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Electronic Discovery in Illinois Five Years After the 2014 Amendments to the Illinois Rules of Civil Procedure

As the 2014 amendments to the Illinois Supreme Court Rules concerning electronic discovery reach their fifth anniversary, it is an appropriate time to look at the history that preceded them, the amendments themselves, and the case law and changes in discovery that have followed.

The History of the Rules Governing Electronic Discovery

The genesis of Illinois' push to modernize its discovery rules can be traced to the evolution of the rules governing practice in the federal system. The effect of technological advancements on discovery was contemplated for decades before enactment of the 2006 e-discovery amendments to the Federal Rules of Civil Procedure. But 2006 was not the first time the United States Supreme Court amended the rules to better serve the evolving landscape of document production. The 1970 Advisory Committee Notes to the Federal Rules observed:

> The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.[1]

This comment reflects that even in the early 1970s, the legal community was concerned with the staggering amount of data that could be found in the e-discovery rabbit hole.

In 1980, a second change came to the Federal Rules that ultimately affected electronic discovery—the requirement that a party produce documents as they are kept in the usual course of business.[2] The original reason for this amendment was to curtail the practice of "deliberately [] mix[ing] critical documents with others in the hope of obscuring significance."[3] As e-discovery grew to greater prominence, courts began to interpret this requirement to mean that parties must produce electronic documents in their native forms, *i.e.*, in "the format in which they were kept with the party before the commencement of litigation."[4] The organic growth of this requirement's application from hard copies to electronic documents speaks to the ingenuity and thoughtfulness of the 1980 Advisory Committee. And it is organic growth such as this that caused some legal commentators in the early 2000s to opine that the pre-2006 "laws and rules [were] sufficient to meet the needs of electronic issues."[5]

Considering the rapid technological advancements going on outside courtroom doors between 1980 and 2006, that period was mysteriously quiet in the realm of rules development. Those 26 years saw the introduction of the World Wide Web, Microsoft Word, Adobe PDF, smartphones, Wi-Fi, and the development of e-mail and text messaging as predominant forms of communication. These inventions brought exciting new sources of data the courts were forced to oversee without the benefit of a formal set of rules governing the use, discoverability, and reasonableness of discovering such data. Moreover, counsel became increasingly concerned about the potential for accidental spoliation. As one commentator noted, "compliance with preservation obligations for electronic data became problematic because of the risk of sanctions for inadvertent deletion of ESI, understandably prompting costly over-preservation."[6]

In 2003, the Sedona Conference Working Group on Electronic Document Retention and Production published its first edition of "*The Sedona Principles*," a set of proposed guidelines for changes to the Federal Rules and a blueprint for courts struggling to manage the new and evolving issues that e-discovery presented.[7] The drafters of the first set of the Sedona Principles wrote that they were "concerned about the adequacy of rules and concepts that were developed largely for paper discovery to handle issues of electronic discovery" while keeping in mind the "rule of reasonableness."[8] In furtherance of these concerns, the Sedona Conference addressed, among other things, the pre-litigation preservation of electronic discovery, proportionality, limitations on electronically stored information (ESI), and the need for collaboration among counsel.[9]

The 2006 Amendments to the Federal Rules of Civil Procedure

The Supreme Court's rules advisory committee took note of the Sedona Principles and drafted the first set of amendments specifically addressing topics unique to electronic discovery in 2006. These amendments included:

(1) Rules 34 & 35 (among others): The inclusion of a specific reference to electronically stored information as a bucket of discovery (and generic standards for ESI production);

(2) Rule 26(f)(3)(c): A requirement for counsel to "meet and confer" to discuss "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(3) Rule 26(b)(2): Greater authority for courts to rule on electronic discovery disputes; and

(4) Rule 37(e): A "safe harbor" rule which prevented courts from imposing sanctions on a failure to preserve ESI "lost as a result of the routine, good-faith operation of an electronic information system." This rule was further amended in 2015, as discussed below.

While the obvious purpose of the Federal Rules of Civil Procedure is to provide guidelines for federal courts, the drafters also intended for the rules "to provide a model of procedural uniformity to be followed by the states."[10] Consistent with this principal, Illinois promulgated its own set of e-discovery rules.

The 2014 Amendments to the Illinois Supreme Court Rules

In 2014, Illinois Supreme Court Rule 201 was amended to change its terminology from "retrievable information in computer storage" to "electronically stored information" to comport with the Federal Rules' definition of ESI.[11] The drafters of the Rule 201 amendments also included a list of data that constitutes ESI as follows:

> any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations 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.[12]

This expansive definition of ESI encompasses nearly every document, photograph, and other written or recorded item that lawyers encounter in 2019; everything except handwritten notes.

But arguably the most important change to the Illinois rules was the addition of a "proportionality" provision in Rule 201(c). While Federal Rule of Civil Procedure 26 has incorporated proportionality since 1983,[13] long before the e-discovery amendments, its first appearance in the Illinois Supreme Court Rules was in partnership with ESI. It is important to note, however, that Rule 201(c) applies to all discovery—not just electronic discovery. Thus, its reach extends beyond the topic of this paper. Rule 201(c)(3) reads:

> When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account 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 resolving the issues.[14]

While the language and the order of considerations differs slightly from Federal Rule 26(b)(1), the meaning is the same. In 2009, Judge Shira A. Scheindlin, author of the groundbreaking *Zubulake v. UBS Warburg* opinions on e-discovery in 2003 and 2004, and her co-author, noted that "[o]ne of the recurrent concerns about paper discovery was that extremely broad discovery requests were easy to draft, extremely burdensome to satisfy and often produce little or nothing of importance to the case."[15] "Given the added burden and cost of electronic discovery, the concept of proportionality has become even more important."[16]

While Illinois has made strides in addressing e-discovery issues, there are two notable absences from the rules: the duty to preserve ESI and sanctions for failure to comply with that duty. However, given the dearth of Illinois case law applying the 2014 amendments, the advisory committee is not likely to take up these issues anytime soon.

Many Illinois attorneys express surprise at the lack of case law on the Illinois e-discovery amendments. There is no consensus on the reasons for the shortage of case law, but there are a few possibilities. Large breach of contract cases or labor disputes between national and international companies with the potential for harassing and burdensome e-discovery may be litigated more often in federal courts via those courts' diversity jurisdiction. These classes of litigants and cases are also likely to have large amounts of *relevant* ESI, such as emails (including lengthy email chains with dozens of participants), graphs, charts, and spreadsheets, as opposed to personal injury cases that are also more likely to be litigated in state courts.

Federal question cases involving the Sarbanes-Oxley Act or the Computer Fraud and Abuse Act are also likely to fall victim to oppressive e-discovery requests. Additionally, it is reasonable to consider that Illinois judges are well-equipped to deal with discovery issues as a result of their necessary familiarity with the Federal Rules, given the absence of any Illinois ESI rules until 2014. Finally, the Illinois rules may have already been sufficient to deal with e-discovery, and the purpose of the amendments was to provide defense attorneys with peace of mind. Whatever the reasons may be, it appears unlikely that Illinois will see a sudden surge of opinions regarding e-discovery issues.

Additional 2015 Amendments to the Federal Rules of Civil Procedure

At the same time the Illinois amendments were being promulgated, the Supreme Court's rules advisory committee was once again studying further amendments to the Federal Rules concerning ESI. In 2015, the Supreme Court adopted two additional changes.

First, Rule 26(b)'s proportionality section was moved and slightly reworded.[17] Rather than proportionality being explained in the "limitations" section of the rule, it is now contained in the "scope" section. Second, and more importantly, the "safe harbor" provision of Rule 37(e) (concerning spoliation and duty to preserve ESI) was withdrawn and replaced with a detailed guide for determining how and when to sanction a party for intentional or negligent spoliation.[18] Looking forward, if Illinois amends its ESI rules in the near future, it likely will be to include a section similar to the 2015 version of Rule 37(e)'s safe harbor rule.

Post-Amendment Case Law Development in Illinois: *Carlson v. Jerousek*

While attorneys may have anticipated a great flurry of appellate court opinions following the 2014 amendments, relatively few cases set the tone for a measured approach to appeals predicated on the amended rules. None is more expansive than *Carlson v. Jerousek*.[19]

Carlson, decided in December 2016 by the Illinois Appellate Court, Second District, explored the historical scope of written discovery, the advent of the concept of proportionality, and how proportionality should be applied to ESI. The issue in dispute was whether personal injury defendants were entitled to complete forensic images of the hard disk drives from the plaintiff's five personal computers and a work computer issued to him by his employer.[20] The plaintiff, a senior computer analyst by trade, was a heavy computer user. The defendants' request was made in the context of a protracted discovery dispute over computer usage history, including metadata. The metadata, the defendants argued,

might shed light on the plaintiff's ability to maintain his mental focus after the automobile accident at issue.[21] They intended to explore whether the plaintiff's behavior on computers, at work and at home, rebutted claims of cognitive difficulties alleged in the lawsuit.[22] They also sought evidence of internet-based searches relating to brain injuries.[23] The plaintiff objected on multiple grounds, including overbreadth, undue burden, and relevance.[24]

The trial court in *Carlson* was initially resistant to the defendants' wide-ranging request for ESI. During a hearing on the defendants' motion to compel, it acknowledged the inevitable objection by the plaintiff's employer (a non-party that issued one of the computers to the plaintiff) and the likelihood that other, more narrowly-tailored searches were sufficient to obtain equivalent information.[25] The trial court observed that "people put their whole lives on a computer" and ruled that it is "not acceptable for the defense to be able to search through their entire life."[26]

After this ruling, the defendants in *Carlson* next attempted to proceed by way of an agreed protective order. They presented a draft order to the plaintiff, but it was rejected.[27] This was unsurprising, as the order called for a defense expert to make forensic images (mirror copies) of the plaintiff's six computer hard drives, search the entirety of the data contained on them, and identify "evidence of the existence of information relating to issues in [the] lawsuit."[28] As examples of the information to be sought, the proposed order referenced:

> [1] Time stamps indicating duration of computer usage at work or for work purposes; [2] Time stamps indicating duration of usage for purposes of using computer games; [3] Search terms with respect to head trauma, traumatic brain injury, icepick headaches, memory loss, unbalanced IQ, fatigue, personality disorders, hand tremors, sleep apnea, and lack of concentration; [and] [4] Documents created by Plaintiff with respect to his symptoms and/or research regarding the search terms contained in subparagraph 3.[29]

After further arguments related to the proposed protective order and whether the plaintiff's work computer was his property or his employer's, the trial court ultimately relented. It ordered forensic imaging of all six computers and also entered the protective order proposed by the defendants.[30] The plaintiff notified the court it would not produce his computers as ordered and requested an order of "friendly" contempt to allow for an immediate appeal. After extensive briefing, the trial court entered an order of "friendly" contempt.[31]

The Second District framed the overarching question presented as defining "the circumstances under which a party to a civil suit may inspect the contents of another person's computer through forensic imaging."[32] Finding "a dearth of case law on this issue in Illinois," the court's opinion first reviewed the state's amended discovery rules and their interaction with the privacy rights of litigants.[33]

The court began with Supreme Court Rule 201 and acknowledged that it sets forth many of the general principals governing discovery.[34] For example, a party serving discovery requests is entitled to "full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense."[35] That being said, the amended rule cautions that "discovery requests that are disproportionate in terms of burden or expense should be avoided."[36] The court extensively quoted amended Rule 201(c)'s proportionality provision and emphasized language stating that courts may consider "whether the likely burden or expense of the proposed discovery . . . outweighs the likely benefit."[37] It further explained that a valid ground for objecting to Rule 213 interrogatories and Rule 214 requests to produce is 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)."[38] Relying on the Illinois Supreme Court's

Kunkel v. Walton opinion, the appellate court observed that Rule 201 and its related discovery rules "form a comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment."[39]

At its core, *Carlson* involved serious questions about electronic privacy. The appellate court stressed that "[t]he civil discovery rules are not blind to the privacy interests of the party responding to discovery."[40] Regardless of the necessarily broad nature of discovery, opting for litigation is not a *de facto* forfeiture of one's personal privacy.[41] The *Carlson* opinion reminds the reader that, when it comes to the right to privacy, the protections contained in the Illinois Constitution of 1970 go beyond those guaranteed by the Fourth Amendment to the United States Constitution. The Illinois Constitution privacy clause contains a broadly-stated "zone of personal privacy."[42] The privacy clause has been held to establish safeguards against the "unreasonable" collection and use of Illinois citizens' personal information, such as medical and financial information, the contents of private writings, and the choice of reading materials.[43]

Having acknowledged the potential constitutional dimensions of the issues before it, the Second District returned to the post-amendment discovery rules for a discussion of their safeguards against the unreasonable disclosure of personal information. Those safeguards take two forms: relevance and proportionality.[44] Relevance, according to the *Carlson* court, is not merely a generic concept; rather, it "provides a foundation in balancing constitutional privacy concerns with the need for reasonable discovery, facilitating trial preparation while safeguarding against improper and abusive discovery."[45] In common usage, relevant information for discovery purposes is broadly defined as including not only admissible information, but other information that may reasonably lead to the discovery of admissible information. However, the court warned, this definition is not "an invitation to invent attenuated chains of possible relevancy."[46]

The second tier of protection against unreasonable disclosure of personal information is the requirement of proportionality. The court acknowledged the federal court origins of the concept, as well as Illinois' decision to add it to Rule 201 in 2014.[47] Trial courts are required to assess proportionality through a balancing test that must take into consideration the monetary and nonmonetary concerns listed in Rule 201(c)(3); however, Rule 201(c)(1) also allows trial courts to deny requests as appropriate to prevent unreasonable embarrassment or oppression.[48] Development of the proportionality rule throughout the federal judicial system, as reviewed in the Second District's opinion, led the court to conclude that other factors, such as "the extent to which the discovery sought represents a substantial invasion of . . . privacy interests" and "whether [it] is sought from a nonparty without any direct stake in the outcome of the litigation," should also be considered as appropriate in every case.[49]

The *Carlson* court next turned its attention to ESI, defining it generally and reviewing other jurisdictions' proportional limits on the discovery of this form of information. It acknowledged that ESI entails challenges not encountered with traditional documents or tangible things.[50] The "exponentially greater volume" of ESI as compared to paper, the difficulties and added cost of excluding irrelevant and privileged materials, the significant quantity of metadata embedded in electronic files, and the likely need for ESI experts to advise attorneys, all complicate the discovery process immensely.[51]

Within this complicated environment emerge unique privacy concerns. Relying on the United States Supreme Court's decision in *Riley v. California*, the Second District found the privacy issues raised by searches of computerized devices "dwarf" those presented by the search of physical items.[52] Parroting the Supreme Court, the court acknowledged personal computers and networks, through metadata and browsing histories, can amount to "a digital record of nearly every aspect of [citizens'] lives—from the mundane to the intimate."[53] Pointing to Rule 201(c)(3)'s Committee Comments, the *Carlson* court noted the amended proportionality requirement specifically targets these challenges posed by electronic discovery. The court then reviewed the categories of ESI that are, pursuant to the Committee Comments,

presumptively *not discoverable* due to the high burden of producing them.[54] In the absence of a stated Illinois methodology for justifying an exception to the presumption, the court found useful the approach taken by Colorado's supreme court, which dictates that a request for ESI in one of the categories generally immune from production must be justified through showing: (1) a compelling need for the information; (2) the unavailability of the information from other sources; and (3) that the information is sought through the least intrusive means.[55]

Turning to the question of whether the trial court erred in ordering forensic imaging of the plaintiff's hard disk drives, the Second District initially examined whether the request was consistent with the established norms (*i.e.*, the protocol) for the exchange of discovery in this state.[56] It then considered whether the request sought information that satisfied the requirements of relevance and proportionality. In all instances, the court found the request too broad and the trial court's order an abuse of discretion.

As a general principle, discovery involves one party making a specific request for information and the other party searching its records for information responsive to the request.[57] The *Carlson* defendants' request for copies of the plaintiff's hard drives turned this norm on its head. In effect, they demanded all of the plaintiff's electronic information, which they then would search for evidence relevant to the suit. The court found case law from other jurisdictions rejecting this approach. In *Menke v. Broward County School Board*, a Florida appellate court stated, "[i]n civil litigation, we have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation."[58] The Second District referred to the defendants' request as "an inversion of traditional discovery protocol" and, although conceding it might be appropriate in rare circumstances, found it to be entirely inappropriate here.[59] There was no record of noncompliance by the plaintiff, and the computers at issue played no direct role in the underlying incident. According to the court, it was an abuse of the trial court's discretion to agree to a departure from the "traditional" approach to discovery.[60]

Before specifically addressing relevance, the court commented that the categories of information set forth in the defendants' protective order were "ambiguous" and "lack[ed] crucial details."[61] The opinion noted that, in many cases, parties seeking forensic imaging submit affidavits from experts outlining the specific categories of information sought, the methods by which that information (and not other data) would be specifically identified and retrieved, and the cost associated with the effort.[62] Experts, the court reasoned, are often essential to ensure retrieval and to provide information about the search process to enable the court and responding party to monitor this complicated process. In *Carlson*, no expert testimony was provided to the court, and counsel's efforts to define the process in layman's terms were a poor substitute. Considering the privacy interests at stake, the resulting ambiguity meant the trial court abused its discretion in ordering forensic imaging.[63]

The Second District also took issue with the relevance of the ESI to the claims at issue, stressing that the proposed means of discovery—forensic imaging of six computer hard drives—should have been central to the trial court's relevancy assessment. A broad request for personal computer usage information and associated metadata would have greater relevance, according to the court, if the computers were themselves "at the heart of the claims raised."[64] Furthermore, the court found the defendants had, but did not exploit, "ample" alternative ways of obtaining the same information. "Instead," the court found, "the defendants appear to have abandoned traditional methods of discovery to pursue far more intrusive methods of gaining the information they sought."[65]

The *Carlson* court next applied the proportionality balancing test and found the scale tilted dramatically to one side. On the one hand, the court conceded the information identified by the defendants in their protective order might have

some probative value, but believed it to be minimal.[66] On the other hand, according to the court, was "an enormous amount of data . . . potentially including personal photographs, declarations of love, bank records and other financial information, records of online purchases, confidential information about family and friends contained in communications with them, and private online activities utterly unconnected to this suit."[67] The sheer quantity of irrelevant information that necessarily would be reproduced in the process troubled the court. It characterized the request for forensic imaging as "asking to search an entire house merely because some items in the house might be relevant." Further analogizing, it declared "[a] party may not dredge an ocean of electronically stored information . . . in an effort to capture a few elusive, perhaps non-existent fish."[68] The court plainly saw little value in the safeguards offered by the protective order, which would have limited the quantity of data ultimately distributed to the defendants and their attorneys.

Finally, the court concluded that much of the data sought by the defendants appeared to fall into the categories of ESI that are presumptively "not discoverable" under the amended rules. In particular, the court identified "time stamps" for work- and game-related computer usage as "data in metadata fields that are frequently updated automatically," as well as "online access data."[69] In *dicta*, the court even questioned whether the process of forensic imaging itself (*i.e.*, creating a complete copy) would run afoul of the prohibitions outlined in Rule 201's Committee Comments.[70] It did not reach such a conclusion, but remarked that the defendants would need to overcome these prohibitions to obtain, at the very least, the electronic "time stamps" sought.[71]

The Second District concluded that compelled forensic imaging should be a procedure of last resort. Although plainly telegraphing that no such basis existed in this case, the court ruled the trial court failed to conduct the balancing test required by the proportionality rule, and thus struck its order and remanded the case for reconsideration under the correct standard.[72]

Although addressing a somewhat extreme example, *Carlson*'s detailed approach makes it required reading for those grappling with ESI questions and application of the 2014 amendments.

Sanctions and Penalties Related to E-Discovery Have Not Emerged in Illinois

The storm clouds of anticipated sanctions and penalties for both attorneys and litigants that were gathering at the time of the 2014 amendments have mostly cleared in the past five years. Initially, there was considerable and not unfounded concern by both the trial bar and the business community regarding potential serious penalties for lapses in adhering to the new rules, particularly in the area of electronic preservation. To date, those fears generally have not been realized in Illinois. That being said, the potential still exists for draconian penalties and sanctions to be imposed and upheld on appeal. Because the 2014 amendments are based on developments in the federal system, Illinois courts may look to federal courts' handling of issues involving the retention and disclosure of e-discovery.

As previously noted, New York federal Judge Scheindlin's 2003-2004 *Zubulake v. UBS Warburg* opinions are generally considered a starting point for a comprehensive analysis of case law concerning electronic discovery. *Zubulake* was an employment action and the court's five published opinions largely concerned the defendant's and the defendant's attorneys' alleged failure to take necessary steps to guarantee that relevant data was both preserved and produced in discovery.[73] Sanctions were awarded against the defendant and an adverse jury instruction was given against the defendant at trial.[74] These rulings were a wakeup call, particularly for the defense bar, as to the need to closely monitor clients' document retention policies in anticipation of litigation.

Remarkably, as of this writing there are no published Illinois appellate court opinions regarding large-scale sanctions related to electronic discovery, and specifically, regarding ESI retention problems. One reason for this may be that Illinois law at present does not differentiate between discovery of physical documents and ESI. Although Rule 201(b)(4) defines ESI, it simply instructs that if a production request does not specify a form for ESI, the responding party must produce it in a form in which it is ordinarily maintained or, alternatively, in a reasonably usable form.[75] Rule 219, which details the consequences of a party's refusal to comply with discovery rules does not even mention ESI or e-discovery by name.[76] The Committee Comments for the rule, however, do address electronic discovery, reading:

> The Committee believes that the rule is sufficient to cover sanction issues as they relate to electronic discovery. The rulings in *Shimanovsky v. GMC*, 181 Ill. 2d 112 (1998) and *Adams v. Bath and Body Works*, 358 Ill. App. 3d 387 (1st Dist. 2005) contain detailed discussion of sanctions for discovery violations for the loss or destruction of relevant evidence and for the separate and distinct claim for the tort of negligent spoliation of evidence.[77]

Thus, the Committee Comment is unambiguous that the rules regarding discovery sanctions do not differentiate between physical documents and ESI. Prevailing Illinois law on destruction of relevant evidence and a claim for the tort of negligent spoliation of evidence remain.[78] Wholesale new standards that many attorneys anticipated relating to ESI have not developed.

Practical Advice for E-Discovery in Illinois Courts

Sources for Guidance

As noted, because Illinois appellate court opinions on ESI and e-discovery are limited, it is appropriate to look to federal court opinions for guidance.[79] The Seventh Circuit Council on eDiscovery and Digital Information has developed principles related to ESI discovery.[80]

Along with case law from the federal courts, additional resources exist to develop procedures for handling discovery requests for ESI. The Sedona Principles, as since amended, dictate best practices for the production of electronic information in litigation.[81] Currently, the Sedona Principles include 14 distinct guidelines for litigants.[82] These principles relate to relevance, proportionality, privacy concerns, preservation of electronically stored information, and procedures for producing ESI.[83] Although the Sedona Principles have not been adopted in Illinois, the guidelines remain useful as the case law governing ESI in Illinois gradually develops. Adherence to these principles should serve any litigant in good stead in Illinois courts.

Relevance

As with discovery of physical objects and documents, electronic discovery is subject to the requirement of relevance. Where a litigant cannot identify the evidence sought that would prove a fact at issue, there is no basis to permit the litigant to search an opponent's computer.[84]

Further, metadata is not automatically relevant in a case, as explained in *Carlson*. Even where a photograph or document is produced in electronic form, the metadata as to its creation may not necessarily lead to additional relevant information.

Proportionality

Illinois Supreme Court Rule 201(c)(3) identifies the proportionality factors to consider in determining whether the burden of the proposed discovery outweighs the likely benefit. The factors include 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 resolving the issues.[85]

In applying the proportionality standard, courts may consider the entry of a protective order pursuant to Illinois Supreme Court Rule 201(c) to prevent harassment or unreasonable expense. Courts may also apportion costs related to the discovery of ESI as well. In *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, the Illinois Appellate Court, First District affirmed the trial court's award of $3,025.80 to Chase Bank relating to its costs and expenses incurred in retrieval and production of documents.[86] In its petition, Chase Bank stated it incurred approximately $18,000 in costs.[87] The court noted the record established the trial court acted within its authority under Rule 201(c) to balance the party's need for the discovery material against the expense of production incurred by Chase Bank.[88]

The importance of the Rule 201(c)(3) proportionality factors is greater when the burden imposed by discovery requests is higher. In order to justify access to the entire contents of a hard drive, a party must meet a high burden. Forensic copying of a hard drive will only be available as a last resort, as announced in *Carlson*.[89]

Privilege and Privacy Concerns

Electronic discovery in certain cases can result in voluminous amounts of documents being produced as well as voluminous amounts of documents being withheld pursuant to a claim of privilege. It is appropriate for the trial court to review a privilege log alone, rather than documents themselves, where a highly detailed privilege log has been provided.[90]

Prudent counsel likely would consider objecting to any request to examine the contents of an entire computer hard drive or database.[91] By allowing an opposing litigant unfettered access to such content, counsel may unwittingly open the door to privileged, protected communications. A better strategy would be to suggest the use of an agreed search protocol with the requirement that counsel be permitted to review all documents for privilege prior to production.[92]

The traditional privileges in a lawsuit, such as the work-product privilege and attorney-client privilege, are not the only applicable protections. In the context of medical records, the physician-patient privilege and Health Insurance Portability and Accountability Act of 1996 must be considered. Additionally, and as stressed in *Carlson*, the Illinois Constitution expressly guarantees a zone of personal privacy against unreasonable invasions, including those that may occur during the course of litigation.[93]

Preservation of ESI

Sedona Principle number three provides that parties should confer and agree on the scope of e-discovery and its preservation as soon as practicable.[94] This is advisable, even if not specifically required under the Illinois rules. By

agreeing upon the scope of e-discovery and the materials to be preserved once a lawsuit has been filed, counsel can provide some degree of protection to clients from spoliation claims related to materials not covered by the agreement.

Even before litigation, the duty to preserve ESI may arise under certain circumstances. Businesses, in particular, should take measures to ensure that file retention policies align with the potential need for ESI during litigation.

Given their ubiquitous nature, email communications present a special headache. Courts do understand that deleting emails is a business reality; thus, the mere fact that certain emails were deleted in the ordinary course of business is not troubling on its face.[95] Intent still matters, and each occurrence should be considered in light of the specific factual circumstances of the case.

Unpublished opinions suggest that this principle rightly extends beyond emails, as well. For example, where a computer hard drive was destroyed through unintentional means, such as a computer virus, sanctions for destruction of evidence were inappropriate.[96] Similarly, sanctions against a defendant were unwarranted where the plaintiff did not request preservation of video footage from surveillance cameras until three years after the accident at issue, long after the footage was discarded.[97] On the other hand, where evidence suggested that a party deliberately disposed of computers after an opponent uncovered a scheme to pay commissions to a relative and filed a counterclaim regarding that scheme, the trial court properly enter a default judgment as a discovery sanction.[98]

Producing ESI

Illinois Supreme Court Rule 214(b) allows a party to produce electronically stored information in a form in which it is ordinarily maintained or in a reasonably usable form.[99] In identifying the potential sources of ESI, it is important to understand one's client's business and computer storage capabilities. The Rule 214 Committee Comments state that "there can be no question but that a producing party must search its computer storage when responding to a request to produce documents pursuant to this rule."[100]

In nearly all instances, the search will be conducted by the responding party. "There is no provision allowing the requesting party to conduct its own search of the responding party's files—regardless of whether those files are physical or electronic."[101] Certain discovery requests will require the use of a computer forensic expert. Such an expert can help to identify data deleted from a hard drive[102] and uncover communications in messaging platforms,[103] among other tasks. The *Carlson* court, as mentioned above, found experts to be "often essential" for establishing parameters for forensic collection of ESI.[104]

Requesting ESI

Litigants can identify the nature and location of electronically stored information more easily through the use of interrogatories. After determining the sources of ESI, targeted requests for production can be used. In making initial document requests, a litigant should identify the electronically stored information requested specifically and detail the format requested. Where metadata or inspection of a computer hard drive is necessary, this should be made clear in the initial request.

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Conclusion

Five years after the 2014 amendments to the Illinois Supreme Court Rules governing the production of electronic discovery, a definitive path forward has not yet been established by the courts. Although *Carlson* and a few other opinions provide some guidance, the anticipated mad dash to the appellate court has not occurred. As a consequence, the amendments did not revolutionize the practice of law—for good or bad—as many expected or feared. Discovery, whether in paper or digital form, is assessed using the fundamental principles of relevance and proportionality. Although the sheer volume and scope of electronic data has magnified the importance of proportionality and personal privacy, the circuit courts—sometimes with the assistance of experts—remain capable of sorting through the discovery disputes on their dockets. Whether contained in a file cabinet or hard disk drive, information still can be assessed by the court and adjudged discoverable or not.

It will be interesting to see what transpires over the next five years. As the bar generally acclimates itself to the digital practice of law, the growing sophistication of practitioners may result in appellate decisions involving far more complex written discovery disputes than previously addressed. On the other hand, the next five years could match the previous five, with discovery continuing without the need for extensive appellate comment.

(Endnotes)

[1] Fed. R. Civ. P. 34, Adv. Comm. Notes to 1970 Amend.

[2] Fed. R. Civ. P. 34(b)(2)(E)(i), 1980 Amend.

[3] Fed. R. Civ. P. 34(b), Comm. Note to 1980 Amend.

[4] *In re Santa Fe Natural Tobacco Co. Mktg. & Sales Practices and Prods. Liab. Litig.*, No. MD 16-2695 JB/LF, 2018 WL 3972909, at *8 (D. N. Mex. Aug. 18, 2018).

[5] *The Sedona Principles for Electronic Document Production*, Intro. at 2 (March 2003).

[6] E-Discovery in Federal and State Courts after the 2006 Federal Amendments, https://www.bna.com/uploadedfiles/BNA_V2/Images/From_BNA_V1/Misc/Allman%20EDiscovery@20Rules.pdf, at p.3.

[7] *Sedona Conference 2003.*

[8] *Id.*

[9] *Id.*

[10] Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1179 (2005).

[11] Ill. S. Ct. R. 201(b), Comm. Cmts. (Rev. May 29, 2014).

[12] Ill. S. Ct. R. 201 (b)(4).

[13] Steven M. Puiszis, *Understanding Illinois' New EDiscovery Rules* (citing Shira A. Scheindlin and Daniel J. Capra, *Electronic Discovery and Digital Evidence*, CASES AND MATERIALS 4 2009, at 8), https://c.ymcdn.com/sites/iadtc.site-ym.com/resource/resmgr/Understanding_Illinois'_New_.pdf).

[14] Ill. S. Ct. R. 201(c)(3).

[15] Puiszis, *supra* note 13, at 8.

[16] *Id.*

[17] *Compare* Fed. R. Civ. P. 26 (b)(1)-(2) (eff. Dec. 1, 2007) *and* Fed. R. Civ. P. 26(b)(1) (eff. Dec. 1, 2015).

[18] Fed. R. Civ. P. 37(e).

[19] *Carlson v. Jerousek*, 2016 IL App (2d) 151248.

[20] *Carlson*, 2016 IL App (2d) 151248, ¶ 1.

[21] *Id.* ¶ 10.

[22] *Id.*

[23] *Id.* ¶¶ 10, 12.

[24] *Id.* ¶¶ 4, 5, 11.

[25] *Id.* ¶ 14.

[26] *Id.*

[27] *Id.* ¶ 15.

[28] *Id.* ¶ 16.

[29] *Id.*

[30] *Id.* ¶ 17.

[31] *Id.* ¶¶ 19, 21.

[32] *Id.* ¶ 25.

[33] *Id.* ¶¶ 25-49.

[34] Ill. S. Ct. R. 201 (eff. July 30, 2014).

[35] *Carlson*, 2016 IL App (2d) 151248, ¶ 27 (quoting Ill. S. Ct. R. 201(b)(1)).

[36] *Carlson*, 2016 IL App (2d) 151248, ¶ 27 (quoting Ill. S. Ct. R. 201(a)).

[37] *Carlson*, 2016 IL App (2d) 151248, ¶ 30 (quoting Ill. S. Ct. R. 201(c)(3)).

[38] *Carlson*, 2016 IL App (2d) 151248, ¶ 28.

[39] *Id.* ¶ 30 (quoting *Kunkel v. Walton*, 179 Ill. 2d 519, 531 (1997)).

[40] *Carlson*, 2016 IL App (2d) 151248, ¶ 31.

[41] *Id.* (quoting *In re Mirapex Products Liability Litigation*, 246 F.R.D. 668, 673 (D. Minn. 2007)).

[42] *See* Ill. Const. 1970, art. I, § 6 (freedom from "unreasonable . . . invasions of privacy").

[43] *Carlson*, 2016 IL App (2d) 151248, ¶¶ 33-34 (citing *People v. Caballes*, 221 Ill. 2d 282, 330-31 (2006); *People v. Mitchell*, 165 Ill. 2d 211, 220 (1995); *In re Will County Grand Jury*, 151 Ill. 2d 381, 391-92, 396 (1992)).

[44] *Carlson*, 2016 IL App (2d) 151248, ¶¶ 35-41.

[45] *Id.* ¶ 37 (quoting *Kunkel*, 179 Ill. 2d at 531 (internal quotations and bracketing omitted.)).

[46] *Carlson*, 2016 IL App (2d) 151248, ¶37.

[47] *Id.* ¶¶ 38 n.1, 39.

[48] *Id.* ¶¶ 40-41.

[49] *Id.* 41 ¶(citing *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993); *Tucker v. Am. Int'l Group Inc.*, 281 F.R.D. 85, 92 (D. Conn. 2012); *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 562 (S.D.N.Y. 1996); Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 U. KAN. L. REV. 235, 236 (Nov. 2015)).

[50] *Carlson*, 2016 IL App (2d) 151248, ¶ 44.

[51] *Carlson*, 2016 IL App (2d) 151248, ¶¶ 43-44.

[52] *Id.* ¶ 45 (quoting *Riley v. California*, 573 U.S. 373, 393-97 (2014) (addressing cell phones, which the Supreme Court regarded as "minicomputers").

[53] *Carlson*, 2016 IL App (2d) 151248, ¶ 45 (quoting *Riley*, 573 U.S. at 395).

[54] *Carlson*, 2016 IL App (2d) 151248, ¶¶ 47-49.

[55] *Id.* ¶ 49.

[56] *Id.* ¶ 53.

[57] *Id.*

[58] *Id.* ¶ 54, (quoting *Menke v. Broward County School Bd.*, 916 So. 2d 8, 10 (Fla. Ct. App. 2005)).

[59] *Id.* ¶ 55.

[60] *Id.* ¶¶ 55-57.

[61] *Id.* ¶¶ 59-61.

[62] *Id.* ¶ 62.

[63] *Id.*

[64] *Id.* ¶ 63.

[65] *Id.* ¶ 64.

[66] *Id.* ¶ 65.

[67] *Id.*

[68] *Id.* (quoting *Tucker*, 281 F.R.D. at 95).

[69] *Carlson*, 2016 IL App (2d) 151248, ¶ 66 (citing Ill. S. Ct. R. 201, Comm. Cmts. (Rev. May 28, 2014)).

[70] *Id.*

[71] *Id.* ¶ 67.

[72] *Id.* ¶¶ 68-70.

[73] *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004.)

[74] *Zubulake*, 229 F.R.D. at 439-40.

[75] Ill. S. Ct. R. 201(b)(4), 214(b).

[76] Ill. S. Ct. R. 219.

[77] Ill. S. Ct. R. 219, Comm. Cmt. (Rev. May 29, 2014).

[78] *Id.*

[79] *Hites v. Waubonsee Cmty. Coll.*, 2016 IL App (2d) 150836, ¶ 60.

[80] *Principles Relating to the Discovery of Electronically Stored Information*, Second Edition (Jan., 2018), Seventh Circuit Council on eDiscovery and Digital Information, https://www.ediscoverycouncil.com/sites/default/files/7thCircuitESIPilotProgram PrinciplesSecondEdition2018.pdf.

[81] *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 11 (2018).

[82] *Id.* at Principles 1-14, 51-53.

[83] *Id.*

[84] *Mostardi Platt Envt'l, Inc. v. Power Holdings, LLC*, 2014 IL App (2d) 130737-U, ¶ 58.

[85] Ill. S. Ct. R. 201(c)(3).

[86] *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶¶ 113-20.

[87] *JPMorgan Chase*, 2014 IL App (1st) 121111, ¶ 113.

[88] *Id.* ¶ 117.

[89] *Carlson*, 2016 IL App (2d) 151248, ¶ 68.

[90] *Mostardi*, 2014 IL App (2d) 130737-U, ¶ 62.

[91] *See, e.g., Peal v. Lee*, 403 Ill. App. 3d 197, 200 (1st Dist. 2010).

[92] *Id.*

[93] *Carlson*, 2016 IL App (2d) 151248, ¶ 33.

[94] *The Sedona Principles*, *supra* note 81, at Principles 3, 51.

[95] *Mostardi*, 2014 IL App (2d) 130737-U, ¶ 59.

[96] *Cordeck Sales, Inc. v. Constr. Systems, Inc.*, 2013 IL App (1st) 112150-U, ¶¶ 15-16.

[97] *Mackic v. Wal-Mart Stores, Inc.*, 2017 IL App (1st) 160103-U.

[98] *Mason v. Sunstar Americas, Inc.*, 2018 IL App (1st) 170042-U, ¶¶ 52, 57-58.

[99] Ill. S. Ct. R. 214(b).

[100] Ill. S. Ct. R. 214, Comm. Cmts. (Rev. June 1, 1995).

[101] *Carlson*, 2016 IL App (2d) 151248, ¶ 53.

[102] *Peal*, 403 Ill. App. 3d at 200-01.

[103] *People v. Smith*, 2015 IL App (2d) 130663-U, ¶ 12.

[104] *Carlson*, 2016 IL App (2d) 151248, ¶ 62.

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