

Justice for all: Reforming e-discovery

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Representing a field that is notorious for being a laggard when it comes to advancing in the digital era, Chief Judge James Holderman knew he was undertaking an ambitious task when he began his formal quest two years ago to reform the practice of electronic discovery.

But there was one fundamental reason that propelled the 65-year-old to want to change the landscape: He believed the onerous and costly nature of e-discovery was limiting the service of justice. In some cases, in fact, plaintiffs were so inundated with pre-trial discovery demands by the claimants' lawyers that they had no choice but to settle before the case ever made it to trial.

"It was nebulous at best as to what a party had to preserve and, frankly, the law hasn't advanced," Holderman says. "It affects justice in the United States because of the cost and burden of electronically stored information."

As chief judge of the U.S. District Court for the Northern District of Illinois since 2006 – he joined the court in 1985 after being nominated by President Reagan – Holderman believed that if he didn't take the initiative, the problems would only continue and likely worsen.

"I knew it was a problem when general counsel were coming up to me and saying that it's a problem and they didn't even have a case in front of me," he says. "Frankly, there was no question in my mind that at some point in time all discovery was going to be e-discovery. We needed to do something non-traditional."

It was May 20, 2009, when Holderman and Magistrate Judge Nan Nolan met with a group of lawyers at the U.S. District courthouse in Chicago – "the best and brightest of the people we knew that were knowledgeable about electronically stored information" – to launch the Seventh Circuit Electronic Discovery Pilot Program, a first-of-its-kind effort in the United States and one that builds on a proclamation from The Sedona Conference to remove adversarial relations from the pre-trial discovery process.

The main issue that came out of the initial meeting was the burden of cost, Holderman says. As the calendar flipped to the 21 century, legal teams began asking for exponentially more information – much of it often unnecessary – because data proliferated from paper records stored in a filing cabinet to information spread across email and other corporate systems.

"I said, 'Here's what we should do,'" Holderman recalls. "We should develop principles and guidelines for lawyers involved in litigation in how they should conduct themselves when dealing with electronically stored information so the burden of asking for everything and providing the minimum is avoided. That way we focus more on what is needed and eliminate some of the discovery that is particularly burdensome."

Meanwhile, Holderman also sought to educate individual corporations on the need to categorize their data to make the preservation and early-case assessment stages more manageable and efficient.

On Dec. 1, 2006, an amendment to the Federal Rules of Civil Procedure took effect that ordered businesses and their lawyers to, at the start of any lawsuit, meet and discuss the scope of

electronically stored information in the case. The updated regulation also mandated that organizations, at the first whiff of a possible legal action, preserve any relevant data.

Even so, nearly five years later, organizations are falling short at properly reining in these costs, says Sean Regan, director of product marketing at Symantec, which recently acquired Clearwell Systems for its e-discovery platform.

He says most entities exclusively are opting for backup technology for e-discovery purposes.

“That is an incredibly inefficient method of e-discovery,” Regan says. “That’s blunt-force discovery. Backup tapes were designed for full recovery. When the mail server goes down, backup is perfect for that. But when we start saving backup tapes indefinitely because of e-discovery, it’s overkill.”

Beginning the process

The Seventh Circuit pilot program was implemented as a “multiyear, multiphase process to develop, implement, evaluate and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery.”

The program – now in its second phase – has brought together dozens of lawyers, judges and non-legal types, including vendor experts, to develop a set of principles that offer guidance on streamlining the discovery process.

“Lawyers need to have an understanding that everyone is not trying to hide the ball,” Holderman says. “I said the problem is you don’t trust each other. What we need to do is develop a system where you can still not trust each other, but you can trust that the system is not going to be able to be manipulated.”

Initial findings from phase two of the program were released in May, and it contains 11 principles, or duties. Among the notable ones:

- *Cooperation*: “The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.”
- *Discovery proportionality*: “[R]equests for production of electronically stored information (ESI) and related responses should be reasonably targeted, clear, and as specific as practicable.”
- *Meet and confer*: “Prior to the initial status conference with the court, counsel shall meet and discuss the application of the discovery process.”

Some of the principles apply more closely to the IT teams at defendant or plaintiff organizations. For example, the guidelines require the appointment of an e-discovery liaison, charged with mediating disputes. These appointees, Holderman says, maintain an understanding of how preservation and recovery works. Often times, they are security professionals and may have to appear in front of the judge.

In addition, the rules state that all parties to a case must discuss methods to identify relevant electronic data and avoid duplicate efforts.

Participating judges from the Seventh Circuit states of Indiana, Illinois and Wisconsin have placed these principles into some 300 cases already, Holderman says. Violators face contempt

of court charges. Initial polling has shown that in most cases, lawyers have said the guidance does not decrease their ability to “zealously represent their client.”

Moving discovery in-house

Of course, long before Holderman's pilot project ever got off the ground, there have been enough horror stories for IT departments to take note of the risks that come with an inadequate information management and governance program. E-discovery is a major component of such a program.

The landmark case of *Zubulake v. UBS Warburg* should give pause to businesses. In 2002, Laura Zubulake filed a gender discrimination lawsuit against her employer. It wasn't long after that the defendant was unable to produce relevant emails, due to either negligently or willfully destroying the emails or failing to properly preserve them. Ultimately, the case led to a \$29.2 million jury verdict for the plaintiff.

Incidents like this have forced many organizations to recognize the importance of proper e-discovery tools, many of which have significantly matured over the past several years, as well as the need to bring these capabilities in-house. In fact, according to Gartner, the global e-discovery market is expected to hit \$1.5 billion in 2013.

Yet, according to an August 2010 Symantec study, less than half of enterprises – 46 percent – have a formal information retention plan in place.

And often, says Symantec's Regan, companies are leaning too heavily on shipping out their archived information to discovery services providers. This presents a two-fold problem: high cost and the potential for compromise.

“High cost is never an excuse,” says Patrick Zeller (*left*), vice president and deputy general counsel of Guidance Software, a Pasadena, Calif.-based firm that specializes in forensics and e-discovery. “You can go and tell a judge that this is going to cost me a million dollars, but if you keep that data in a format that is difficult to search, that is not an excuse. Judges are going to order you to produce it.”

And instead of relying on third-party vendors, organizations should consider shifting their e-discovery efforts in-house with software specifically designed for proper categorization, discovery and recovery, Regan says.

“If you don't bring a process in-house with IT and legal folks working together, you're exposing yourself to a huge amount of risk,” Zeller says. He cites the Washington state Supreme Court's \$8 million judgment against Hyundai Motor Co. for the carmaker's failure to comply with discovery demands.

E-discovery best practices have ancillary benefits as well. Organizations can identify unnecessary records and get a handle on the type of data they have stored in their systems, say experts. These solutions can assist organizations in realizing they are housing unnecessary confidential information – or help them defend against a patent dispute.

E-discovery also can be used to investigate potential breaches. Zeller referenced a Chicago law firm that traced how many times an inadvertently sent email, containing the pay rates of associate attorneys, was forwarded.

Last fall, under the Seventh Circuit pilot program, a subcommittee was formed to help judges and committee members get up to speed on the latest in technology.

“It will help client IT and client legal clear up some of the language barriers and come up with standard wording,” says Jennifer Freeman, co-chairwoman of the subcommittee and a senior legal consultant at Kroll Ontrack, a Minneapolis-based legal technology and consulting provider.

The subcommittee also is seeking to define and assess those technologies that could lend greater efficiencies while lowering cost and risk.

Still, Holderman says that despite software created specifically for e-discovery, tools are not available to “get all the needles out of the haystack.”

“The reason is, electronically stored information is not stored for purposes of retrieval in litigation,” he says. “It’s stored for purposes of running the business.”

Zeller says the preponderance of unstructured data, such as metadata – often defined as data about data – that is necessary for litigation is only adding to the complexity.

Ultimately, Holderman says, the goal of the e-discovery pilot program is to improve cooperation among IT and legal teams and increase education and awareness about the need to wrangle in the costly, time-consuming and argumentative nature that often is associated with the preservation, search, identification, assessment and collection of pertinent data related to legal actions.

“I’ve said it at every meeting,” Holderman says. “I think we need to change the culture of pretrial litigation in the United States. We are going to make pretrial litigation more reasonable and fair now...Ultimately, companies and readers will have more concrete guidelines so they know they can keep stuff and delete stuff without someday getting sanctioned by a court.”