E-Discovery from the Judicial Perspective

By Gerald "Jud" E. DeLoss

In a typical legal action, judges have a different perspective on the production of electronically stored information (ESI) than do HIM professionals. The Federal Rules of Civil Procedure, case law, and past experiences with discovery disputes play an important role in how judges view e-discovery. Having a broader understanding of the overall discovery process can help HIM professionals play a more productive role within their organizations' in-house discovery teams.

While litigation is an adversarial process, the courts have tended to favor a more open and cooperative approach to e-discovery and ESI production and appear more willing to impose sanctions against those who do not.

Judges will require that counsel and parties attempt to resolve any disagreements on their own prior to involving the court. The Federal Rules of Civil Procedure and local court rules now emphasize a more collaborative approach to pre-trial processes.

The courts now recognize that an attorney's obligation to represent his or her client is not compromised by cooperating in the discovery process. In addition, the courts now recognize the need for litigants to meet and confer on e-discovery issues early in the proceedings. Judges may order that "meet and confers" take place to discuss and resolve potential issues.

The court will request that parties:

- Spell out the relevant ESI
- Identify the scope of e-discovery
- Specify formats for production
- Recognize the preservation of ESI
- Agree on whether discovery will proceed in stages
- Outline how the parties will address issues of privilege and inadvertent production

The Importance of "Educating" the Judge

Generally judges now recognize the complexity of e-discovery and will seek education or explanation on the specific ESI and discovery issues in the litigation either directly through court-appointed experts or indirectly through the parties' own experts. Thus, it is important for parties to retain experts that relate well with jurors and who can respond to a judge's questioning.

The experts may be from within the organization involved in the litigation or an outside expert retained specifically for trial. In either case, it is critical for the party to have a knowledgeable contact person available to assist or lead in the identification, preservation, and production of relevant ESI.

Relevant ESI

The courts have identified areas and categories of ESI that generally are not discoverable in litigation. Examples include fragmented information on hard drives, RAM memory, temporary online information such as cookies or history files, metadata that are automatically updated, back-up data duplicative of data that are more easily accessible elsewhere, and other ESI that would require extraordinary efforts to preserve.

Of course, exceptions do exist if these data are necessary to establish or disprove an essential element of a claim or action. If the judge determines that to be the case, then the typical off-limits sources of ESI may be discoverable.

A judge will also require that litigants attempt to identify the ESI subject to discovery and eliminate duplicative sources of ESI. Again, this process should take place early in the proceedings, and the court will want the issues resolved without court intervention if possible.

Scope of e-Discovery

Courts have long frowned on "fishing expeditions," or those discovery attempts that are loosely framed and seek to gather any and all evidence that might theoretically be relevant. The burden of producing ESI has made it imperative that discovery requests and responses be narrowly tailored and reasonable in nature. The boilerplate requests and objections utilized by attorneys in the past will not succeed under the revised court rules governing discovery.

The Federal Rules of Civil Procedure govern the "proportionality" of the discovery. Discovery is generally not allowed where the court finds:

- Discovery is unreasonably cumulative or duplicative or the information can be obtained from some other source that is more convenient, less burdensome, or less expensive
- The party seeking the information has had ample opportunity to do so
- The burden or expense of production outweighs its likely benefit

Court rules also specifically limit the discovery of ESI. Thus, a party need not produce ESI from sources that are not readily accessible due to undue burden or cost. The judge will want the parties to address these issues as well as technical details such as the types of filters applicable to data and searches along with keyword searching, clustering, or other advanced technologies utilized in culling ESI.

Formats for Production

Generally, the court will require that parties set out the format or formats that ESI may be produced during discovery at the beginning of the proceedings without court intervention. However, the judge will step in if counsel cannot agree.

One method that speeds up the process while preserving the ability to later obtain ESI is providing a report on the database query for relevant information, rather than producing the entire database. If the ESI is not subject to search, then the court generally requests that it be produced in its entirety.

Cost is one aspect of production that must be addressed early in the litigation. The court will generally impose the costs of producing a copy of the ESI on the requesting party. If a party wants specific formats, then counsel must discuss and agree upon a method of allocating those costs.

Preserving ESI

Judges now have a heightened sensitivity to preserving ESI and its loss, known as spoliation. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, a new opinion written by Judge Shira A. Scheindlin provided the criteria a court should review in evaluating ESI preservation.

During discovery in the case, settled in January 2010, Judge Scheindlin determined that plaintiffs were negligent in preserving and collecting ESI, which led to the spoliation of relevant evidence. The court imposed sanctions on plaintiffs.

The judge identified the factors that would establish negligent conduct supporting the imposition of sanctions:

- Failure to obtain records from employees who had some involvement with the issues at stake in the litigation, but not key players
- Failure to assess the accuracy and validity of search terms used to search ESI
- Failure of counsel to supervise the preservation and production of ESI

In addition, Judge Scheindlin found that some of the plaintiffs were grossly negligent in failing to satisfy their e-discovery obligations, including failing to: issue a written litigation hold; identify all key players and ensure their records are preserved; preserve e-mail; collect information from former employees' files while within parties' control, custody, or possession; and preserve back-up tapes when they are the sole source of relevant information or relate to key players.

As a result of the gross negligence of plaintiffs, the court charged the jury with the discovery abuses and informed the jurors that they should presume that any missing evidence would have been adverse to the grossly negligent plaintiffs.

Stages of Discovery

If the litigation is complex, the litigants may choose to divide discovery into separate stages. Thus, they would address threshold issues and only discovery relating to a focused area before proceeding with discovery related to subsequent legal issues.

A judge will generally favor the less expensive and less time-consuming route of breaking discovery into such stages. This avoids complicating or convoluting the issues and focuses the review upon only the immediately relevant ESI.

Privileges and Production

Clearly privileged information is not subject to discovery. However, in the heat of the discovery process and with the volume of ESI subject to discovery, privileged information can and will be disclosed to the opposition. In these cases, the judge will require the parties address the process of "clawing back" that information during preliminary discussions. This results in faster production, less restrictive production, and fewer objections against production, which mean fewer headaches for the judge.

A judge's workload under e-discovery will never be light, but as a result of changes to the rules governing litigation, many potential issues can be addressed before they develop into full-blown disputes.

Jud DeLoss (gdeloss@kdlegal.com) is counsel with Krieg DeVault, LLP, in Chicago, IL.

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