

UNDERSTANDING ILLINOIS' NEW EDISCOVERY RULES

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I. INTRODUCTION

On May 29, 2014, the Illinois Supreme Court formally adopted Rules relating to the discovery of electronically stored information (“ESI”). This was accomplished by amending Supreme Court Rules 201, 214 and 218. Illinois’ new ediscovery rules (“Rules”) go into effect on July 1, 2014.

Among other things, the Rules incorporate the concept of “proportionality” from Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure as a way of controlling ediscovery costs. Supreme Court Rule 201(a) was also specifically amended and now provides “discovery requests that are disproportionate in terms of its burden or expense should be avoided.” Ill. S. Ct. R. 201(a) (eff. July 1, 2014). Additionally, the Committee Comments to Supreme Court Rule 201(c) adopted one of the approaches taken in the Seventh Circuit Ediscovery Pilot Program Principles by listing various categories of burdensome ESI that can be excluded from discovery under a proportionality analysis. Rule 201(c)’s Committee Comments further explain “if any party intends to request the preservation or production of potentially burdensome categories of ESI then that intention should be addressed at the initial case management conference ... or as soon thereafter as practicable.” Ill. S. Ct. R. 201(c), Committee Comments (adopted May 29, 2014).

The Rules are also notable for what they do not cover. They do not address several issues that have arisen under the federal rules relating to the format of ESI when produced in discovery. The Rules also do not touch upon when the duty to preserve ESI is triggered, what measures a party should take to preserve ESI, and they do not address sanctions for the loss of ESI.

This article will briefly highlight the differences between ESI and conventional paper discovery which prompted the adoption of these Rules, will outline Illinois’ new Rules and provide practice tips for their application.

II. HOW DISCOVERY OF ESI IS DIFFERENT THAN PAPER DISCOVERY

A common misperception about electronic discovery is that it is easy, and should be treated just like paper discovery. If that reality was true, then there would have been no need for the adoption of rules relating to the discovery of ESI. Ediscovery presents a number of unique challenges unlike anything we encountered when we practiced in the era of paper-based discovery. The discovery of ESI raises markedly different issues than traditional paper discovery because ESI differs from paper records in at least seven significant ways:

Volume: The first way that ESI differs from paper discovery is the sheer volume of information that is potentially available to be discovered. Today, virtually all information is created electronically, most of which is never printed on paper outside of a litigation context. Phone conversations have been replaced by email, and documents once sent by mail, are now emailed. In 2003, it was estimated that “close to 100 billion e-mails are sent daily,” and that number has only grown since then. George L. Paul and Jason R. Baron, *Information Inflation: Can the Legal System Adapt?* 13 Rich. J.L.&Tech. 10 (2007), available at http://law.richmond.edu/jolt/v13i3/article_10.pdf. Additionally, these authors further highlighted “[t]he amount of stored information continues to grow exponentially,” explaining:

Perhaps more easily grasped, the amount of information in business has increased by thousands, if not tens of thousands of times in the last few years. In a small business, whereas formerly there was usually one four-drawer file cabinet full of paper records, now there is the equivalent of two thousand four-drawer file cabinets full of such records, all contained in a cubic foot or so in the form of electronically stored information. This is a sea change. *Id.*

For a different perspective on the volume of ESI potentially discoverable, consider that today you can buy a hard drive with one terabyte of storage for your home computer for less than \$100. One terabyte of storage equates to 50,000 trees made into paper and printed. The entire printed collection of the U.S. Library of Congress would take only 10 terabytes of storage. *How Much Information?* available at: <http://www2.sims.berkeley.edu/research/projects/how-muchinfo/datapowers.html>.

As a result of this explosion in the amount of electronic information, the cost to collect and review ESI for relevancy and privilege is far greater than what we ever dealt with paper discovery.

Metadata: Another way ESI differs from paper discovery is metadata. ESI creates information about itself, which is called metadata. Metadata is generally not visible to the user, and is automatically generated by the system or application used to create an electronic document or another type of ESI. Metadata can tell you who created a document, when it was created, when it was last accessed, who last viewed the document, if the document was modified, when it was modified, who modified it, and how many versions of the document exist. Metadata can tell you who sent an email, when it was sent, who was copied on the email and to whom it was sent. Depending on the nature of the application or program involved, literally hundreds of fields of metadata can be created about an electronic document or other types of ESI.

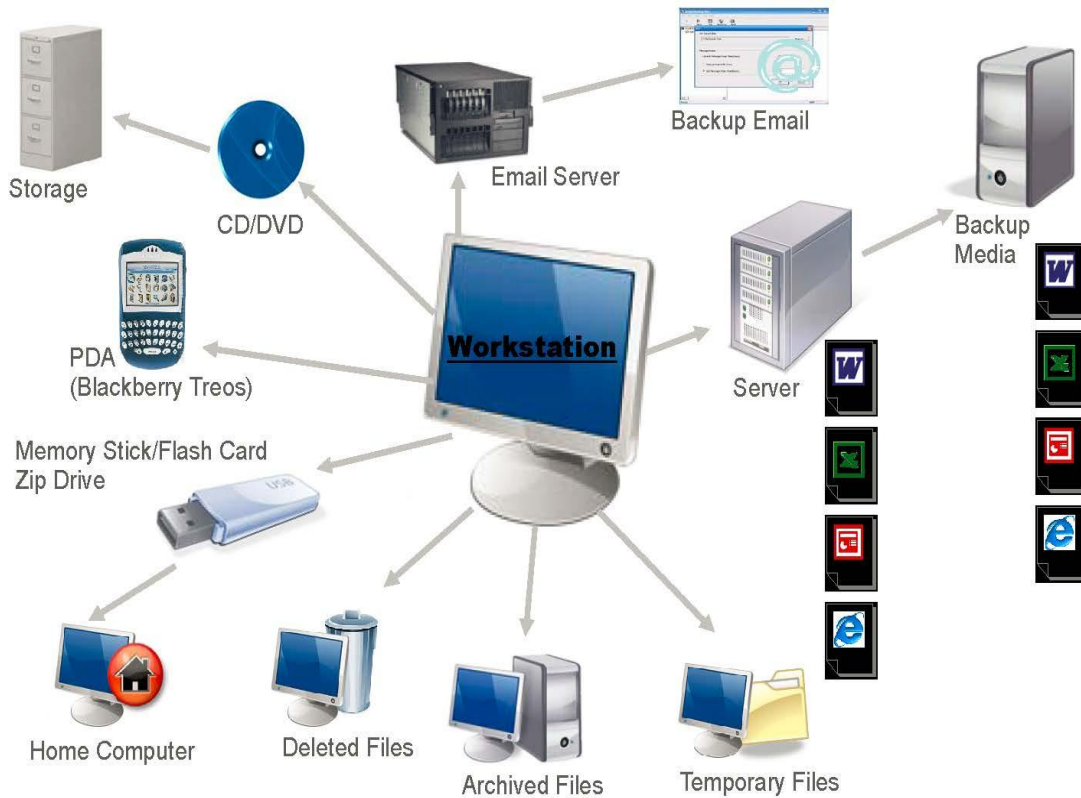
The information provided by the generation of metadata can be useful. For instance, it can be used to authenticate a document or identify who sent an email when

that is unclear or unknown. But for the most part, many of the metadata fields have little or no evidentiary value or usefulness in litigation.

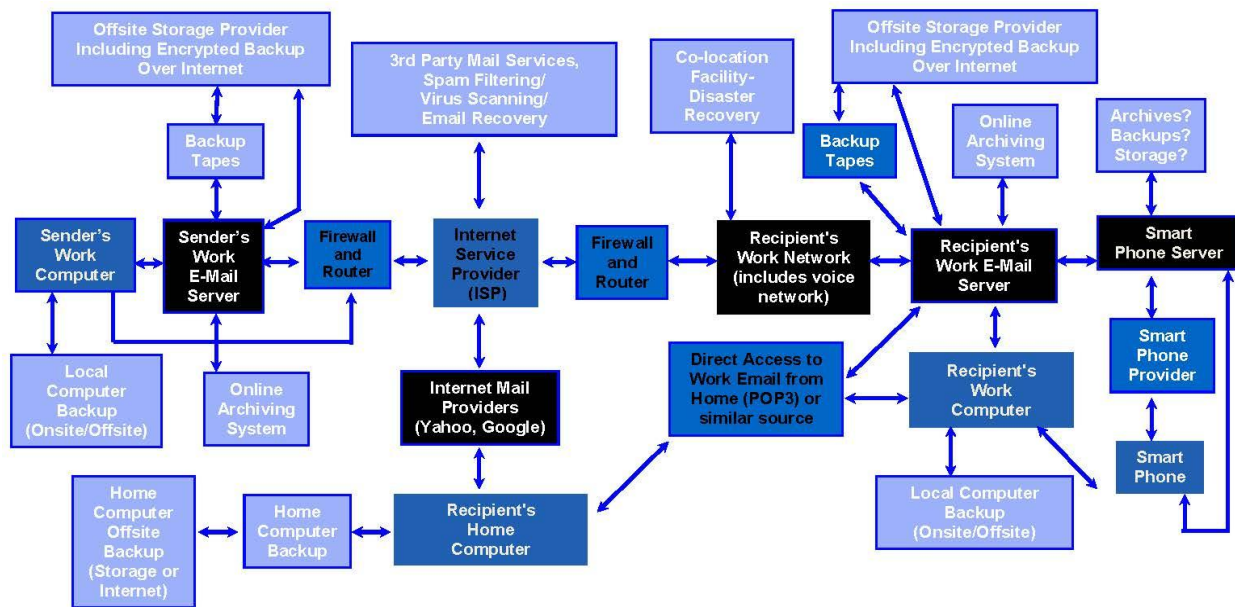
Dynamic Nature: ESI also differ from paper records because it is dynamic in nature. Various metadata fields automatically change simply by clicking on a document to print it or to move it to a folder or transfer it to a disc for production in discovery. Simply turning on or booting up a computer can alter fragmented information or residual data on a computer's hard drive. Certain forms of ESI such as information in a computer's random access memory, in user or server logs, in cache files and in browser histories are ephemeral or transient in nature, existing only for a relatively short period of time. Fragmented or deleted data can only be discovered through a forensic examination of a computer's hard drive and ephemeral data is extremely difficult to preserve given its short life span during which time it is capable of being recovered.

Exists in Various Formats: Additionally, unlike paper documents, ESI can be created and stored in various formats. We are all familiar with emails in Outlook or documents created in Word or Word Perfect. But there are thousands of other formats that are used to create or store ESI, many of which are unique or proprietary in nature. Without access to the application used to create a particular form of ESI, it may be unreadable and useless when produced in its "native" state. So it can be critical to know the format in which requested ESI is created and stored. ESI produced in its native state will contain metadata, but can be very difficult to baste stamp and impossible to redact. ESI can also be produced in an imaged format, the most common of which include portable document format (.pdf), tagged information file format (.tiff), or joint photographic experts group (.jpg). While ESI produced in an imaged format can be baste stamped, redacted and viewed by the party receiving it, no metadata will be included with the image unless a "load file" is added to the image. The addition of a load file to ESI produced in an imaged format will require the parties agree on the metadata fields to include, and will add to the cost of production. There are pros and cons to producing ESI in a native or imaged format, which should be carefully evaluated before any production occurs.

Dispersion of Data: Another salient difference is the dispersion of ESI. With paper records, finding the warehouse where a company's records were stored was relatively easy. When it comes to ESI, however, just figuring out where the documents are stored or located can present a significant challenge. ESI can be stored locally on a company's desktop computers or on portable laptops or tablets, may reside on mobile phones, or have been downloaded onto a flash drive or a disc. ESI may be found on home computers if employees are allowed to work from home or could be stored on a company's servers located in a different state or country. Determining all the locations where ESI may be stored or reside is no easy task as the diagram below clearly shows:



Additionally, email can be found in a variety of locations. The diagram immediately below shows the various routes a single email can potentially take between the persons sending and receiving an email:



The route an email will take will depend on the network configuration of the sender and recipient's email systems. How long an email may reside in any of these

locations will depend upon the retention practices of any persons or entities involved in the transmission.

Difficulty of Disposal: While ESI is dynamic in nature and certain forms of ESI can be readily altered through the normal operation of a computer (*e.g.* metadata or fragmented data), electronic documents can be more difficult to dispose of than their paper counterparts. Once a paper document is shredded, it cannot be retrieved. Hitting the delete key on a computer on the other hand, does not delete any information. Instead, hitting the delete key simply alters the computer's file allocation table or disk directory so that the computer reads the space on the hard drive where the document is stored as available for reuse. Until that space is completely reused or overwritten, the "deleted" information, or at least a portion thereof, potentially can be recovered through a forensic examination of the computer's hard drive.

The wide dispersion of ESI also makes it more difficult to dispose. Attempting to delete information on a work computer, even if successful, will not delete copies on portable storage devices, or copies on home computers or back-up tapes.

Legacy or Obsolete Data: Think back to the computers we used merely a decade ago. The mobile phones we carry today have more memory and computing power than those computers. Hardware, software and computer systems rapidly grow obsolete in just a matter of a few years given the rate at which technology is advancing. It is not uncommon to encounter data created by software or on systems that a vendor no longer supports. Thus, it is not unusual for companies to periodically change their computer systems, software applications or technology platforms. Once the change to a new system, application or platform occurs, if the information created by the legacy application or system is not migrated to the new platform, which may require conversion or translation of the data, the information on the legacy system can be difficult to retrieve or process. The potential relevancy of legacy data can be difficult to determine without restoration, which can be extremely time consuming and costly to accomplish.

In light of these differences, we must be prepared to refute the notion that discovery of ESI should be treated just like paper discovery. As one court aptly noted:

[T]he Court is not persuaded by the plaintiffs' attempt to equate traditional paper-based discovery with the discovery of e-mail files. Several commentators have noted important differences between the two.... Chief among these differences is the sheer volume of electronic information. E-mails have replaced other forms of communication besides just paper-based communication. Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail. Additionally, computers have the ability to capture several copies (or drafts) of the same e-mail, thus multiplying the volume of documents.

All of these e-mails must be scanned for both relevance and privilege. Also, unlike most paper-based discovery, archived e-mails typically lack a coherent filing system. Moreover, dated archival systems commonly store information on magnetic tapes which have become obsolete. Thus, parties incur additional costs in translating the data from the tapes into useable form. One commentator has suggested that given the extraordinary costs of converting obsolete backup tapes into useable form, the requesting party should be required to show that production will likely result in the discovery of relevant information.

Byers v. Illinois State Police, 2012 WL 1264004 at *10 (N.D. Ill. 2002).

III. ILLINOIS' EDISCOVERY RULES

Definition of ESI: Supreme Court Rule 201(b) was amended to specifically include a definition of ESI in the scope of discovery. Subparagraph (4) was added to Rule 201(b) and provides that ESI:

Shall include any writings, drawings, graphs, charts, photographs, sound records, images, and any other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably useable form.

Ill S. Ct. R. 201(b) (eff. July 1, 2014).

The Committee Comments to subparagraph (4) explain that the definition of ESI was intended to comport with the Fed. R. Civ. P. 34(a)(1)(A). Ill. S. Ct. R. 201(b), Committee Comments (adopted May 29, 2014). Because the definition of ESI in Rule 201(b)(4) is virtually identical to Rule 34(a)(1)(A), decisions interpreting Fed. R. Civ. P. 34(a) should be illustrative of the scope of potentially discoverable ESI in Illinois.

The Committee Comments to Rule 201(b)(4) explain the definition of ESI "is intended to be flexible and expansive as technology changes." *Id.* While Illinois' definition of ESI is intended to be flexible enough to accommodate technological advances, in one regard it is self-limiting. If electronic data is not capable of being stored, then it should fall outside the scope of discovery under the Illinois Rule. *See, e.g., Convolv, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004) (addressing the failure to preserve wave patterns on oscilloscopes).

The reference in Rule 201(b)(4) to translation of ESI into a reasonably useable form recognizes that ESI can be created in unique or proprietary formats or on legacy software that when produced in a "native" format may need to be converted into another format simply to be reviewed by the party receiving the ESI.

Proportionality: Illinois Supreme Court Rule 201(c), which deals with the prevention of discovery abuse, was amended to incorporate the concept of proportionality currently found in Fed. R. Civ. P. 26(b)(2)(C)(iii). Subparagraph (3) of Rule 201(c) now provides:

Proportionality. When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in litigation, and the importance of the requested discovery in resolving those issues.

Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014).

While the addition of proportionality into Supreme Court Rule 201(c) was intended to control the burden and expense of ediscovery, like its counterpart in the Federal Rules, it is not necessarily limited to ediscovery. Rather, Rule 201(c)(3) applies to any discovery methods available under our Supreme Court Rules. This conclusion is confirmed by the 2014 amendment to Supreme Court Rule 201(a). Previously, Rule 201(a) provided that the "[d]uplication of discovery methods to obtain the same information should be avoided." Ill. S. Ct. R. 201(a) (eff. Jan. 1, 2013). After its 2014 amendment, Rule 201(a) now reads: "Duplication of discovery methods to obtain the same information and *discovery requests that are disproportionate in terms of burden or expense* should be avoided." Ill. S. Ct. R. 201(a) (eff. July 1, 2014) (emphasis added). Note that the language added to Supreme Court Rule 201(a) addresses discovery requests generally, and is *not* limited to requests for electronic discovery.

Additionally, the proportionality provision added to Supreme Court Rule 201(c) in subparagraph (3) employs the phrase "*including* electronically stored information." Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014) (emphasis added). Had the Supreme Court Rules Committee intended to limit Rule 201(c)'s proportionality analysis only to the discovery of ESI, it would have only provided that Rule 201(c)(3) applies to the discovery *of* ESI rather than employing the phrase "*including* electronically stored information."

The concept of proportionality addresses the marginal utility of the requested discovery. *See, e.g., Byers*, 2002 WL 1264004 at *11 ("when faced with a request that would impose significant cost on the responding party a court should focus on the marginal utility of the proposed search"). The Committee Comments to Rule 201(c) explain that proportionality is intended to apply when the benefit of the discovery being sought is outweighed by the cost and burden of producing the requested information. Ill. S. Ct. R. 201(c), Committee Comments (adopted May 29, 2014).

Several commentators have cogently explained why the concept of proportionality was added to the Federal Rules:

One of the recurrent concerns about paper discovery was that extremely broad discovery requests were easy to draft, extremely burdensome to satisfy and often produce little or nothing of importance to the case. In 1983, the "proportionality" provisions now contained in Rule 26(b)(2)(C) were added to address these concerns.

Shira A. Scheindlin and Daniel J. Capra, *Electronic Discovery and Digital Evidence*, CASES AND MATERIALS 4 2009. Given the added burden and cost of electronic discovery, the concept of proportionality has become even more important.

When asserting a proportionality objection, counsel should consider providing the court with as much factual information as can be compiled. For instance, if a party's discovery request would require a defendant to search 50 computers, explain that to the court and provide an estimate of the man hours or costs involved to comply with that request. While the amount of the damages sought is relevant to the proportionality analysis, remember that one of the benchmarks against which the ediscovery cost will be measured against is "the amount in controversy."

Since one factor to consider in any proportionality analysis is the importance of the issue in the litigation which the requested discovery is targeting, discovery on tangential issues having little importance to the ultimate resolution of the action should be a prime candidate for a proportionality objection. Because proportionality focuses on the marginal utility of the requested discovery, requests for information from backup tapes and other sources of ESI that are extremely costly to restore and produce should also trigger a proportionality objection when the information can be obtained from a less costly or burdensome source.

Frequently court and counsel may not realize how broad a discovery request is that seeks "all communications" about a particular subject matter. Compliance with such a request in some instances could literally require the search of hundreds or thousands of computers depending on the size of the company. In this scenario, counsel should remember that another factor in any proportionality analysis is the importance of the requested discovery in resolving the issues in the litigation. As a result, counsel should seek to collaboratively identify with opposing counsel those persons (data custodians) most likely to have relevant information. ESI from those custodians should be produced, and a proportionality objection should be raised to producing ESI from other persons who are not likely to have any relevant information. Again, however, counsel should be prepared to present information on the cost and burden of producing that additional ESI to the court. While discovery may be broad, it is not unlimited and a proportionality objection should be raised when appropriate.

Categories of ESI That Often May Not Be Discoverable: The Committee Comments to subparagraph (3) of Rule 201(c) explain that a proportionality analysis "often may indicate" that certain "categories of ESI should not be discoverable." The

Comment then lists the following eight (8) categories of burdensome ESI that often may not be discoverable under a proportionality analysis:

- Deleted, slack, fragmented or unallocated data on hard drives;
- Random access memory ("RAM") or other ephemeral data;
- On-line access data;
- Data in metadata fields that are frequently updated automatically;
- Backup data that is substantially duplicative of data that is more accessible elsewhere;
- Legacy data;
- Information whose retrieval cannot be accomplished without substantial additional programming or without transforming it into another form before search and retrieval can be achieved; and
- Other forms of ESI whose preservation or production requires extraordinary affirmative measures.

Ill S. Ct. R. 201(c)(3), Committee Comments (adopted May 29, 2014).

The concept that certain categories of ESI may not be generally discoverable was drawn from Principle 2.04(d) of the Seventh Circuit's Electronic Discovery Pilot Program Principles *available at*: http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf. Obviously, a valid proportionality objection can be raised when the aforementioned categories of ESI are sought in discovery.

The Committee Comments further note, however, that a proportionality analysis "may support the discovery of some of the types of ESI" listed above. The Comments further explain that the list of burdensome categories of ESI should not be viewed as "static, since technological changes eventually might reduce the cost of producing some of these types of ESI." Additionally, the Comments clarify that proportionality requires a "case-by-case analysis."

Finally, it is important to note that the Committee Comments to Rule 201(c) provide:

If any party intends to request the preservation or production of potentially burdensome categories of ESI, then that intention should be addressed at the initial case management conference in accordance with Supreme Court Rule 218(a)(10) or as soon thereafter as practicable.

Ill. S. Ct. R. 201(c), Committee Comments (adopted May 29, 2014). If a party fails to request the preservation of one or more of these categories of burdensome ESI, then in fairness, that party should not be able to later complain that it was not preserved or bring a motion for sanctions for its loss.

Forms of ESI Production: Supreme Court Rule 214 was amended to specifically provide that requests for written discovery can include ESI as defined under Rule 201(b)(4). Subparagraph (b) was added to Rule 214 and provides: "If a discovery request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably useable form or forms." Ill. S. Ct. R. 214(b) (eff. July 1, 2014). Supreme Court Rule 214(b) is based upon Fed. R. Civ. P. 34(b)(2)(E)(ii), and therefore federal decisions interpreting that particular provision of the federal discovery rules may provide guidance in complying with Rule 214(b)'s requirements.

An additional provision was added to Rule 214(c), which recognizes that a party may object to a production request "on the basis that the burden or expense of producing the requested materials would be disproportionate to the likely benefit in light of the factors set out in Rule 201(c)(3)." Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014). In other words, Rule 214(c) as amended contemplates a proportionality objection.

Fed. R. Civ. P. 34(b)(2)(D) provides that a responding party may object to the "requested form for producing ESI." That subdivision of Rule 34 further provides that if the responding party objects to a requested form, or if no form was specified in a production request, the producing party "must state the form or forms it intends to use" when producing the requested ESI. Fed. R. Civ. P. 34(b)(2)(D). Similar provisions are noticeably absent from the amendments to Supreme Court Rule 214. It would seem, however, that a similar approach to ESI production formats is contemplated under our Supreme Court Rules.

The Supreme Court Rules contemplate that the parties will attempt to work out their discovery differences, which can include disputes over the format in which ESI is produced. *See* Ill. S. Ct. 201(k) (eff. October 24, 2012). The parties should attempt to resolve any dispute over the format of the ESI production before any production occurs. If the parties cannot resolve their dispute, they should then seek a resolution by the court. This will help to avoid arguments that the ESI was not produced in a reasonably useable form and limit the risk of having to produce ESI a second time in a different format.

Fed. R. Civ. P. 34(b)(2)(E)(iii) provides that a party need not produce the same ESI "in more than one form." While a similar provision was not added to Supreme Court Rule 214, it was apparently thought to be unnecessary in light of Supreme Court Rule 201(a), which already frowns upon "[d]uplication of discovery methods to obtain the same information." Ill. S. Ct. R. 201(a) (eff. July 1, 2014).

The 2006 Advisory Committee Note to Federal Rule 34 explains that if a party "ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." Fed. R. Civ. P. 34 advisory committee's note (2006 amendment). We should expect that a similar approach will be taken in Illinois since Rule 214(b) now requires information to be produced in a "reasonably useable" form. *See* Ill. S. Ct. R. 214(b) (eff. July 1, 2014).

Early Attention to Ediscovery: Supreme Court Rule 218 was amended to include a provision that encourages parties to use the initial case management conference to resolve issues concerning ESI. Subparagraph (10) was added to Rule 218(a) and provides that at the initial case management conference "issues involving electronically stored information and its presentation" shall be considered by counsel and the court. Ill. S. Ct. R. 218(a)(10) (eff. July 1, 2014). This means that counsel for a party will need to learn about the client's available ESI and its information systems in order to be prepared to address issues relating to the preservation and production of the client's ESI.

Sanctions: No changes were made to the sanctions available under Supreme Court Rule 219 addressing the loss of ESI. A Committee Comment was added to Rule 219, however, which explained:

The Committee believes that the rule is sufficient to cover sanction issues as they relate to electronic discovery. The rulings in *Shimanovsky v. GMC*, 181 Ill.2d 112 (1998) and *Adams v. Bath and Body Works*, 358 Ill. App. 3d 387 (1st Dist. 2005) contain detailed discussion of sanctions for discovery violations for the loss or destruction of relevant evidence and for the separate and distinct claim for the tort of negligent spoliation of evidence.

Ill. S. Ct. R. 219, Committee Comment (adopted May 29, 2014).

While an established body of law exists in Illinois which addresses the issuance of sanctions, generally these decisions involve the loss or destruction of tangible objects and involve some type of human intervention, negligent or otherwise. ESI on the other hand, can be lost simply from the routine operation of a computer, and as noted above, some forms of ESI are transitory or ephemeral in nature. Accordingly, the issue of sanctions for the loss of ESI will present new scenarios that court and counsel will have to carefully address. The Committee Comment to 201(c)(3), which requires a party to specifically request the preservation of potentially burdensome categories of ESI at either the initial case management conference or as soon thereafter as practicable is another factor that should not be overlooked when sanctions are sought involving the loss of ESI.

While on the issue of sanctions, it is worth noting that on the same day that the Illinois' Rules were adopted, the Standing Committee on Rules of Practice and

Procedure in federal court approved a package of proposed amendments to the Federal Rules, one of which deals with the loss of ESI. The proposed Rule 37(e) applies to ESI that: 1) should have been preserved; 2) is lost because a party failed to take reasonable steps to preserve it; and, 3) cannot be restored or replaced through additional discovery. If a court finds that another party has been prejudiced by the loss of that ESI, it is permitted to order “measures no greater than necessary to cure the prejudice.” More significant sanctions are permitted only upon an additional finding that the “party acted with the intent to deprive another party of the information’s use in the litigation.” Available at: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks>, at p. 318.

IV. PRACTICE TIPS

Consider Conferring with Opposing Counsel Prior to the Initial Case Management Conference: Rule 218 requires that counsel familiar with the case be prepared to discuss issues relating to ESI and its preservation at the initial case management conference. Consider discussing ESI issues whenever possible with opposing counsel prior to the initial conference with the court. Knowing your opponent’s position on ediscovery issues prior to that conference may save time by identifying issues on which you agree or which are not worth fighting over, and allows you to focus on important ediscovery issues on which there is disagreement.

As explained below, however, this strategy requires prior consultation with the client. You should endeavor to avoid committing to a position with opposing counsel or the court on an ediscovery issue that the client cannot meet.

Advance Reasonable Ediscovery Positions: The cost and expense of ediscovery requires you to work collaboratively with opposing counsel more now than ever before. There will be instances where ediscovery issues cannot be resolved. When that occurs, it is critical that *you* do not appear to be taking unreasonable positions on ediscovery. Your letters to opposing counsel and discovery objections should be written with the understanding that they will be reviewed by the court in connection with a motion to compel or for sanctions. Judges are human and do not appreciate gamesmanship, hardball or scorched-earth tactics when it comes to discovery. The ediscovery positions you advance are more likely to be accepted by the court if they are reasonable.

Strategies for Limiting Discovery Costs: There are various strategies and tools that can limit ediscovery costs which should be discussed with opposing counsel, and hopefully agreed upon. The first is “deduplication.” If an employee sends an email to five coworkers, you should only have to produce one copy of that email, not six copies. Deduplication tools permit the identification of exact copies of emails or documents which can limit the volume of ESI that has to be reviewed and produced in discovery.

You should also discuss and seek agreement on date ranges – how far back you have to search, and data custodians – those persons who likely have relevant information. The use of keyword searches should also be discussed and, where possible, you seek the input of your opposing counsel on search terms to use. These "filters" will help limit that amount of ESI that has to be reviewed for privilege and work product before it is produced in discovery.

If you or your client is interested in employing predictive coding or computer or assisted review tools to identify relevant ESI, this issue should also be addressed with opposing counsel. Over the past year predictive coding has been gaining greater acceptance on a national basis by court and counsel. Predictive coding involves a process of coding relevant and irrelevant documents in conjunction with the use of technology which learns to identify relevant materials from those coded documents.

Seek Rule 502(d) Non-Waiver Orders: The issuance of a non-waiver order pursuant to Illinois Rule of Evidence 502(d) should be addressed at the initial case management conference, if a motion seeking such an order has not already been filed. A Rule 502(d) non-waiver order will protect the parties and their counsel against a waiver of attorney-client privilege or work product protection that can occur in discovery. Given the volume of ESI now available, Rule 502(d) non-waiver orders should always be considered as part of your discovery strategy.

Consider Promptly Issuing a Litigation Hold: When you are initially retained, consider sending the client a litigation hold letter. While the content of your letter may vary depending on the nature of the case and your client, the letter should explain the client's obligation to preserve potentially relevant information. Consider including in your letter a broad explanation of the issues in the case, the types of ESI that may have to be preserved and the potential ramifications of failing to preserve potentially relevant ESI. Consider also advising in your letter that key personnel who may have relevant ESI be alerted, preferably in writing, about the litigation hold.

Your Initial Client Meeting: Given the potential complexity of ediscovery issues and the client's IT network, a best-practices approach suggests that we attempt to learn as much as we can about the client's information and email systems before the initial case management conference. Every case and client is different so there is no one-size-fits all approach when it comes to ediscovery. And the information you may need to obtain from your clients will vary from case to case. However, some of the information that you may want to learn from the client might include:

- A description of the client's network architecture, and an explanation of how the client's email and information systems operate;
- How email and ESI are retained by the client, how long they are retained, and all locations where they are stored;

- What applications are used to create and store email and ESI;
- The volume of email and ESI in the client's possession and how much may be relevant to the case you are defending;
- How many computers, tablets and mobile phones or devices may contain potentially relevant ESI or email, where they are located, whether they are connected to a central network or server, and whether information is stored on them that may not be found on the network;
- Whether the client has a BYOD (“bring your own device”) policy, whether employees are allowed to work using home computers and/or personal mobile devices, whether those personal devices are linked to a network server and have ESI that may be stored on only those devices;
- Whether the client's email or information system has any automated features that routinely destroy emails or discards ESI after a specific time or once a specific volume is reached, and whether that feature can be or has been interrupted;
- What controls or policies a client has addressing the use of or the downloading of information on portable flash drives or other portable storage media;
- How frequently the client backs up its systems, what information is captured on backup tapes, how long those backup tapes are retained, and whether any potentially relevant ESI may be found only on those tapes;
- Whether the client has any legacy systems or legacy data on which potentially relevant ESI is stored;
- Whether any potentially relevant ESI is stored in the cloud, or is in the possession or under the custody or control of a third party, and if so, the identity and location of that third party or cloud vendor;
- Whether the client has taken any steps to preserve potentially relevant email and ESI and what steps have been taken;
- Whether third parties and/or key personnel who likely have relevant email or ESI in their possession or under their control have been notified about the litigation hold and are preserving information;
- Whether the client has the internal capability to preserve, review, process, and produce its email or ESI to you or an ediscovery vendor;

- Whether there are any unique features to the client's email or information systems that may impact its ability to preserve or produce its ESI or email;
- Whether the client is aware of any issues, problems or concerns with its systems and/or its ability to preserve and produce its ESI or email;
- Whether the client has a document retention policy, whether that policy applies to ESI or emails and whether the client has complied with that policy;
- Whether the client has a data map showing where its data is stored and how that data flows across its network;
- Who is/are the person or persons most knowledgeable about the client's email and information systems and its retention practices that you can contact when necessary.

With this information, you should be able to plan your discussions with opposing counsel about ediscovery issues that may arise in your case.

About the author:



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