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The results of the Seventh Circuit's ground breaking Electronic Discovery Pilot Program were presented May 3 to the Seventh Circuit Bar Association's Annual Meeting and Judicial Conference. Attorneys from Hogan Lovells US LLP highlight this important study and provide suggestions for developing e-discovery strategies in light of the study's focus and findings.

Practical Principles for E-Discovery in the 21st Century: Phase One Results of the Seventh Circuit's Electronic Discovery Pilot Program



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On May 3, 2010, the Seventh Circuit Electronic Discovery Pilot Program Committee ("Committee") presented the findings of their unprecedented e-discovery program. The Committee also made its findings available to a wide audience of federal judges at the Federal Civil Rules Advisory Committee Conference on May 11.

Committee Members.

The approximately 60-member Committee consists of a diverse group of attorneys (in-house¹ and outside counsel), government lawyers,² non-attorneys,³ and judges experienced with the discovery of electronically

¹ In house counsel on the Committee include attorneys from McDonald's Corporation, State Farm Insurance, Eli Lilly and Company, and Baxter Healthcare Corp.

stored information (ESI). The pilot program was designed to develop and test principles aimed at decreasing the expense, burden, and time of e-discovery in modern litigation.

Real Life Application. The most unique element of the study is that the 13 participating judges actually tested the Committee's e-discovery principles in 93 current cases.⁴

After a year of planning, executing, and then surveying the effects of the Committee's proposals, the Committee presented their findings in a 425-page report at the Seventh Circuit Bar Association's Annual Meeting and Judicial Conference. "What we are doing," Chief Judge James Holderman (N.D. Ill.) explained previously and reiterated at the Federal Civil Rules Advisory Committee Conference, "is developing procedures that enable the purposes of the [Federal Rules of Civil Procedure] to be achieved in the 21st century and make them work for the types of discovery that are necessary in litigation today."⁵ "The reason we put together the Seventh Circuit Pilot Program," continued Judge Holderman, "was to develop a new approach based on a set of Principles directed specifically to the issues raised by e-discovery. Whenever I speak to bar groups or to business executives, they tell me that something has to be done about e-discovery."⁶

² Representatives from government include counsel from the EEOC, United States Attorneys' Offices, and the Securities and Exchange Commission.

⁴ The courts implemented the Principles by entering in each case the proposed order included in the Pilot Program materials. The proposed order contains the 11 Principles, split into three categories: General Principles, Early Case Assessment Principles, and Education Principles. The type of cases in the Pilot Program ranged from bankruptcy, employment, copyright, patent through contract and torts.

⁵ *Seventh Circuit's Electronic Discovery Pilot Program*, 18 Metro. Corp. Couns. 5 at 2 (2010).

⁶ *Id.* at 1.

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Phase One of the Committee's work involved creating and testing the Principles; Phase Two will begin in July 2010.

Principles Relating to the Discovery of ESI. The Committee drafted the Pilot Program's Principles Relating to the Discovery of Electronically Stored Information ("Principles") in the summer of 2009, adopted them in September 2009, and put them into practice in October 2009.⁷ The purpose of the Principles "is to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Rule 26(f)(2)."⁸

The Committee developed 11 Principles intended to help courts secure the "just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention."⁹

After first outlining the Principles' purposes, the remaining 10 Principles address cooperation, proportionality of discovery, duty to meet and confer, use of e-discovery liaisons, preservation requests and orders, scope of preservation, identification of ESI, production format, judicial expectations of counsel, and duty of continuing education.¹⁰ In particular:

- Counsel must meet and discuss specific subject areas prior to the initial status conference with the Court. Among these subject areas are the:

- ▶ identification of relevant and discoverable ESI,

⁷ Even sophisticated individuals, well-versed and sensitized to e-discovery issues do not always agree on the best course of action. The Committee itself struggled at times while drafting the Principles. "To be sure, there were difficult drafting issues and every subcommittee member who participated in this process can point to language that they feel could be improved. Indeed, some issues proved very difficult to resolve and were settled only after a mediation session with Magistrate Judge Nolan. But it is fair to say that all are satisfied that the final product promises to improve many of the common problems of electronic discovery today." See *Seventh Circuit Electronic Discovery Pilot Program, Report on Phase One*, May 20, 2009 – May 1, 2010, <http://www.7thcircuitbar.org>, p.26-27.

⁸ *Seventh Circuit Electronic Discovery Pilot Program, Phase One, October 1, 2009 – May 1, 2010, Statement of Purpose and Preparation of Principles*, <http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf>, p. 9 [hereinafter Principles].

⁹ See Principle 1.01 (Purpose).

¹⁰ See Principle 1.02 (Cooperation); Principle 1.03 (Discovery Proportionality); Principle 2.01 (Duty to Meet and Confer); Principle 2.02 (E-Discovery Liaison(s)); Principle 2.03 (Preservation Requests and Orders); Principle 2.04 (Scope of Preservation); Principle 2.05 (Identification of Electronically Stored Information); Principle 2.06 (Production Format); Principle 3.01 (Judicial Expectations of Counsel); and Principle 3.02 (Duty of Continuing Education).

- ▶ scope and format of preservation and production of ESI,
- ▶ potential for phased discovery, and
- ▶ procedures for handling inadvertent production of privileged materials.¹¹
 - The Court may delay discovery or impose sanctions for failure to cooperate and participate in good faith in the meet and confer process or if the party impedes the purpose of the Principles.¹²
 - Parties are required to designate an e-discovery liaison in cases where there is a dispute concerning the preservation or production of ESI.
 - ▶ This liaison must “be prepared to participate in e-discovery dispute resolution; . . . be knowledgeable about the party’s e-discovery efforts”¹³ and either know, or learn, and have the ability to explain the party’s electronic systems and technical aspects of e-discovery.
 - ▶ Where there is no dispute, the Committee still suggests—but does not mandate—the aid of an e-discovery liaison.¹⁴
 - Parties must meet and confer before serving motions or engaging in discovery about discovery.
 - ▶ In order to temper the growing trend of discovery about discovery, parties, before initiating such discovery, must confer to determine the need for such discovery and whether there are alternate means for determining the desired information.¹⁵
 - Parties are encouraged to discuss sharing the cost of certain steps in the e-discovery process.
 - ▶ Examples of areas for potential cost sharing include the expense of converting documents from non-searchable to searchable text.¹⁶

Study Observations and Results. From October 2009 to March 2010, the Principles were tested in actual cases. Thirteen judges of the U.S. District Court for the Northern District of Illinois, including five district judges and eight magistrate judges, implemented the Principles in 93 civil cases by issuing orders incorporating the Principles.

In March 2010, five months after the study began, survey questionnaires were sent to all 13 judges and 285 attorneys whose cases were part of Phase One. All 13 judges responded to the Judge Survey Questionnaires,¹⁷ and 133 attorneys (46 percent) responded to the Attorney Survey Questionnaires.

In reviewing the report, several important observations can be made. First, many of the judges and attorneys surveyed thought it was too early to tell if the Principles were effective since the Principles had only been applied for five or six months at the time of the survey.¹⁸

¹¹ Principle 2.01.

¹² Principle 2.01(d).

¹³ Principle 2.02.

¹⁴ *Id.*

¹⁵ Principle 2.04(b).

¹⁶ Principle 2.06(d).

¹⁷ The report cautions, “It would be best for the reader to treat the responses to the Judge Survey as anecdotal expressions of experienced observers.” Seventh Circuit Electronic Discovery Pilot Program, Report on Phase One, May 20, 2009 – May 1, 2010, <http://www.7thcircuitbar.org/associations>, p.34.

¹⁸ In contrast the average length of discovery in civil litigation in the United States is nine months. See Administrative Office of the U.S. Courts, Table C-5: U.S. District Courts—

For example, the Committee reported that it was too early to determine (a) if the scope of preservation was actually affected by the use of the Principles; (b) if it was beneficial to discuss the sources of ESI early in the process; or (c) if discussion of the format of producing ESI was advantageous.

Second, the perspectives of judges and attorneys on the effectiveness and usefulness of certain principles varied greatly. For example, while 67 percent of judges responded that the proportionality standards in the Federal Rules of Civil Procedure played a significant role in the development of discovery plans in the cases before them, only 20 percent of the attorneys responded similarly.

Eighty-four percent of the judges believe the application of the Principles increased or greatly increased the level of cooperation by counsel, while only 34 percent of the attorneys agreed and 65 percent of attorney respondents said the Principles had no effect on cooperation among counsel.

Similarly, 92 percent of judges indicated the Principles had a positive effect on counsels’ meaningfully attempting to resolve discovery disputes before requesting court involvement yet only 39 percent of attorney respondents agreed.

Finally, there were some Principles that both judges and attorneys thought were valuable additions. For example, both groups thought the inclusion of a discovery liaison was very helpful. While most survey respondents did not perceive the program as shortening the discovery period, most of the judges believed it lowered the number of discovery disputes, and approximately 80 percent of attorney respondents reported that their clients’ total litigation costs decreased or were unaffected as a result of the pilot program. The majority of judges and counsel did not think that the Principles affected counsels’ ability to zealously represent their clients.

Looking Ahead. The Committee is considering additional changes to better address pretrial issues including: (a) a proposed protocol for the production of ESI (which would include definitions to provide a starting point for discussions and modification to fit each case in the program); (b) more detailed information and starting points for discussions on such topics as metadata preservation, de-duplication procedures, search criteria and formats, production formats, and various nuts and bolts e-discovery procedures (such as redactions, TIFF specifications, Bates numbering procedures, and “claw-back” procedures for inadvertent disclosures); and (c) modification to the standard Form 52 used in discovery conferences.¹⁹

As a result of the judge and attorney surveys the Committee recommended the following next steps²⁰, summarized in the table on page 4.

Phase Two of the study will expand both the geographic area covered by the Pilot Program and the number of participating judges and cases. In order to

Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending June 30, 2009 (2009), <http://www.uscourts.gov/stats/june09/C05Jun09.pdf>.

¹⁹ FRCP Civil Form 52.

²⁰ See Seventh Circuit Electronic Discovery Pilot Program, Report on Phase One, May 20, 2009 – May 1, 2010, <http://www.7thcircuitbar.org/associations>, pp.49 - 68.

Principle	Revision needed?	Recommendation
1.01 (Purpose)	No	Continue testing in Phase Two
1.02 (Cooperation)	No	Continue testing in Phase Two
1.03 (Discovery Proportionality)	No	Continue testing in Phase Two
2.01 (Duty to Meet and Confer)	Perhaps	Strengthen to make more effective in Phase Two
2.02 (E-Discovery Liaisons)	No	Continue testing in Phase Two
2.03 (Preservation Requests and Orders)	No	Too early to draw conclusions; continue testing in Phase Two
2.04 (Scope of Preservation)	No	Too early to draw conclusions; continue testing in Phase Two
2.05 (Identification of ESI)	Perhaps	Too early to draw conclusions; continue testing in Phase Two and consider offering further guidance
2.06 (Production Format)	No	Too early to draw conclusions; continue testing in Phase Two
3.01 (Judicial Expectations of Counsel)	No	Too early to draw conclusions; continue testing in Phase Two
3.02 (Duty of Continuing Education)	No	Too early to draw conclusions; continue testing in Phase Two

test the Principles more thoroughly, the Committee also intends to lengthen the time for the Phase Two implementation period. Phase Two is currently scheduled to run from July 1, 2010 to May 1, 2011, at which point the Committee will present its report.

Recommendations. In light of the study's findings and the potential trends it might signal, the authors recommend that consideration be given to the following when developing not only specific case strategy but company-wide e-discovery plans:

- **Select an e-discovery liaison.** A company should identify the appropriate contacts within each department or area of responsibility that are likely to be a source of data or involved in litigation. Where necessary, counsel should be involved with such selections, as counsel will be able to help assess the knowledge and skills necessary for the e-discovery liaison to be the designee for court conferences as well as meetings with opposing counsel. An e-discovery liaison can also be an outside counsel or consultant with knowledge of both the company's systems and e-discovery concerns.

- **Know your IT systems and data.** If a company does not yet have a designee with a general idea of what systems and data exist, then someone should be tasked with gaining this knowledge so that when litigation occurs the company can save time and money determining what information it has.

- **Develop standing disclosures of IT capabilities and limitations.** Establishing positions on costly aspects of e-discovery, such as back-up tape restoration, email searches and collection, or laptop/desktop imaging, will help a company not only strategically frame the

discovery discussion but assist the company in proactively determining resources and budget for these IT areas before litigation occurs.

- **Negotiate e-discovery issues at the beginning of the case.** This enables parties to make strategic decisions early in the process, resolve disputes more expeditiously and ultimately minimize unnecessary burden and expense.

- **Seek clarification and limitation from opposing counsel or the court on the scope of preservation.** By promptly explaining the burden of what are often overbroad and impractical preservation requirements, a company can often obtain some relief. This proactive and informed approach can productively help focus the case and lower both operation and financial costs.

The Seventh Circuit Electronic Discovery Pilot Program has implications for all civil matters in federal court. This study reinforces the importance of planning before litigation so companies and their counsel can make strategic and informed decisions once they are in the throes of discovery.

Practical solutions may be slow in coming but they are on the way.²¹ The question remains, however, whether the courts can move fast enough to keep pace with evolving technology and rising costs as the 21st century continues to speed by.

²¹ Companies and their counsel can have an impact on the future development of this e-discovery pilot program by posting comments about the program at: <http://www.7thcircuitbar.org/forum.cfm>.