LAWYERS JOURNAL

What the judges think: e-discovery practices and trends

by Daniel Miller and Tina Miller

A recent survey of leading federal jurists indicates that many attorneys need to improve their knowledge and practices regarding e-discovery.

The "Federal Judges Survey on e-discovery Best Practices and Trends," commissioned by the e-discovery software firm Exterro, reflects responses from 22 federal district and magistrate judges, including the Western District of Pennsylvania's Chief Judge Joy Flowers Conti, Judge Nora Barry Fischer and Magistrate Judge Lisa Pupo Lenihan.

The judges were asked 15 multiple-choice questions covering a number of e-discovery topics. Despite the numerous and varied e-discovery seminars and training sessions currently available to practitioners, the survey results indicate that many attorneys still lack e-discovery competency. In particular, the judges complained about two main problems – a lack of knowledge about their clients' e-discovery environment and a lack of cooperation between opposing parties and attorneys.

The survey highlights the continued need for education in fundamental concepts in e-discovery. Fifty percent of respondents noted that the typical amount of electronically stored information in cases has grown substantially over the past five years, yet the judges see significant gaps in attorneys' understanding of e-discovery principles.

According to the survey, the primary area where counsel needs improvement is preservation, which should occur early in the case and sometimes before the case even begins. An important part of preservation is planning, which includes not only understanding the technology and data at issue in the case, but also understanding the client's systems.

Communication with opposing counsel about the scope of discovery is also important. It is too late to start learning the fundamental principles of preservation after your client has been sued. The judges stressed the importance of considering e-discovery prior to a suit being filed to avoid mistakes that will have ramifications throughout the case.

A key part of proper planning and preparation is developing an understanding of relevant rules, including Federal Rule of Evidence 502 and the e-discovery rules within (and the anticipated amendments to) Federal Rule of Civil Procedure 26.

The survey results show a belief among judges that parties are not taking full advantage of their ability to preclude waiver through the use of FRE 502(d). Half of the judges surveyed said that Rule 502(d), which allows the parties to agree that privilege protection is not waived by disclosure connected with litigation, is the most underutilized federal rule.

Similarly, the survey concludes that the proposed changes to Rule 26(b)(1) regarding proportionality should be beneficial to attorneys who take a more proactive approach to efficient and cost-effective e-discovery.

Perhaps most surprising, years after the initial publication and subsequent judicial support for the Sedona Conference's Cooperation Proclamation, cooperation among parties with regard to e-discovery remains a major problem. Half of the respondents believe that communication problems account for the most common e-discovery issues for parties in their courts. This includes lack of or poor cooperation between the parties and miscommunication between internal team members. The judges surveyed commented on the time and money wasted on disputes about basic e-discovery issues that could be resolved through cooperation.

Magistrate Judge Lisa Pupo Lenihan, who participated in the survey, noted that the survey findings comport with her experience and stated, "In the majority of the Rule 16 Initial Case Management conferences that I conduct, the parties surprisingly have not discussed any specifics of the e-discovery process. While I agree that extensive e-discovery is not necessary in every case, I do think that counsel should discuss, at minimum, specific things like how email searches will take place." Judge Lenihan further noted, "I am often surprised by counsel for plaintiffs particularly who indicate that they are not even seeking e-discovery. To me, ESI is usually all there is. No one writes paper memos anymore. All communication is electronic."

The federal judiciary is attuned to both the proposed revisions to the Federal Rules of Civil Procedure related to e-discovery and emerging technological issues that will likely affect e-discovery in the future. According to Conti, the results of the survey were fairly consistent with her understanding of the current state of e-discovery practice.

"There was one surprise and that relates to the percentage of judges (45 percent) who felt that, if Rule 502(d) orders were entered, there would be substantial cost savings," said Conti. "Our district has a default Rule 502(d) order that is entered in most cases, but I have not heard that substantial savings have resulted from it. My understanding is that many clients still insist on a privilege review before documents are produced."

Fischer noted, "We are seeing increased awareness and experience with e-discovery. We are also seeing conscious

choices in some cases to forego e-discovery." She emphasized the need for continued training both by lawyers and judges as the tools for e-discovery increase.

"This is particularly true given the rule of competence and the standards now adopted by the American Bar Association and the Pennsylvania Bar Association," said Fischer. "Hence, the Federal Bar Association's quarterly programs on e-discovery, the ACBA Technology and the Law, and the Pennsylvania Bar Institute E-Discovery Institute are all vital."

Fischer also pointed to the Western District of Pennsylvania's E-Discovery Special Master Program as a way for parties to "level the playing field" in e-discovery matters. This unique and successful program allows the court to appoint pre-approved specially qualified electronic discovery special masters to assist the parties in addressing e-discovery issues that may arise during litigation.

Even those who are proficient in e-discovery practices and procedures must continue to hone their skills. For example, the survey noted the importance of continued education about emerging technology platforms and the preservation issues created by mobile devices. Attorneys practicing in the federal courts, and particularly those in this district, would be well served to take the findings of this recent survey to heart. ■

About the Authors: Daniel Miller is a partner with K&L Gates. As a member of the firm's e-DAT Group, his practice focuses on e-discovery and records management issues. Tina Miller is a partner with Farrell & Reisinger. She has been appointed in the Western District as an e-discovery special master.