Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Tips For Managing E-Discovery In State Courts

Law360, New York (December 05, 2014, 11:26 AM ET) --

Ethan Hastert

Scenario: A large American manufacturer is facing multiple lawsuits in state courts throughout the country. The plaintiffs issue broad discovery requests seeking, among other things, electronically stored information from multiple custodians, databases and even back-up tapes. The company, knowing that failure to comply with discovery rules can have disastrous consequences, is concerned with the prospect of complying with the e-discovery rules in each of these state courts.

E-Discovery Regimes in State Courts

In 2006, the Federal Rules of Civil Procedure were amended to provide a uniform set of rules across the federal courts to govern the preservation, collection and production of ESI. The Federal Rules are updated frequently, and most companies that regularly litigate complex disputes are familiar with them. At the state level, however, counsel must navigate an often unfamiliar and disparate legal landscape.

Some states, such as California, Delaware and Illinois, largely mirror the approach taken by the 2006 Federal Rules. However, even in these states there can be important nuances and idiosyncrasies. Other states, such as Connecticut and Wisconsin, have modeled their rules on the Uniform Rules Relating to Discovery of Electronically Stored Information. And many other states are doing something else entirely. New York, for instance, has adopted very few specific rules concerning ESI and has dealt with the issue almost entirely within the rubric of its pre-existing rules, allowing judges to develop an ESI doctrine in a common law fashion.

Disparity Among State E-Discovery Rules

States often take differing approaches to the same e-discovery issues, such as the form in which ESI must be produced. In Illinois, for example, a recent rule change deleted the provision that allowed for ESI to be produced in “printed form.” The new rule requires that, unless the request specifies some other form, ESI must be produced in the form in which it is kept in the ordinary course of business. California has a similar rule. New York, by contrast, has no such presumptive rules and merely requires the parties to discuss the issue at the preliminary conference.

The availability of sanctions for failures to preserve or produce ESI is another significant area in which states often differ. In many states, such as Illinois and New York, the availability of sanctions is almost entirely determined by case law. California has adopted specific provisions dealing with sanctions for ESI issues that mirror the "safe harbor" of Federal Rule 37(e). The Delaware Complex Commercial Litigation Division's safe harbor rule provides that, so long as you comply with the court's e-discovery orders, destruction of ESI pursuant to routine procedures cannot be sanctioned.

With regard to cost-shifting, many states, such as Delaware, Illinois and New York, roughly follow the traditional "American Rule" where the producing party is presumed to bear to costs of production. Other states, however, have deviated significantly from this rule in the context of certain types of ESI requests. Texas, for instance, requires the requestor to pay costs for any extraordinary steps that the producing party has to take in order to retrieve or produce the requested ESI. Similarly, California requires the requesting party to pay for recovery of information from backup tapes or other data compilations that need to be translated into a "usable form" before being produced.

Navigating State Court E-Discovery

Organizations faced with frequent litigation in state courts should consider developing e-discovery strategies that take into account the specific rules in the jurisdictions in which they litigate the most. Organizations that routinely find themselves litigating in many different state courts should also consider developing e-discovery strategies that reflect the disparate nature of the various states' rules. To assist in that effort, some practical guidelines can be used to navigate state court litigation regardless of where the case is filed:

Understand the nuances of the e-discovery rules in particular state courts.

There is no uniform body of rules governing e-discovery at the state level. Some states lack rules specifically addressing e-discovery and those states that have adopted such rules may not track the Federal Rules of Civil Procedure. Counsel should, therefore, become familiar with the statutes, rules and case law that govern the collection, review and production of ESI in the state court's in which they litigate most often.

Be aware of preservation requirements. In many states, courts can impose devastating sanctions for failures to preserve and produce ESI.

Failure to be aware of a state's preservation rules, particularly when and under what circumstances the duty to preserve arises, can lead to early missteps from which a party cannot easily recover. Many states follow the federal rule, under which the duty to preserve can arise well before a lawsuit is filed. In other states, like Illinois, there is generally no prelitigation duty to preserve evidence.

Facilitate discussions between outside counsel and the company's information technology personnel regarding the company's technological systems.

To ensure that outside counsel is prepared to negotiate reasonable e-discovery protocols that reflect the organization's capabilities — as well as to defend that plan in court — in-house counsel should take steps to ensure that outside counsel becomes familiar with the company's electronic information systems, including legacy and disaster recovery systems. In-house counsel may want to consider designating an employee who is thoroughly knowledgeable about these systems to educate outside

counsel (and the court), if necessary.

Develop an e-discovery plan in anticipation of a meet-and-confer with opposing counsel and a preliminary conference with the court.

Being prepared to address e-discovery issues early in the litigation can avoid later motion practice and complications. Counsel should work together to develop an e-discovery strategy as soon as the complaint is served — or even before if the organization reasonably anticipates litigation — and prior to contacting opposing counsel. Craft a list of questions regarding e-discovery to ask opposing counsel at the meet-and-confer session and prepare answers to these questions in the event the court asks similar questions at the preliminary conference.

Be aware of cost allocation rules.

Cost allocation rules will inform not only discovery strategy but also motion practice and ultimately settlement discussions. Where a state offers no clear rules on cost-shifting and instead applies a judicially created multi-factor test, counsel may want to seek a stipulation on cost allocation that the court can "so-order" at a preliminary conference to ensure clarity on this all important issue. If a cost allocation dispute cannot be resolved among the parties, counsel should seek court intervention before any ESI costs have been incurred.

—By Ethan Hastert and Corwin Carr, Mayer Brown LLP

Ethan Hastert is a partner and Corwin Carr is an associate in Mayer Brown's Chicago office.