

COOPERATE, OR ELSE:

The Seventh Circuit's Electronic Discovery Pilot Program

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Disputes over the costs and burdens associated with discovery are not new: they first arose when the Federal Civil Rules of Procedure took effect in 1938. Despite multiple amendments to the Federal Rules over the years, the demand to reduce the burdens associated with discovery persist, particularly with the advent of electronic discovery. Today, e-discovery expenses constitute a significant percentage of total litigation costs.

The 2006 amendments to the Federal Rules were an important step in managing these burdens, but they did not go far enough to address the complex issues e-discovery raises. Accordingly, in 2009, under the leadership of Chief District Judge James Holderman and Magistrate Judge Nan Nolan, a committee of judges, attorneys, academics, and consultants developed the Seventh Circuit's Electronic Discovery Pilot Program.

According to the Committee, Phase One's goals included drafting "guiding principles for the discovery of [electronically stored information] that are fair to all parties and minimize the cost and burden of discovery in proportion to the litigation," implementing those principles in cases, and surveying the judges and counsel involved in those cases to determine the principles' efficacy.

The Committee began by drafting 11 e-discovery Principles that attempt to bridge the gap between the Federal Rules and practice. The Committee recognized that e-discovery problems often begin at the outset of litigation, when parties issue generic demands for all

electronic data to be preserved regardless of relevance, setting an adversarial stage for the remainder of discovery. Thus, the Principles' aim was "to incentivize early and informal information exchange between counsel on commonly encountered issues relating to evidence preservation and discovery."

The Committee divided the Principles into three categories: General Principles, which establish the Program's purpose; Early Case Assessment Principles, which specify the e-discovery issues counsel should discuss; and Education Principles, which suggest that counsel learn the fundamentals of ESI. Principle 1.01 explains that "the purpose of these Principles is . . . to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention."

The remaining Principles focus on cooperation, proportionality, the duty to meet and confer, the duty to preserve, drafting preservation requests and orders, identifying ESI, and formatting ESI for production. The Principles also require the parties to use e-discovery liaisons, who are attorneys or consultants with expertise in handling the technical aspects of e-discovery, to assist in resolving disputes throughout the discovery process. Additionally, the Committee drafted a proposed Standing Order Relating to the Discovery of Electronically Stored Information. Principle 2.01(d) reaffirms that courts may impose sanctions on parties for failing to engage in a meaningful meet and confer process.



As part of Phase One of the Pilot Program, 13 judges in the Northern District of Illinois implemented the Principles in 93 test cases. In March 2010, the Committee surveyed the judges and attorneys who participated in the test cases. The judges' responses were overwhelmingly positive, agreeing that the Principles helped the lawyers resolve discovery disputes without judicial intervention. In particular, the judges lauded the appointment of an e-discovery liaison to smooth potential wrinkles in the discovery process. However, attorney responses to the survey were mixed: 38% believed the Principles improved their ability to resolve discovery disputes without the court's help, while 61% disagreed, finding the Principles had little to no effect. Just under half (43%) stated that the Principles increased the fairness of the discovery process; the majority saw no difference.

As part of Phase Two, which concludes in May 2011, the Pilot Program was expanded to courts in Indiana and Wisconsin. The Committee also plans to survey the 30,000 attorneys registered in the court's e-filing system to gather more data. A final goal in this phase is to develop principles to guide attorneys in handling privileged information, using phased discovery, and searching for ESI.

For Seventh Circuit e-discovery case summaries and news, please visit the Applied Discovery website (www.applieddiscovery.com).



About the Author: Michael Gray leads the Labor & Employment Practice in Jones Day's Chicago Office. Michael's practice focuses on representing corporate clients with complex labor and employment litigation, including class action and multi-plaintiff employment discrimination lawsuits, state law overtime class actions, FLSA collective actions, and trade secrets and restrictive covenant matters. He has represented employers throughout the United States in bench and jury trials in state and federal courts, administrative hearings, arbitrations, and appellate courts in matters arising under federal and state anti-discrimination laws, the Fair Labor Standards Act, the Family and Medical Leave Act, Employee Retirement Income Security Act, the Sarbanes-Oxley Act, labor management relations laws, and diverse state law wrongful discharge, statutory, contract, and tort claims. As a leader in the area of electronic discovery and the use of technology in complex litigation, Michael speaks across the country to clients and members of the bar on the topic, writes on the practical implications of e-discovery obligations, and participates in his firm's e-Discovery Committee.



About the Author: Jon Resnick is an attorney and Worldwide Vice President, Field Operations and Marketing at Applied Discovery, a division of LexisNexis. In this role, Jon oversees the largest client development and data collection and forensics consulting team in the e-discovery industry. In addition, Jon has primary responsibility for identifying, coordinating, and supervising all client development activities with Applied Discovery's strategic outside partner channel.

Jon's team is comprised of former practicing attorneys, legal professionals, and technology experts dedicated to working with clients from the nation's top corporations and law firms to navigate the challenges of complex discovery matters. The team counsels clients on a wide range of discovery matters including data gathering, identifying potential sources of relevant ESI, negotiating scope limitations, formulating e-discovery and document review strategies, and producing documents to government agencies and other requesting parties. Jon's team also works with clients to develop cost-saving strategies in matters involving the collection, processing and review of large amounts of e-mail and other electronic data. Jon and his team have particular expertise in the government investigation, antitrust, and commercial litigation areas.