

consistent with the Supreme Court's rule-making authority (Supreme Court Rule 3), as opposed to its *ad hoc* adjudicatory role (Supreme Court Rule 234 or 431), that its "mandatory permissive and mandatory directory" analysis should not be interpretive in nature. This view, however, is myopic.

In our imperfect world, trial judges need discretion to analyze not only a given array of facts but also the opportunity to adhere to a rule that incorporates a wide range of elements to ensure the efficiency and fairness of a trial. This makes sense since it vests in the trial court the ability to assess what should

occur at *voir dire* including examination by the court as well as counsel. It would be unfortunate if Rule 234, or Rule 431, for that matter, required that one size fits all. Thankfully, trials were never contemplated to proceed that way. ■

A new approach to electronically stored information: The Seventh Circuit Electronic Discovery Pilot Program

By Timothy J. Chorvat and Christine P. Benavente¹

On October 1, 2009, Phase One of the Seventh Circuit Electronic Discovery Pilot Program ("Pilot Program") came into effect in participating federal courts in the Northern District of Illinois and other districts in the Seventh Circuit. The Pilot Program represents an effort to reduce the rising burden and cost of discovery that results from the now-universal use of electronically stored information ("ESI"). Phase One of the two-phased Pilot Program will run from October 1, 2009 to May 1, 2010. During Phase One, volunteer district court, magistrate, and bankruptcy judges in the Seventh Circuit are implementing a set of Principles Relating to the Discovery of Electronically Stored Information ("Principles") in selected cases, through the entry of a Proposed Standing Order²

Chief District Judge James F. Holderman of the United States District Court for the Northern District of Illinois appointed a group of lawyers and ESI experts to the Seventh Circuit Electronic Discovery Committee (the "E-Discovery Committee"), which developed the Principles. United States Magistrate Judge Nan Nolan chairs the E-Discovery Committee. The E-Discovery Committee consists of more than 40 experts in the electronic discovery field and represents a diverse range of perspectives, including "in-house counsel, private practitioners, government attorneys, academics, and litigation expert consultants."³

The Pilot Program responds to comments from practitioners and business leaders who have expressed a need to reform the expensive and uncooperative pretrial discovery process, as well as studies on civil practice. The cutting-edge Pilot Program is designed to " ... assist courts in the administration of Federal Rule of Civil Procedure 1, to secure

the just, speedy, and inexpensive determination in every case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention.⁴

In its work on this project, and based on its members' experiences, the E-Discovery Committee identified three major areas of focus: preservation, early case assessment, and education. Sub-committees in each of those areas identified problems to be addressed, worked to achieve consensus among different interest groups including the plaintiff and defense bar and inside and outside counsel, and prepared draft standards. The E-Discovery Committee then melded those drafts into the Principles that are now being tested.

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)."⁵ Particularly innovative is Principle 2.02, which requires parties to designate e-discovery liaisons in the event of an ESI dispute. Discovery disputes often arise, or prove difficult to resolve, when counsel are not conversant with the substantive and technical issues that arise from the ESI involved in their case. The main function of the e-discovery liaison is to facilitate communication with the opposing party and the court about the facts underlying a dispute as well as possible resolutions. The liaison must be familiar with, or have access to, persons familiar with the technologies and electronic systems being used in discovery.

The Principles also set out:

- A duty to cooperate by reminding practitioners that "[a]n attorney's zealous repre-

sentation of a client is not compromised by conducting discovery in a cooperative manner..."⁶ (Principle 1.02):

- A proportionality standard for ESI discovery plans, requests, and responses, which should be "targeted, clear, and as specific as practicable"⁷ (Principle 1.03)
- A duty to meet and confer prior to the initial status conference to discuss the discovery process and identify potential disputes for early resolution. This duty requires the parties to discuss the requirements imposed by the Federal Rules of Civil Procedure and the Principles, relevant discoverable ESI, the scope and format of preservation and production, the potential for conducting discovery in stages, and the procedures for handling inadvertent production.⁸ (Principle 2.01):
- Considerations for drafting specific and useful preservation requests and responses, which strongly discourage vague or overly broad preservation requests.⁹ (Principle 2.03)
- A list of those categories of ESI that are generally not discoverable, such as ephemeral data in a computer's RAM memory, deleted data on hard drives, temporary and frequently updated data like cookies and some metadata, and backup data that is substantially duplicative of material more accessible in other forms. Principle 2.04 further requires parties to confer promptly about any effort to seek production of, or require preservation of, information in the listed categories.¹⁰ (Principle 2.04)
- A requirement that parties "discuss potential methodologies for identifying ESI for production."¹¹ For example, parties are to discuss their plans to eliminate duplicative ESI and to filter ESI so that only

relevant ESI is produced, as well as the use of advanced technology to expedite review.¹² (Principle 2.05)

- A requirement that parties “make a good faith effort to agree on the format(s) for production.”¹³ Also, parties should discuss cost sharing on technology upgrades such as optical character recognition (OCR).¹⁴ (Principle 2.06); and
- The court’s expectations, including familiarity with the Federal Rules of Civil Procedure and any applicable state rules, the Advisory Committee Report on the 2006 Amendments to the Federal Rules, the Principles, and publicly available materials including publications of The Sedona Conference® relating to electronic discovery.¹⁵ (Principle 3.01 and 3.02).¹⁶

The Pilot Program consistently emphasizes education and cooperation, rather than sanctions or punitive enforcement. To assist the bar in becoming more knowledgeable about ESI and the legal rules that govern electronic discovery, the E-Discovery Committee will post a set of informative and educational materials—essentially an online treatise—beginning in January 2010.

Also in early 2010, the Institute for the Ad-

vancement of the American Legal System at the University of Denver, led by former Justice of the Colorado Supreme Court Rebecca Kourlis, will distribute questionnaires to participating judges and attorneys. Those questionnaires will assess the effectiveness of the Principles. The results will be presented at the 7th Circuit Annual Meeting in May 2010. At that time, the E-Discovery Committee will evaluate and, if necessary, revise the Principles. Phase Two will proceed from June 2010 to May 2011. In May 2011, the E-Discovery Committee will formally present its findings and issue its final Principles. ■

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2. The Proposed Standing Order is available on the Seventh Circuit’s Web site: <<http://www.ca7.uscourts.gov>>.

3. Seventh Circuit E-Discovery Committee. Seventh Circuit Electronic Discovery Pilot Program Phase One October 1, 2009 - May 1, 2010 Statement of Purpose and Preparation of Principles (Oct. 7, 2009). 7. <http://www.ca7.uscourts.gov/7thCircuit_ElectronicDiscovery.pdf>.

4. Seventh Circuit E-Discovery Committee, su-

pra note 3, at 11.

5. Seventh Circuit E-Discovery Committee, supra note 3, at 9.

6. Seventh Circuit E-Discovery Committee, supra note 3, at 11.

7. Seventh Circuit E-Discovery Committee, supra note 3, at 11.

8. Seventh Circuit E-Discovery Committee, supra note 3, at 11-12.

9. Seventh Circuit E-Discovery Committee. Seventh Circuit Electronic Discovery Pilot Program Phase One October 1, 2009 - May 1, 2010 Statement of Purpose and Preparation of Principles (Oct. 7, 2009). 13. <http://www.ca7.uscourts.gov/7thCircuit_ElectronicDiscovery.pdf>.

10. Seventh Circuit E-Discovery Committee, supra note 9, at 14.

11. Seventh Circuit E-Discovery Committee, supra note 9, at 15.

12. Seventh Circuit E-Discovery Committee, supra note 9, at 15.

13. Seventh Circuit E-Discovery Committee, supra note 9, at 15.

14. Seventh Circuit E-Discovery Committee. Seventh Circuit Electronic Discovery Pilot Program Phase One October 1, 2009 - May 1, 2010 Statement of Purpose and Preparation of Principles (Oct. 7, 2009), 15. <http://www.ca7.uscourts.gov/7thCircuit_ElectronicDiscovery.pdf>

15. Seventh Circuit E-Discovery Committee, supra note 14, at 16.

16. Helpful Web sites include <<http://www.thesedonaconference.org>>, <www.fjc.gov>.



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