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Controlling Legal Costs – Law Firms

The Costly Impact Of E-Discovery

The Editor interviews ***Beth S. Rose****, Member of the firm of Sills Cummis & Gross P.C. and nationally known for her defense of pharmaceutical and medical device companies.*

Editor: We're coming up on the first anniversary of the Final Report of the joint project of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System that was issued March 11th of last year. The survey that was conducted in connection with it concluded that there are serious problems in the civil justice system with respect to the expansion of e-discovery. Please describe a case in which you've been involved in which extensive e-discovery was threatened but was settled in order to avoid discovery costs.

Rose: Recently, the firm represented the plaintiff in a commercial case where approximately $1.5 million was in dispute. The defendant filed an answer and a counter-claim. It soon became clear that the cost of preserving and collecting e-discovery from the client had the potential to cost as much as the value of our claim. There were approximately 75 custodians who needed to be interviewed and whose electronically stored information needed to be identified and collected. In a short period of time, the client spent hundreds of thousands of dollars and the process was far from complete. When the client estimated what the final cost of the e-discovery was likely to be, a decision was made to settle the claim.

Editor: Is that unusual?

Beth S. Rose

Rose: I don't think so. The e-discovery typically sought in complex commercial and products liability cases is vast and almost without boundary. It can cost millions of dollars and the client reasonably has to factor that cost into how it is going to defend the lawsuit.

Editor: Could you give us some examples of cases in which extensive discovery took place and the case went to trial, focusing on whether or not the information developed in e-discovery affected the outcome.

Rose: Recently, I was involved in a mass tort case in which there were hundreds of plaintiffs who claimed that their ingestion of a particular drug caused them injury. My client produced millions of pages of documents,which translated into approximately 600,000 documents. During the first trial, there were approximately 250 exhibits that were moved into evidence. A large portion of the documents were "learned treatises," which under rule 803(18) were not provided to the jury during their deliberations. Another large chunk of documents consisted of plaintiff's medical records. In other words, very little of the e-discovery was used at trial.

Editor: The unused evidence represented the preponderance of the cost of e-discovery?

Rose: Yes, that's correct and is consistent with my experience in several cases.

Editor: To what extent, in your experience, are cases commenced as an investigative tool to see whether or not facts can be developed that would justify bringing the case?

Rose: That is a difficult question for me to answer as my practice is devoted to defense work. Some of the complaints served on my clients are quite detailed. Others are completely devoid of any factual information.

Editor: Moving on, the Supreme Court in *Iqbal* stated that unnecessary discovery could distract government officials from their work. To what extent does e-discovery distract corporate employees?

Rose: E-discovery has a huge impact on corporate employees and can potentially distract them from the substantive work that they are doing. From my own experience, explaining a litigation hold and its implications to employees, many of whom have no prior experience with liti-

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gation or with the obligation to preserve electronically stored information, collecting their data and sending them reminders is a substantial time commitment. The challenge to collect and preserve electronic information becomes even more complex in cases where a product or a medical device is still on the market and is being sold as the litigation moves forward. Documents are being created every day, and it is a difficult task to develop a protocol so that employees preserve relevant electronic information. It is inevitable that employee productivity will be compromised. In terms of indirect costs, the client will have to retain outside counsel. The amount of time outside counsel will spend with the employees depends on the complexity of the case and the data that is available. A vendor may have to be retained and the company's IT department is likely going to have to get involved in the preservation/collection process. These are all additional costs that the client incurs as part of the discovery process. In terms of proportionality, in a personal injury case or a product liability case, the e-discovery costs are going to be borne disproportionately by the defendant. The plaintiff may have some electronically stored information on a laptop, but it has not been my experience that plaintiffs in product liability cases produce millions of pages of electronic discovery, so the costs are not borne equally.

Editor: Clearly that would be the case in a class action with respect to a medical device or a drug.The individual, as opposed to the manufacturer, is going to have much less in the way of data to be recovered. It's almost inherent in the system, whether or not you compound it with e-discovery.

Rose: I agree, but I also want to clarify that disproportionality exists whether there is one plaintiff or 100 plaintiffs, because even if it's just one plaintiff suing a pharmaceutical or a medical device company, or really any company, depending on the breadth of discovery and how liberal the discovery rules are, the defendant may have to produce a significant amount of information regarding the research and development, testing, manufacture, design and labeling of the product.

Editor: To what extent would a requirement for fact-based pleading address the issues that you've been talking about?

Rose: Time will tell. Fact-based pleading could be helpful if it were coupled with a fundamental change in how courts view discovery. Even with the most specific of pleadings, if a court's view is that the discovery rules are to be applied liberally, and that the defendant is required to produce almost any document that relates to the product at issue, then I doubt that there would really be a change. My sense is without a fundamental change in how courts look at discovery, I am skeptical that fact-based pleading will completely solve the problem. Many judges in New Jersey and elsewhere take a very liberal view of discovery.

Editor: I would imagine some of your colleagues in your firm who represent hospitals might find themselves more optimistic about fact-based pleading as helping to reduce the discovery burden by dissuading plaintiffs from bringing actions without asserting any facts.

Rose: Perhaps. In New Jersey and no doubt in other states, there are statutes that require plaintiffs who file medical malpractice claims to submit an affidavit of merit early in the litigation from a physician to support the claim that the defendant deviated from the appropriate standard of care.

Editor: Please comment about litigation holds and the role of the courts with respect to sanctions on the preservation of evidence.

Rose: I believe that the use of sanctions should be limited to situations where there is intentional destruction of evidence. I have worked on a number of cases involving large e-discovery issues. My clients and I approach e-discovery issues in good faith and with the best of intentions. We try to identify all custodians who may have relevant electronic information, including relevant databases. We take reasonable steps to preserve the data and to collect it in a way that is consistent with the rules. But human beings are not perfect and projects are not perfect and, despite the strictest of protocols and vigilance, something may slip through the cracks. With the nature of electronically stored information and auto-delete programs that companies have in place, it is easy for data to be overwritten and to be lost or not retained.

What concerns me is that hindsight is 20/20. Even with a good faith effort, a litigant or a court can always look at what a party has done, and ask "Why didn't you do x, why didn't you do y, why didn't you collect from z?" So, even though our courts say that they are not holding parties to perfection and are only applying a rule of reason, in many cases, the standard seems to be perfection. For example, in a January 10, 2010 opinion out of the Southern District of New York, *Pension Committee of the University of Montreal v. Banco Of America Securities, LLC* the court presumed that if something went wrong, if something were lost in the normal course despite efforts to preserve, that was *per se* negligence. The court stated that "[a] failure to preserve evidence, resulting in the loss or destruction of relevant information, is surely negligent and depending on the circumstances may be grossly negligent or willful." If we are practical about the possibility that electronic information may be lost despite the good faith and reasonable efforts of the litigants, the notion that the party who is involved ends up being *per se* negligent is very troubling and just not realistic.

Editor: Is there anything you would like to add?

Rose: I have noticed that courts criticize the litigation hold that a party has used, and because there is no standardized litigation hold, litigants approach it differently, and certainly you can appreciate why that is so. But I am also starting to think that there may be some utility to having set criteria for the minimum requirements of a litigation hold, so that when the need for a litigation hold is triggered, plaintiffs and defendants have more guidance.

The views and opinions expressed in this interview are those of the interviewee and do not necessarily reflect those of Sills Cummis & Gross P.C. or the firm's clients.