

Solving the E-Discovery Morass, One Idea at a Time

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Publication: The Legal Intelligencer

Date: September 13, 2011

Much is said about the burdens and challenges of e-discovery, and rightfully so, but the organizations dedicated solely to improving the process are nearly just as prevalent.

One organization that has the most power to effect change in this area, at least at the federal level, is the Civil Rules Advisory Committee of the U.S. Judicial Conference. The committee, which is meeting more frequently these days, met last week to discuss potential changes to the Federal Rules of Civil Procedure — specifically the rules regarding preservation and sanctions in e-discovery.

Offering a clearer direction on preservation issues in terms of what needs to be preserved and when would be music to defense attorneys' ears. It is often their clients that have the bulk of the data to be preserved and a number of defense attorneys cited enhanced preservation rules as one of the best ways to improve the difficulties of e-discovery for their clients.

"That would probably benefit a lot of large organizations with challenging IT issues," Morgan Lewis & Bockius' Stephanie A. "Tess" Blair said.

Similarly, Ballard Spahr's Philip Yannella cited more definitive rules in the area of proportionality and suggested judges should "breathe more life" into existing rules regarding cost-shifting and Rule 26's requirement that attorneys sign document requests averring they are not frivolous.

Though on the flip side, plaintiffs lawyers have said they are fine with the way things are now and say their clients have a right, free of charge, to see documents relevant to their cases.

Philadelphia-based Paul Weiner is national e-discovery counsel for labor law firm Littler Mendelson, focusing only on e-discovery issues for the firm's management-side clients across the country. He said there are existing aspects of e-discovery that make it better than the days of pure paper discovery and there are things firms and clients are already doing to improve the process — they just have to catch on en masse.

"E-discovery and the technology out there really offer protections that didn't exist in the paper world," Weiner said.

Clients can use technology to quickly tag documents that may be privileged and separate those out for a special review. Similarly, the equivalent to a warehouse full of paper documents can be searched in a matter of seconds with the right keywords in a computer, he said.

E-discovery, and the challenges stemming from it, has also led to some unique collaboration among lawyers, judges and in-house counsel. Weiner pointed to the Sedona Conference's cooperation proclamation, which has been endorsed by more than 100 judges. The proclamation supports opposing parties working together at the onset of litigation to map out discovery needs and figure out how to manage it. Weiner said parties are using that "meet-and-confer" approach more, but said it could be used much more frequently.

From Weiner's perspective, firms like his that have put in place the people, processes and technology to handle e-discovery rather than ignoring it have a competitive advantage. He said corporations are starting to

hire their own e-discovery experts to work in-house and guide the corporation and outside counsel on e-discovery.

One area that could use some judicial guidance is computer-assisted review, or predictive coding, in which a human goes through a portion of documents and codes them and then a computer learns from those decisions and takes over the rest of the coding.

"We really need some judicial guidance out there where they say, 'This is a method that works and is defensible and people should use it,'" Weiner said.

But he pointed out that he gets a lot of push back on the use of predictive coding from opposing parties in asymmetrical litigation who don't have many documents to hand over.

A number of litigators and consultants have circled back to pre-discovery as the time to really manage an organization's document cache.

Kroll Ontrack's managing director for discovery consulting, David Meadows, said he started to see a serious uptick in 2010 in the number of companies interested in data mapping and knowing where their data is stored and who has access to it. And now in the last year, those companies are branching out to look at records management plans, he said.

"If they really want to get there and save on costs, they need to get the funnel smaller in the first place," Meadows said.

What is still lacking in most companies, however, is a general training for employees on what litigation hold notices are and what the companies' policies are for data maintenance. In a bad economy, corporations couldn't focus their resources on managing data, Meadows said.

'Pie in the Sky' or Not?

When asked what suggestions they had for improving e-discovery, a number of lawyers responded with "well if it was free" or "these are my pie-in-the-sky ideas." Feasible or not, they provide food for thought.

"I've always thought the problem in determining the proper amount of discovery is that no one wants to say their case is just normal," Yannella said. "Everyone thinks their case is big."

He suggested courts set a benchmark ratio for the cost of discovery versus the cost of the overall amount in controversy. It would help give parties a target in tailoring their e-discovery requests, he said. Yannella pointed out the U.S. Supreme Court created a similar ratio with punitive and compensatory damages.

There are challenges with that set up, however, for both plaintiffs and defendants. Yannella said plaintiffs won't want to be locked into any limitations and defendants wouldn't want to share how much they were spending on e-discovery.

Another idea is to look at how alternative dispute resolution companies handle discovery, he said. Federal courts could learn something, he said, from the "far more circumscribed" and "less burdensome" approach to e-discovery in ADR.

And as many lawyers have said, Yannella ultimately pointed to technology as a driver in improving e-discovery. He said federal courts have clearly hinted that they are amenable to a number of forms of technology in the discovery space, but more guidance is still needed.

Meadows' colleague, Michele Lange, director for discovery product management, said no judge has issued an opinion on the validity of computer-assisted coding specifically, but there is a lot more discussion around the topic. She said she thinks the day is "very close" for more judicial guidance on the issue and the rules committee could look at the topic as well.

Buchanan Ingersoll & Rooney's Donald Myers said rules on preservation or other areas of the Electronic Discovery Reference Model could be tweaked, but he said the real fix will come from technology.

Michael Hayes, co-leader of Montgomery McCracken Walker & Rhoads' e-discovery practice, said he is a proponent of e-discovery masters in larger cases where e-discovery is prevalent.

"The last thing you want to do is bombard the court with these inane issues," he said.

Hayes pointed out that Philadelphia courts already conduct management or scheduling conferences with court administrators at the outset of a case. The guidelines for those conferences could include a discussion about e-discovery, he said.

"This is the time for the parties to sit down and talk about how they will produce it," Hayes said. "That could be a Philly-based thing that other jurisdictions adopt or not adopt."

LDISCOVERY General Counsel Leonard Deutchman, who himself has served as e-discovery master in Philadelphia Common Pleas Court, took that concept a step further. He suggested state courts in Pennsylvania set up litigation centers dedicated to e-discovery with judges specifically assigned to hear those issues.

Allegheny County Judge R. Stanton Wettick Jr., who led the state rules committee that proposed e-discovery rules specifically rejecting the federal model, scoffed at that idea, however.

"Do we have two judges?" he asked, with one dealing with e-discovery and the other dealing with the merits. He also asked whether all e-discovery issues would have to be addressed before getting to the merits of the case.

As with e-discovery's challenges, even the potential solutions can create intense debate. E-discovery is embedded in an adversarial-by-nature litigation process with plaintiffs and defendants and federal and state judiciaries often at odds. There seems to be a growing cadre of professionals and organizations, however, with the goal of improving the process, and, of course, making a little money off of it, too.

The general consensus is that, as technology evolves and improves, so too will the e-discovery process. But that will still require an evolution of understanding from the broader bench and bar that implements those tools.

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