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Cutting Your e-Discovery Costs

By Jaclyn Jaeger — June 30, 2009

One of the biggest beefs companies have with corporate litigation has been the rise in discovery costs, especially as Corporate America has entered the electronic era and creates exponentially more information to search. But many times, it's the lawyers themselves who make the process more expensive than it needs to be.

That was the message expressed by federal magistrate Judge Robert Collings, who spoke recently at the IQPC Corporate Litigation Exchange. He noted that misunderstandings over e-discovery arise when opposing sides attempt to guess at the scope of a dispute, rather than coming to an agreement and sticking to it. The result, he said, is that parties take their best guesses at what the other side wants—and fail, leading to time-consuming and costly pre-trial hearings and disputes.

A better approach is for lawyers to resolve the issues among themselves and then come to the court with solutions, an approach that would be "embraced by judges," says Rick Wolf, CEO of legal consulting firm Lexakos.

As Collings pointed out, many magistrates would be more than happy to help settle the scope of a dispute. What really gets under their skin is refereeing each side's decisions *after* those choices have been made.

That's where the growing role of mediators in e-discovery disputes is coming into play, driven in part by 2006 amendments to the Federal Rules of Civil Procedure. Rule 29, in particular, gives opposing sides the leeway to set their own discovery rules, which has given rise to "a whole additional cottage industry of consultants," says John Watkins of law firm Chorey, Taylor & Feil, and a registered mediator with the Georgia Office of Dispute Resolution.

"The mediator is not there to act as a judge or jury or to decide the case," Watkins explains. Generally, he or she provide suggestions, offers feedback, asks probing questions, and—unlike arbitrators—tries to assist the parties in reaching their own agreement, he says.

While mediation itself is not anything new, lawyers are only just beginning to turn to neutral outsiders to help resolve issues unique to e-discovery, including "scope, identifying search terms, and the proper use of technology to call out information that

may be privileged or confidential," says Wolf, who sits on the e-discovery panel for the International Institute for Conflict Prevention & Resolution.

Using mediation in that narrow e-discovery context, he says, "could provide a very efficient means of getting to the merits of a problem." By reaching a compromise outside the courtroom, lawyers can "come to the judge with progress reports, rather than being embroiled in suits."

That approach does cut the costs of discovery—one of the most expensive parts of litigation, Watkins notes—but it can also save considerable time as well. Mediation can range anywhere from a few hours to a few days, and because the process is voluntary, a party can choose to walk away if he believes the process isn't accomplishing much, he adds.

Standards for experts and consultants in the field of e-discovery have not yet fully developed, so litigants (and courts) should carefully consider the knowledge and wisdom of a potential consultant, experts say. "Find a person who's experienced in litigation and the court system, and also has some experience in the area of the particular dispute," Watkins says.

Effective mediators will "not just understand how to mediate cases and be experienced in mediation, but also understand how things work in corporations," says Wolf. "In other words, if you don't understand the infrastructure and operation of technology systems and e-mail systems in companies and also the way corporations operate, it's difficult to be able to navigate through and help in a mediation setting."

Those burdens don't just fall upon lawyers. As discussed in a paper written by Judge Lee Rosenthal—the U.S. district judge who chaired the committee that revised the rules of civil procedure in 2006—judges also have responsibilities in helping lawyers wade through the rough waters of e-discovery cases.

According to the Federal Judicial Center, which published Rosenthal's "pocket guide," judges "must understand the relevant technology at a level that allows effective communication with attorneys, parties, and experts," if they are to effectively manage these issues. "Judges must also encourage parties to narrowly target requests for [electronically stored information] and to make these as early as possible in the litigation."

The guide goes on to state that rather than wait on lawyers to identify and argue matters, judges should "require parties to provide the judge with expert briefings on the relevant technological issues." In some instances, courts should require the parties to seek mediation, the guide advised.

Watkins, however, prefers that parties seek mediation voluntarily, "because if it's voluntary, at least the parties have expressed some interest in resolving the dispute."

Quicker resolution of e-discovery arguments also hinges on companies developing a more centralized approach to litigation management. “The reason that there is a struggle or a misunderstanding is because the mystery around a corporation’s technology, infrastructure, and systems continue,” Wolf says. He cites a survey conducted by Lexakos, which found that only 32 percent of law departments last year used a centralized litigation group; that number has jumped to 49 percent for 2009.

Those numbers show that law departments are getting more creative in how they cut costs and manage themselves more efficiently, Wolf says. “That’s significant, because it’s impossible to manage electronic discovery and the complex issues that are associated with it unless you have centralization and standards that are in place internally to access the information for litigation purposes.”

Centralization should give outside lawyers more streamlined access to a company’s internal information; that, in turn, should simplify disputes and lower costs, Wolf continues. “So the more centralized you are, the better your processes are. The easier it’s going to be for outside lawyers and judges to get to the heart of the matter.”

JUDGES’ POCKET HELP

The following excerpt is from the Federal Judicial Center’s Pocket Guide for Judges:

Conclusion

Discovery of ESI presents unique issues regarding the scope of discovery, the allocation of costs, the form of production, the waiver of privilege and work-product protection, and the preservation of data and spoliation. To effectively manage these issues, judges must understand the relevant technology at a level that allows effective communication with attorneys, parties, and experts. The information in this guide is a start, and additional resources can be found on the Center’s intranet site.

More specifically, judges must require attorneys to take seriously their obligation to meet and confer under Rule 26(f) and to submit a meaningful discovery plan that addresses ESI issues, and judges must ensure that adequate disclosures are made pursuant to Rule 26(a)(1). Judges must also encourage parties to narrowly target requests for ESI and to make these as early as possible in the litigation. Judges must evaluate whether the costs of complying with the requests are proportional to their benefit. To this end, judges may need to encourage or order tiered discovery and sampling to determine the relevance, need, and cost of more expansive discovery, and may shift costs from the producing party to the requesting party, particularly when information that is not reasonably accessible must be produced. Judges need to help ensure that ESI is produced in a usable form, and, to facilitate efficient and cost-effective discovery, judges may need to clarify the procedures to be followed if privileged or protected information is inadvertently disclosed. They should help parties establish effective data-preservation policies,

balancing the need to preserve relevant evidence and the need to continue routine computer operations critical to a party's activities, and enter preservation orders as appropriate.

In complex cases, these responsibilities are not easy undertakings. Thus, it may be appropriate for the judge to require parties to provide the judge with expert briefings on the relevant technological issues, and in some instances to seek the assistance of a special master or neutral expert. For example, the court may appoint a neutral expert to help develop a discovery plan and supervise technical aspects of discovery, review documents claimed to be privileged or protected, or participate in an on-site inspection.

In the end, judges must actively manage electronic discovery—raising points for consideration by the parties—rather than awaiting the parties' identification and argument of the matters. Such active management can help ensure the expeditious and fair conduct of discovery involving ESI.

Source

FDC: Managing Discovery of Electronic Information (2007).

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