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The Case for Meaningful, Rule-Based Guidance on E-Discovery Matters

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Electronic discovery can be extremely complex, expensive and time-consuming. Worse still, the process is fraught with many perils, especially for the unwary practitioner. Not surprisingly, we perceive a widespread "fear and loathing of e-discovery" amongst members of the bar. Thankfully, however, the inconvenience, anxiety and expense associated with e-discovery can be greatly alleviated with sound, rule-based guidance from the courts designed to streamline the process, promote proportionality, encourage cooperation and ensure fairness.

Unfortunately, there presently are no Pennsylvania Rules of Civil Procedure specifically dealing with the discovery of electronically stored information. There is, however, a proposal developed by the Pennsylvania Civil Procedural Rules Committee currently before the Pennsylvania Supreme Court concerning e-discovery. This article will address the committee's proposal, offer specific suggestions for improvements to our state and local rules of court and provide a few general recommendations to help Pennsylvania practitioners deal with e-discovery issues in the absence of any meaningful, rule-based guidance.

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In January of last year, the Civil Procedural Rules Committee submitted Proposed Recommendation No. 249 for consideration by the Pennsylvania Supreme Court and comments from the bar. The recommendation is composed of proposed revisions to Rules 4009.1, 4009.11, 4009.12, 4009.21, 4009.23 and 4011 and the accompanying explanatory comments. Although the comment period for Recommendation No. 249 ended in February of last year, the Pennsylvania Supreme Court has yet to act on it as of press time.

If adopted, Recommendation No. 249 would add the term "electronically stored information" to the lexicon of permissible discovery appearing in the 4009 series of the Pennsylvania Rules of Civil Procedure. But, in reality, ESI has already been the subject of permissible discovery in Pennsylvania for decades.

The proposed additions to the explanatory comment to Rule 4011 in Recommendation No. 249 have the potential to provide some needed guidance to the bench and bar. The proposed revisions to the comment state, in summary, that: (1) Pennsylvania does not intend to adopt the growing

body of federal case law concerning e-discovery issues; (2) courts confronted with e-discovery disputes should consider the nature of the litigation, the relevance of the ESI sought and the relative costs and burdens; and (3) parties and courts should consider tools such as "electronic searching, sampling, cost-sharing and non-waiver agreements to fairly allocate discovery burdens and costs."

Hopefully, the Pennsylvania Supreme Court will soon adopt Recommendation No. 249. The proposed revisions, however, are not enough to address the difficult e-discovery issues and obligations that frequently arise in litigation. E-discovery is already the tail that wags the tiger of litigation. The sheer volume of ESI out there is enormous and will continue to grow exponentially in the years to come. Further, the types of ESI and the various ways and places in which it can be generated, recorded and maintained are always evolving, creating even more discovery headaches and potential pitfalls, including sanctions on attorneys and litigants. While a step in the right direction, the proposed additions to the explanatory comment to Rule 4011 in Recommendation No. 249 are not a reasonably proportional response to the magnitude of the problem.

Recommendation No. 249 expressly shuns sound rules, practice and jurisprudence developed in the federal court system in favor of general principles of fairness when e-discovery issues arise. While general principles are helpful, absent meaningful rules to govern the process, Pennsylvania litigants, counsel and courts will continue to spend — and waste — more time and money than is necessary to manage the growing volume, complexity and concerns of e-discovery. In addition, without some enforceable rules to help level the playing field, there is an enormous potential for e-discovery abuses.

For starters, the First Judicial District should consider adopting a local civil rule that would require opposing counsel to: (1) meet and confer regarding anticipated discovery issues (including ESI); and (2) jointly submit a discovery plan at or prior to the scheduling conference that covers e-discovery. This would greatly enhance the utility of scheduling conferences in the Philadelphia Common Pleas Court, fostering early communication and cooperation between parties and counsel concerning discovery issues and potentially reducing the significant demands placed on discovery court. The First Judicial District has a well-deserved reputation for improving the quality and efficiency of the court system through innovative programs, and such a process, if implemented, would do both.

In addition, while Recommendation No. 249 includes a specific endorsement of nonwaiver agreements, the Pennsylvania Supreme Court should go a step further by adopting a close analog to Federal Rule of Evidence 502. Rule 502 eliminates the potential for waiver of the attorney-client privilege or work-product protection based on inadvertent disclosures in discovery so long as reasonable steps were taken to prevent the disclosure and reasonable steps are later taken to rectify it upon discovery. It also ensures the enforceability of nonwaiver agreements in federal proceedings and provides that federal court orders approving such agreements are enforceable in "any other Federal or State proceeding." Rule 502 provides much-needed insulation against the increased risk of privilege waivers occasioned by inadvertent disclosures in e-discovery. A similar rule in Pennsylvania would be of great benefit to litigants and practitioners.

So what can you do to protect yourself and your clients in the absence of any meaningful, rule-based guidance specific to e-discovery in Pennsylvania? First, develop a discovery plan as early as possible that addresses the client's preservation obligations and anticipates the potential back-and-forth of ESI requests, identification, collection, review and production. E-discovery is already a major component of nearly every case, and as recent Pennsylvania decisions concerning the discovery of social media and text messages illustrate, ESI can be a game-changer no matter the nature or scope of your dispute. Without a discovery plan, you'll necessarily increase the potential costs and risks involved with e-discovery and jeopardize your ability to secure relevant ESI from the other side.

Second, strive to maintain open lines of communication with opposing counsel on e-discovery issues. Pursue agreement (where it can be had) concerning the scope, means and methods of e-discovery in every case. When agreements are reached, record and memorialize them to help avoid the potential for misunderstanding and to maximize enforceability. This is not an area where you can rely on a handshake or telephone agreement — you need to have your agreements written down in clear terms.

And third, educate yourself. If e-discovery is to be a useful tool in your litigation bag, you need to have a good, working understanding of what ESI is, the typical ways in which it gets generated, recorded and maintained and how to safely access it for discovery purposes. While e-discovery is not exciting to most practitioners, a basic competency is required to properly represent your clients' interests. The good news is that the information needed is readily available — through CLE programs, from articles, blogs, websites and other online resources, as well as e-discovery vendors whose services you may require.

We can all agree that the merits of a dispute should not be compromised by out-of-control e-discovery costs, burdens or abuses. Hopefully Recommendation No. 249 marks the beginning of an evolution in our Pennsylvania state and local rules that will effectively address e-discovery issues. In the meantime, however, it is incumbent on all of us to strive for better ways to streamline the process, reduce the associated costs, ensure fairness and minimize the potential pitfalls while providing zealous representation on behalf of our clients. •