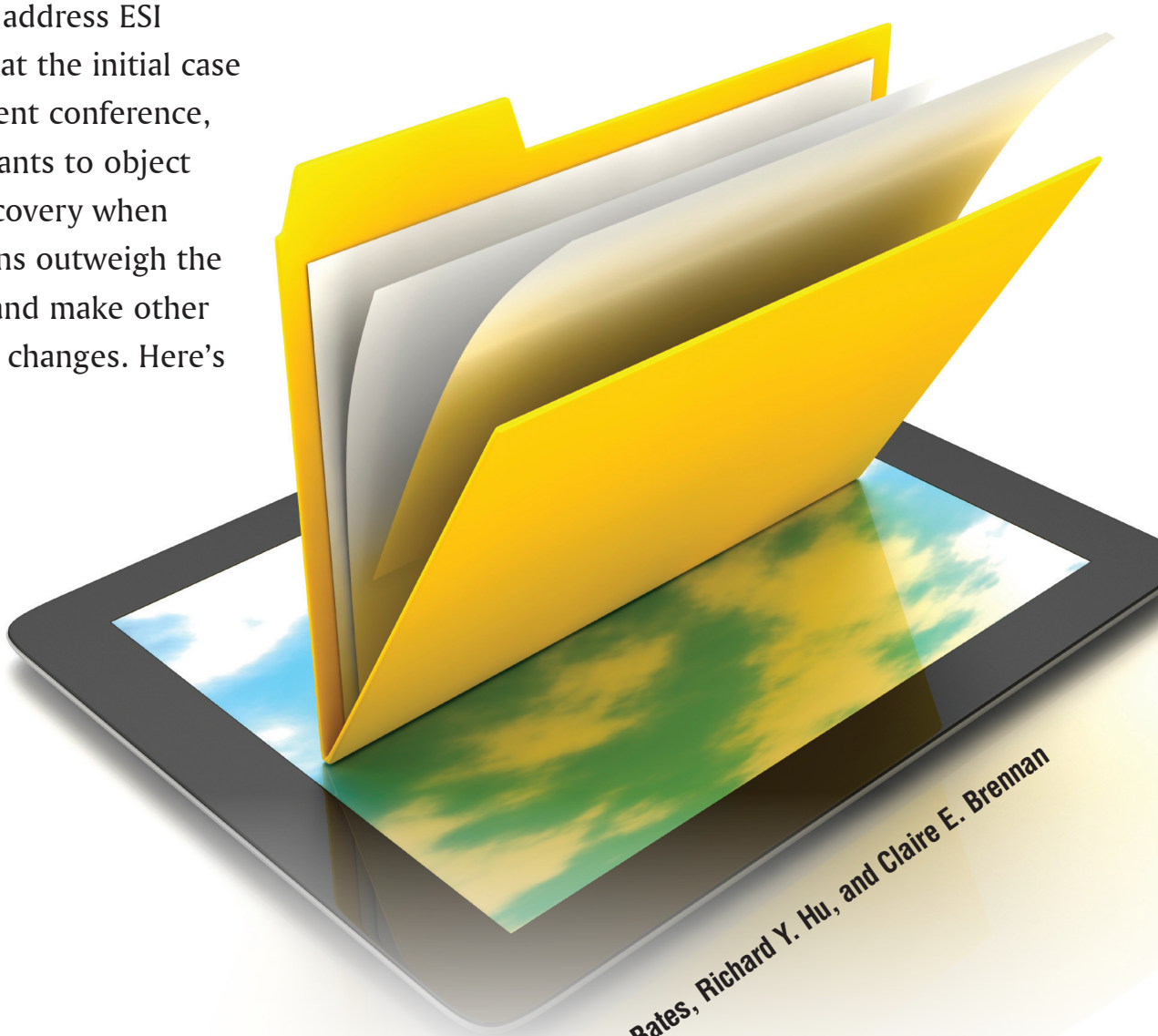
New Rules for Discovery of Electronically Stored Information

New Illinois Supreme Court rule amendments require parties to address ESI discovery at the initial case management conference, allow litigants to object to ESI discovery when the burdens outweigh the benefits, and make other important changes. Here's a review.



By Gabriel Reilly-Bates, Richard Y. Hu, and Claire E. Brennan

The Illinois Supreme Court Rules have been amended, effective July 1, 2014, to address proportionality, production format, and case management conference updates when dealing with electronically stored information ("ESI").[1]

Broadly speaking, these amendments (1) expand the defined scope of ESI, (2) require parties to consider the proportionality of the expenses of conducting ESI versus the benefits of obtaining it, (3) set the default format for producing ESI as its native format (i.e., the electronic format in which the ESI is normally maintained), (4) require a party to identify the ESI in its possession following a request, (5) affirm the obligation of the parties to address ESI issues at the initial case management conference, and (6) reaffirm the applicability of Rule 219 sanctions for ESI violations.

This article explains these recent changes and highlights some of the recent, if sparse, ESI-related case law from the Illinois Appellate Court.

New flexible definition of ESI

The court broadened the scope of ESI by amending Illinois Supreme Court Rules 201 and 214 and adding Revised Committee Comments for Rules 218 and 219. It amended Rule 201 to define ESI as including writings, images, sound recordings, and data in "any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."[2]

This definition was amended to comport with Federal Rule of Civil Procedure 34(a)(1)(A) and is "intended to be flexible and expansive as technology changes."[3] It implies that a party will have to convey ESI in a reasonably usable form and, as such, parties must produce data in a format that renders the data comprehensible.

Proportionality of the costs of ESI versus the benefits

As amended, Rule 201 effectively limits discovery requests in light of e-discovery's growing influence and rapid technological advances. It expressly discourages discovery methods that are "disproportionate in terms of burden or expense" and allows courts to determine "whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit."[4]

Rule 214(b) now provides that "a party must produce [ESI] in a form or forms in which it is ordinarily maintained" unless otherwise requested.

Courts are instructed to consider the following factors when they analyze proportionality: "the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in

1. For the full text of the amended Rules, see http://www.state.il.us/court/SupremeCourt/Rules/Amend/2014/052914.pdf. The amendments to Rules 201, 214, and 218 are most pertinent to this Article.
2. Ill. S. Ct. R. 201(b)(4) (eff. July 1, 2014).
3. Ill. S. Ct. R. 201, Committee Comments (adopted May 29, 2014).
4. Ill. S. Ct. R. 201(a) (eff. July 1, 2014); Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014).

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resolving the issues."[5] As the Supreme Court Rules Committee ("Committee") states, Rule 201(c)(3) was added to address proportionality "especially in the area of [ESI]."[6]

In the comments, the Committee provides a list of categories of ESI that it presumes should not normally be discoverable based upon the proportionality analysis in subsection (c)(3):

> (A) 'deleted,' 'slack,' 'fragmented,' or 'unallocated' data on hard drives; (B) random access memory ('RAM') or other ephemeral data; (C) on-line access data [(i.e., usernames and passwords)]; (D) data in metadata field that are frequently updated automatically; (E) backup data that is substantially duplicative of data that is more accessible elsewhere; (F) legacy data [(i.e., information stored in an old or obsolete format or system, thereby making it difficult to access)]; (G) information whose retrieval cannot be accomplished without substantial additional programming or without transforming it into another form before search and retrieval can be achieved; and (H) other forms of ESI whose preservation or production requires extraordinary affirmative measures.[7]

The Committee, however, warned that the list is "not static, since technological changes eventually might reduce the cost of producing some of these types of ESI" and that the analysis is on a case-by-case basis.[8] Moreover, the comments indicate that if a party intends to request discovery of potentially burdensome categories of ESI, "then that intention should be addressed at the initial case management conference in accordance with Rule 218(a)(10) or as soon thereafter as practicable."[9]

Thus, it is important for a litigant to understand what types of data, such as metadata, will be necessary or helpful at an early stage of the litigation and to bargain to receive that information at the initial case management conference. For example, where a party's internet search history would be relevant, the opposing party should bargain early on to obtain information that would normally not be available, such as deleted files or metadata files that show when a certain website was accessed.

Amendments to Rule 218 expand the initial case management conference to specifically include "issues involving electronically stored information and preservation."

An amendment to Rule 214(c) allows a party receiving a discovery request to object on the basis of proportionality, stating that "[a] party may object to a request on the basis that the burden or expense of producing the requested materials would be disproportionate to the likely benefit, in light of the factors set out in Rule 201(c)(3)."[10] Thus, parties may point specifically to the new rule when lodging an objection based on proportionality, although it is unclear how much detail is required in the objection. This will be a powerful tool in cases where the costs of obtaining the discoverable ESI materials greatly outweigh their benefit.

Production format of ESI

The court amended Rule 214 in various parts to change the rules for the production format of ESI. The amendment eliminates the outdated requirement that ESI be produced solely in printed form. Instead, Rule 214(b), "modeled after Federal Rule of Civil Procedure 34(b)," now provides that if a request for ESI does not specify the form for producing such information, "a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."[11]

Thus, the default method of producing ESI will now be in its native format. This has the added benefit of being more cost-effective and providing the recipient more information because documents in their native format usually contain a host of metadata information.

In addition, this new rule should be read in concert with Rule 201, which requires translation of ESI materials to a reasonably usable format. Again, a party seeking discovery in a particular format should address these issues with opposing counsel early on at the case management conference.

Identification of responsive ESI

Once the discovery request has been served upon an opponent, the party served must "identify all materials in the party's possession…."[12] The traditional notions of possession, custody, and control that dictate whether a party has an obligation to produce a document apply equally to ESI.

While Illinois courts have not definitively stated the test for control, non-ESI case law has followed the "legal right" line of reasoning, where a party has "control" over information if it has the legal right to obtain that data. In *Hawkins v. Wiggins*, the appellate court found that since the plaintiff had a statutory right to inspect and reproduce copies of his tax records, he had control over the returns and thus a duty to produce.[13] In *Franzen v. Dunbar Builders Corp.*, the appellate court ordered a condominium association to produce plans that were in the possession of an independent architect that it had employed, based both on customary practices and the absence of a clause in the employment agreement reserving ownership of the plans for the architect.[14]

In addition, Rule 214 states that "copies of identifications, objections and affidavits of completeness shall be served on all parties entitled to notice."[15] The intention here was "to assist in the area of ESI by allowing for identification of materials."[16] Since many attorneys already provide copies of identifications for ESI, this addition seems to be a codification of that practice.

Litigants can no longer afford to wait to start a comprehensive review of their client's ESI until pushed by opposing counsel. The rule clearly requires a party to conduct an affirmative search for ESI using proper search methods.

5. Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014).
6. Ill. S. Ct. R. 201, Committee Comments (adopted May 29, 2014).
7. *Id.* The Committee cites to the U.S. Court of Appeals for the Seventh Circuit's Electronic Discovery Committee's "Principles Relating to the Discovery of Electronically Stored Information," Principle 2.04(d) for this list.
8. Ill. S. Ct. R. 201, Committee Comments (adopted May 29, 2014).
9. *Id.*
10. Ill. S. Ct. R. 214(c) (eff. July 1, 2014).
11. Ill. S. Ct. R. 214(b) (eff. July 1, 2014).
12. Ill. S. Ct. R. 214(c) (eff. July 1, 2014).
13. *Hawkins v. Wiggins*, 92 Ill. App. 3d 278, 282 (1st Dist. 1980).
14. *Franzen v. Dunbar Builders Corp.*, 132 Ill. App. 2d 701, 708-09 (1st Dist. 1971).
15. Ill. S. Ct. R. 214 (eff. July 1, 2014).
16. Ill. S. Ct. R. 214, Committee Comments (adopted May 29, 2014).

Counsel should not rely upon their clients to search for responsive documents, but should employ an ESI searching tool (such as Relativity or Summation) to find responsive documents.

At least one court has penalized a litigant for conducting a sloppy, ineffective search of ESI. In *Master Hand Contractors, Inc. v. Convent of Sacred Heart of Chicago*, the appellate court affirmed the dismissal of a complaint with prejudice pursuant to Rule 219(c) where the plaintiff, who called himself a "computer idiot," self-selected emails instead of using a search tool and without the supervision of counsel, resulting in responsive documents not being produced.[17]

Case management conference is to include ESI issues

The court also amended Rule 218, expanding the initial case management conference to specifically include "issues involving electronically stored information and preservation."[18] The intention of this amendment is to "encourage parties to use the case management conference to resolve issues concerning electronically stored information early in the case."[19]

Attorneys should take advantage of the case management conference to discuss, first, whether there will be discovery of ESI at all. If so, they can explore what types or categories of discoverable information each party has in electronic form, where and on what type of media that information is likely to be found, and whether that ESI is relevant to the case.

Attorneys can also discuss the steps each party will take to preserve the different types or categories of ESI, the number and identity of custodians who are knowledgeable about potentially relevant ESI, what methods will be efficient in identifying discoverable ESI (e.g. sampling, key word searches), whether the ESI will be produced in "native format," and the scope of discovery within each different category of ESI. They can also consider whether relevant ESI has been deleted, and if so, whether the deleted ESI needs to be restored and who will incur the cost of restoration, as well as whether any information is not "reasonably accessible." Finally, they can negotiate the burdens and costs of retrieving ESI, any conditions that should be placed on production, and the prospective production schedule.

Regarding cost shifting of ESI, the Circuit Court of Cook County in *Vision Point of Sale, Inc. v. Haas*, adopted the guidance provided by the Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production,[20] and in particular Sedona Principle 13, which states as follows:

> Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information should be borne by the responding party unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.[21]

However, as previously noted, Rule 214(c) now specifically permits a litigant to make a proportionality objection.

Comments applying Rule 219 sanctions to ESI violations

Although the court did not amend Rule 219 ("Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences"), the Committee opined that the rule can be the basis for sanctions for ESI discovery violations.[22] In particular, the Committee pointed to *Shimanovsky v. GMC* and *Adams v. Bath & Body Works*[23] as instructive cases on sanctions for the loss or destruction of relevant evidence and for the separate tort of negligent spoliation of evidence.[24]

In *Shimanovsky*, the trial court dismissed a complaint alleging a personal injury claim with prejudice pursuant to Rule 219(c) as a sanction for the plaintiff's destruction of power-steering components even though the parts had been destroyed during pre-suit testing by plaintiff's retained expert.[25] The Illinois Supreme Court concluded that even a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence.

Moreover, the Illinois Supreme Court noted that the factors involved in the Rule 219(c) analysis include: "(1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to testimony or evidence; and (6) the good faith of the party offering the testimony or evidence."[26]

To warrant dismissal, the offending party's actions must "show a deliberate, contumacious or unwarranted disregard of the court's authority" and should only be used "as a last resort and after all of the court's other enforcement powers have failed to advance the litigation."[27] Note, however, that in *Shimanovsky* the plaintiff destroyed the relevant evidence.

In *Adams*, the trial court dismissed the complaint in part because plaintiff and counsel had the opportunity and responsibility to preserve relevant evidence but failed to do so when they allowed an end table, couch, and carpet to be destroyed.[28] The appellate court noted that instead of seeking dismissal under Rule 219(c), parties could bring a claim for negligent spoliation of evidence. There, the standard is "mere negligence, the failure to foresee 'that the [destroyed] evidence was material to a potential civil action.'"[29] Consequently, whether a party should pursue a Rule 219(c) dismissal or a claim for negligent spoliation depends on the opponent's culpability in the destruction of the evidence.

Neither *Shimanovsky* nor *Adams* dealt specifically with spoliation of ESI. However, other Illinois courts have addressed sanctions for ESI violations.

In *Mostardi Platt Environmental, Inc. v. Power Holdings, LLC*, the appellate court found that using a third-party web server to operate a corporate email system that could not be imaged did not constitute shielding or burying evidence and that deleting various emails was not troubling on its face because doing so is a business reality.[30]

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17. *Master Hand Contractors, Inc. v. Convent of Sacred Heart of Chicago*, 2013 IL App (1st) 123788-U, ¶ 18 (Nov. 4, 2013).
18. Ill. S. Ct. R. 218(a)(10) (eff. July 1, 2014).
19. Ill. S. Ct. R. 218, Committee Comments (adopted May 29, 2014).
20. The Sedona Principles are a set of 14 principles that were developed by members of the Sedona Conference in order to apply the basic principles of discovery to the new medium of ESI, to which the Seventh Circuit and other courts have looked for guidance when implementing ESI policies.
21. *Vision Point of Sale, Inc. v. Haas*, 2004 WL 5326424 (Cir. Ct. Cook Cty. Sept. 27, 2004).
22. Ill. S. Ct. R. 219, Committee Comments (adopted May 29, 2014).
23. *Shimanovsky v. GMC*, 181 Ill. 2d 112 (1998); *Adams v. Bath & Body Works*, 358 Ill. App. 3d 387 (1st Dist. 2005).
24. *Shimanovsky*, 181 Ill. 2d at 117-18.
25. *Id.* at 124.
26. *Id.* at 123.
27. *Id.*
28. *Adams*, 358 Ill. App. 3d at 391-92.
29. *Id.* at 394.
30. *Mostardi Platt Environmental, Inc. v. Power Holdings, LLC*, 2014 IL App (2d) 130737-U (May 27, 2014).

As mentioned before, in *Master Hand Contractors*, the appellate court affirmed the dismissal of a complaint with prejudice pursuant to Rule 219(c) where the plaintiff, without supervision of counsel, selected emails himself instead of using a search tool.[31]

Finally, in *Peal v. Lee*, the appellate court affirmed the dismissal of a complaint with prejudice pursuant to Rule 219(c) where the plaintiff used data wiping programs to permanently delete data from his personal computer days before producing it to the other party and failed to produce five external storage devices that had discoverable information.[32]

Conclusion

While many of the new amendments to the Illinois Supreme Court Rules addressing ESI issues may simply be a codification of existing practice, they signal the high court's desire for the lower courts to become more engaged with ESI issues. Illinois case law about ESI is sparse compared to its federal counterpart and does not provide much insight into the scope of ESI discovery.

When working with ESI, attorneys should work closely with their clients to preserve ESI once the prospect of litigation becomes apparent, negotiate with opposing counsel during the case management conference to define the scope of ESI discovery – raising proportionality issues where necessary – and oversee their clients during production. ■

31. *Master Hand Contractors, Inc. v. Convent of Sacred Heart of Chicago*, 2013 IL App (1st) 123788-U, ¶ 18 (Nov. 4, 2013).
32. *Peal v. Lee*, 403 Ill. App. 3d 197 (1st Dist. 2010).