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Electronic Discovery & Records Management

Tip of the Month

Managing E-Discovery in State Courts

Scenario

A large pharmaceutical company recalls a product after serious safety-related concerns are raised. The company subsequently is faced with multiple lawsuits in state courts throughout the country. In-house counsel anticipates that plaintiffs' counsel will propound broad discovery requests seeking, among other things, electronically stored information ("ESI") from multiple custodians located in numerous e-mail accounts, databases and back-up tapes. In-house counsel 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. Most in-house and outside counsel who regularly litigate complex disputes are familiar with these federal e-discovery rules. At the state level, however, in-house and outside counsel must navigate a more byzantine legal landscape.

Some states – Alaska, Arizona, Arkansas, California, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, New Jersey, New Mexico, North Dakota, Ohio, Utah, Vermont, Virginia, Washington, Wisconsin (effective 2011) and Wyoming – largely follow the 2006 amendments to the Federal Rules of Civil Procedure. Other states – Idaho, Mississippi and Texas – have enacted e-discovery rules that do not track the Federal Rules of Civil Procedure. A third group – Louisiana, Nebraska, New Hampshire and New York – have borrowed a more limited number of concepts from the Federal Rules of Civil Procedure and tweaked them to suit their needs. And Tennessee has enacted a unique set of rules that are an amalgam of a variety of sources. The remainder of the states have yet to address e-discovery through rule-making.

Diversity of State E-Discovery Rules

Counsel should also be aware that different states may take different approaches to the same e-discovery issue and that some states have developed unique rules and procedures. Initial disclosures are one example. Alaska, Arizona and Utah follow Federal Rule 26(a)(1)(A)(ii), and require that parties provide a copy or description of ESI to all other parties in the litigation. Other states do not have similar provisions in their rules and procedures.

Meet-and-confer and preliminary conference requirements offer more examples. Some state courts, such as those in the Commercial Divisions of New York and Delaware, follow the framework of Federal Rules 16(b) and 26(f) and require that counsel discuss e-discovery issues at

meet-and-confer sessions before attending mandatory preliminary conferences at which courts may "so-order" parties' discovery plans. Other states, such as Minnesota, grant parties the discretion to raise e-discovery issues at preliminary conferences with courts by motion.

State requirements may also differ on cost allocation. Delaware, for example, follows the federal presumption that costs associated with producing ESI will be borne by the producing party, while New York generally follows a requester-pays presumption under which the requesting party pays the cost of production, including costs associated with ESI. Other states have enacted cost-shifting statutes. Texas, for instance, has a mandatory cost-shifting statute where courts must order that the requesting party pay the reasonable expenses of any extraordinary steps undertaken by the producing party where the producing party shows that the data is not reasonably available. Idaho has enacted a similar statute that grants discretion to – rather than requires – a court to shift costs to the requesting party. Still other states have e-discovery requirements that address particular cost-allocation issues. In California, the Court of Appeal for the Sixth District held that the California Code of Civil Procedure mandated the requesting party to pay the costs of producing and translating ESI from back-up tapes into reasonably usable form even without a showing of undue burden or expense from the responding party. A nearly identical cost-shifting provision was included in California's Electronic Discovery Act of 2009 to apply in the context of producing ESI in response to a subpoena.

Absent guidance from state legislatures, state court administrators have also crafted e-discovery rules that are unique to their courts. For instance, New York, prompted by a recommendation in a comprehensive report regarding e-discovery in the state's courts, recently amended its administrative code to oblige counsel appearing at a preliminary conference to be "sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery[.]" Although counsel is allowed to bring a client representative or outside expert to the preliminary conference, it appears that counsel retains the primary obligation to be informed of these systems or face possible sanctions.

Navigating State Court E-Discovery

Organizations faced with litigation in state courts should consider developing e-discovery strategies that take into account the specific rules of each jurisdiction. To assist in that effort, some practical guidelines can be used to navigate state court litigation regardless of where a particular litigation arises:

- *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 have failed to enact rules specifically addressing e-discovery and those states that have may or may not track the more familiar e-discovery rules set forth in the Federal Rules of Civil Procedure. Counsel should, therefore, become familiar with the statutes, rules and case law that govern the preservation, collection, review and production of electronically stored information in the particular state court that will supervise discovery.
- *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 propose reasonable e-discovery plans that are in harmony with an organization's actual systems and capabilities – as well as to defend that plan before the court – in-house counsel should take steps to ensure that outside counsel becomes familiar with the company's current and legacy electronic information systems, including any 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 also 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. In-house counsel and outside 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.

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