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CLIFFORD'S NOTES

Federal courts have developed a protocol governing the preservation, collection and production of Electronically Stored Information (ESI) and, if properly followed, can ensure fairness to all parties without imposing unrealistic burdens on the litigation process.

Amendments to the Federal Rules of Civil Procedure that took effect Dec. 1, 2015, focus on early case management, proportionality and preservation. Under the amendments, the most significant changes impacting electronic discovery occurred with respect to Rules 26(b)(1) and 37(e).

Under amended Fed. Rule of Civ. Proc. 37(e)(2), a party must take "reasonable steps" to preserve ESI in the anticipation or conduct of litigation in order to avoid sanctions or curative measures. If a party fails to take "reasonable steps" to preserve ESI and the information cannot be restored or replaced through additional discovery, the amended rule provides for appropriate court action and allows a court to impose additional sanctions if the party that failed to preserve the ESI "acted with the intent to deprive another party of the information's use in the litigation."

At least one federal court has determined that punitive damages are allowed. In *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318-LPS (D. Del., July 6, 2016), the U.S. District Court for the District of Delaware imposed \$3 million in punitive sanctions upon findings of intentional, bad faith spoliation of email threads by defendant's senior managers in an antitrust case under the Sherman Act and common law. See also, *DR Distributors, LLC v. 21 Century Smoking, Inc., and Brent Duke*, No. 12 CV 50324 (N.D. IL., decided Jan. 19, 2021), Judge Iain D. Johnston wrote, "[i]t is no longer amateur hour. It is way too late in the day for lawyers to expect to catch a break on e-discovery compliance because it is technically complex and resource-demanding."

These amended rules, which address proportionality and preservation, impact the way practitioners and their clients manage ESI. The Sedona Conference, a nonpartisan, nonprofit research and educational institute dedicated to the advanced study of several areas of law and policy, coined the term "proportionality" in 1983 to capture both the "burden" and the "expense" of discovery so that disproportionate cost and time is not expended in discovery on cases that may not warrant such efforts.

By 2018, ESI changed to such an extent that the Sedona Committee published the third edition of "The Sedona Principles," that include 14 prin-



PROPORTIONAL RESPONSE

Finding the 'reasonable steps' to preserve ESI

By **BOB CLIFFORD**

ciples addressing the selection of e-discovery methodologies. The Sedona Principles offer a refined analysis based on legal precedent from federal and prevailing state cases offering guidance on the best practices in discovery and how to argue points in courts that have not addressed electronic discovery issues.

Proportionality, however, appears to have taken on a greater significance than intended and has often been weaponized to deny the requesting party relevant documents. Duke Law School reported that in 2020 there were 889 case law decisions involving proportionality disputes, more than the number of sanction disputes that same year. Proportionality is one factor courts consider in making discovery rulings and, significantly, the U.S. Supreme Court adopted the change of the Federal Rules on proportionality by moving this section from "limitations" to "scope" in 2015.

Technology-assisted review (TAR) uses software to search and sort through documents that are relevant for the purposes of e-discovery. TAR can quickly sort through millions of documents, sometimes terabytes of data, to identify and prioritize which documents are considered responsive for a legal case. Too often TAR is not ordered because of a judge's unfamiliarity with ESI protocol.

Illinois courts are acclimating to ESI. In 2014, Illinois Supreme Court Rule 201 was amended to

change its terminology from "retrievable information in computer storage" to "electronically stored information" to be in conformity with the Federal Rules' definition. Illinois Supreme Court Rule 201(a)(4) states: ("ESI") shall include any writings, drawings, graphs... which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."

The Illinois Supreme Court went on in Rule 201(c)(3) to define 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 the litigation, and the importance of the requested discovery in resolving the issues."

One thing is for certain in this increasingly digital world: a cookie-cutter approach is not appropriate in large cases involving ESI. Judges must make discovery decisions on a case-by-case basis to move from the general to the specific as needed in each lawsuit. CL

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