for the 7th Circuit Pilot Program. The principles are largely consistent with the Sedona Conference's work, but perhaps more practical. And, in contrast with *Zubulake* and *Pension Committee*, which are fairly strict and uncompromising, the principles were intended by their drafters to

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fit the needs of each case -- large or small, complex or simple.

The 7th Circuit's principles begin with three general principles, titled "Purpose," "Cooperation" and "Discovery Proportionality." The purpose, not surprisingly, is to "secure the just, speedy, and inexpensive determination of every civil case" and to promote the early resolution of disputes regarding e-discovery. While recognizing an attorney's duty to zealously represent his or her client, the cooperation principle cautions that the "failure of counsel ... to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions." The proportionality principle calls for the application of F.R.C.P. 26(b)(2)(C) when formulating a discovery plan, and demands that discovery requests be "reasonably targeted, clear, and as specific as practicable."

To further the general principles, the committee set forth several specific principles dealing with all aspects of discovery:

• **Duty to meet and confer.** Under the pilot program, litigants are required to meet and confer prior to the initial status conference to discuss the application of the discovery process and how the principles are to be used. Issues to be discussed include identification of relevant ESI, scope of discoverable ESI, formats for preservation, and production and the potential for conducting discovery in phases. Disputes regarding ESI which the parties cannot resolve are to be presented to the court at the initial status conference "or as soon as possible thereafter." Although the latter does leave some leeway, the committee has cautioned that the court may decline to resolve disputes that are not brought promptly to its attention. Additionally, counsel is required to review and understand how its client's data is stored and retrieved. "The idea is to address early on what you have to preserve and produce by providing notice early to your adversary and to get any issues in front of the court as soon as possible," said Gollwitzer.

• **E-discovery liaison.** During the initial meet-and-confer process, the parties are required to designate an individual as an e-discovery liaison. This person does not have to be an attorney, but

he or she must be prepared to participate in e-discovery dispute resolution, have knowledge of the party's e-discovery efforts, and have reasonable access to those individuals who have knowledge of that party's systems and the technical aspects of e-discovery.

• **Preservation requests and orders.** Preservation requests and orders are to be as narrowly tailored as possible and should include specific information, such as names of the parties, factual background of potential claims, names of potential witnesses, and time period(s). Additionally, if a party chooses to respond to a preservation request, it should identify which information it is willing to preserve, any disagreements with the request, and any additional preservation issues not already raised.

• **Scope of preservation.** As discussed in the meet-and-confer principle, the parties should be prepared to discuss claims and defenses in each case, reasonably foreseeable preservation issues, and discovery to be sought. Additionally, this principle lists several categories of ESI that are generally not discoverable, including RAM, temporary internet files, frequently updated metadata fields, and backup data that is more accessible elsewhere. This principle also includes a catch-all for "other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business." If a party wants a particular type of information for its case, it must raise the issue at the outset; otherwise, it cannot later claim spoliation. By the same token, if a party objects to preserving or producing certain types of ESI, it must raise its objection at the outset, rather than attempting after-the-fact to justify destruction of ESI.

• **Identification of ESI.** At the meet-and-confer, the parties should discuss keyword searching, eliminating duplicative ESI, how to filter data by certain search parameters, and other potential methodologies to reduce the scope of data to be reviewed and produced.

• **Production format.** The parties should make a good faith effort to agree on the format of production, but, generally, ESI and other hard-copy documents that are not text-searchable do not

need to be made text-searchable. The parties are encouraged to discuss cost-sharing of optical character recognition or other upgrades, but the requesting party is responsible for the creation of its copy of requested information.

RESULTS OF PHASE ONE AND GOING FORWARD

The overwhelming majority of participating judges found after Phase One that the implementation of the principles: 1) increased cooperation among the parties; 2) had a positive effect on counsel meaningfully attempting to resolve discovery disputes before requesting court involvement; and 3) increased counsel's attention to its clients' data systems.

Attorneys were somewhat less enthusiastic in their responses, but very few felt that the principles had a negative effect on the discovery process. Perhaps most importantly, 80 percent of attorneys stated that the principles had either a neutral or beneficial effect on total litigation costs. Attorneys, in particular, appreciated the discovery liaison requirement, noting that it allowed the parties to focus their discovery requests and create a more efficient discovery process, and, in fact, about 75 percent of attorneys felt that their opponent's liaison was also helpful. Additionally, both judges and attorneys found that they were required to become more familiar with the litigants' data management systems at a much earlier time, allowing the parties to resolve potential discovery disputes with greater finality at a much earlier point than had previously been experienced.

The report concluded that while the feedback of the attorneys and judges had been mostly positive, a common theme among the responses was that the brief period of Phase One did not allow the participants to render a complete opinion on the pilot program. Additionally, the report found that many parties were not adhering to the meet-and-confer guidelines of the principles. In response, the committee expanded the time of Phase Two to two years and made the meet-and-confer principles mandatory on all participating parties.

BEYOND THE 7TH CIRCUIT

Gollwitzer was appointed to chair the National Outreach Committee after helping to draft the preservation and production principles and with the goal of making the 7th Circuit Pilot Program's principles a well-known option for handling e-discovery in cases across the nation. The hope is that attorneys around the country will use the principles as a resource and become involved in the pilot program. To achieve this goal, participants are encouraging their colleagues to use the principles in both the 7th Circuit and other jurisdictions in which the principles are not yet required. Additionally, the principles, reports and other helpful information have been made available for use and can be found at www.discoverypilot.com.

Although Gollwitzer has extended invitations to join the pilot program to many of the attorneys who contacted him, he is not aware of much activity in the 3rd Circuit.

Anyone with exposure to e-discovery issues recognizes the potential for e-discovery costs to dwarf other litigation expenses and to make the proverbial "day in court" unattainable in all but the largest of cases. In the face of that challenge, the 7th Circuit Pilot Program has provided a truly valuable tool: Principles drafted, tested, and revised by practitioners and judges actually using them in real litigation. The developments of this program are certainly worth watching.

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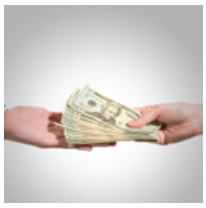

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