



E-discovery Law Alert

New federal rules of civil procedure

A publication of Nixon Peabody LLP

OCTOBER 5, 2009

Know your court and its rules for electronic discovery: Seventh Circuit announces innovative pilot project

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On October 1, 2009, the Seventh Circuit Court of Appeals formally embarked on its “Electronic Discovery Pilot Program.” This program involves the issuance of principles relating to the discovery of electronically stored information (ESI). These principles are similar but not identical to other guidance documents, such as *The Sedona Principles*, and will be imposed on parties appearing before certain courts in the Seventh Circuit by means of Standing Orders adopted by district courts in individual cases. Once adopted as Standing Orders in those courts, the principles are intended to be supplemental procedural guidelines to be followed by litigants.

In sum, the principles call for the parties to cooperate in addressing discovery matters and to focus on, among other things, applying the concept of proportionality in discovery; discussing preservation issues with particularity; and setting expectations for the disclosure of information about ESI, the production format(s), and education for counsel.

The six-page set of principles is a “must read” for any attorney or client with matters that are in the district courts in the Seventh Circuit, regardless of whether a particular court issues a Standing Order, and recommended reading for everyone else involved in discovery, since courts across the country will be looking at these materials as potential guidance in their cases.

The materials are available here:

http://www.nixonpeabody.com/linked_media/publications/7th_Circuit_Pilot_Program.pdf

Notably, the adopted Standing Orders will:

- (a) Define presumptive categories of ESI that are (and are not) within the normal scope of preservation (including a provision that ESI is not generally discoverable where preservation requires extraordinary affirmative measures that are not used in the ordinary course of business), and
- (b) Make the requesting party generally responsible for the incremental costs incurred by the responding party in creating the copy of requested information (with the proviso that parties are encouraged to discuss cost-sharing for optical character recognition or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party).

The adopted Standing Orders also contemplate the appointment of “e-discovery liaisons” to help facilitate meaningful dialog and agreements. The Seventh Circuit materials also direct attorneys to become familiar with the various pertinent publications of the Sedona Conference (www.thesedonaconference.org) and other organizations.

The Seventh Circuit, assisted by the Institute for the Advancement of the American Legal System at the University of Denver, will be evaluating the implementation of the Seventh Circuit Electronic Discovery Pilot Program with judges who volunteer to implement the principles in select cases. Presentation of the resulting data from the first phase (October 2009–May 2010) will take place at the Annual Meeting and Judicial Conference of the Seventh Circuit Bar Association, which will be held in Chicago from May 2–4, 2010. The data will also be available at the Conference of the Advisory Committee on Civil Rules, which will be held at Duke University on May 10 and 11, 2010. Plans are for the program to move to a second phase, from June 2010–May 2011.

The Seventh Circuit will also be soliciting comments from the bar regarding the principles.

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