

Controlling Legal Costs – Law Firms

Push For Proportionality Could Slash Costs – How Much Do You Spend On E-Discovery?

The Editor interviews **Richard A. (Doc) Schneider**, Partner, King & Spalding LLP.

Doc Schneider is a Senior Litigation Partner in the Atlanta office of King & Spalding. Mr. Schneider is one of the leaders of the firm's E-Discovery Practice Group, devoted to counseling with clients on emerging e-discovery issues. He headed King & Spalding's General Litigation team from 1993 to 1998 and is a class action trial defense specialist listed in *Best Lawyers in America* in multiple fields, including Mass Tort Litigation.

On the cover of our March issue, Paul Saunders, chair of the American College of Trial Lawyers (ACTL) Task Force on Discovery and Civil Justice, mentions a few of the important Principles (Principles) set forth in the Final Report of the Joint Project of the College and the Institute for the Advancement of the American Legal System (IAALS). In the following interview, Doc Schneider provides his reactions to the Principles and how they might work a sea change in the often roiling waters of e-discovery.

Editor: What are your thoughts on the ACTL's Principles? Are they needed to prevent e-discovery from becoming the tail that wags the dog, with litigants settling cases with little merit just to save e-discovery dollars?

Schneider: Nice to be with you again, Al, on our favorite topic. I will begin by saying that the Principles represent some impressive thinking on how to prevent e-discovery from overwhelming the merits and achieving the ideal of proportionality. They boil down to positing that one should not do more than is truly warranted by the scale of the case and the amount in controversy. The Principles are being offered to the Federal Rules Advisory Committee for its review when they meet in May at Duke University. And the Principles have been used to craft a set of pilot rules that some judges are testing in pilot programs to see whether allegiance to a central principle of proportionality and a general principle of limited discovery is workable, fair and in the interests of justice.

While I personally have not been involved in a case where any party caved for fear of costly e-discovery, I am confident that there have been settlements driven by just such a rationale.

What is fascinating in the e-discovery field is not so much whether litigants run and hide from it, but how it can take over a case – whether you are a plaintiff or a defendant. Surely, the plaintiffs in *Zubulake Revisited* had to be astonished when they filed suit to recover investment losses only to find themselves on the wrong side of the e-discovery tracks with the renowned Judge Scheindlin. Judge Scheindlin found that plaintiffs had simply failed to take the steps necessary to preserve and she made findings of gross e-discovery negligence – and it is easy to imagine plaintiffs wanting to pack up and go home. E-discovery is critical stuff, you have to follow the rules and trailblazers like Judge Scheindlin are making the lessons crystal clear.

One of the issues that arises is whether there is any way to head off the kinds of messes that Judge Scheindlin has been

forced to deal with, some way to take better stock up front, get everyone on the same page, set expectations and corral costs.

Paul Saunders and his ACTL Task Force on Discovery have done a masterful job of analyzing the challenges presented by our current system and suggesting a set of principles, which, if applied, promise to make discovery more manageable, more reasonable. There will still be unfortunate situations where a judge willing to slog through the details will have to step in and hold the parties to their obligations – but Paul and his group are trying to find a way to keep things in proportion and not let discovery issues unfairly dwarf the merits and cannibalize the legal budgets of every major company across the nation.

The ACTL and the IAALS have put together a set of Principles and Pilot Project Rules that reflect the sense of balance that some might argue Rule 26 of the current Federal Rules of Civil Procedure was already designed to achieve. Rule 26 gives a litigant the right to seek protection if the costs of discovery are unduly burdensome – in other words, disproportionate. The Saunders Principles are a very robust application and expansion of that core idea.

The admirable thing about ACTL and IAALS approach is that it openly seeks to restore the balance between cost and merits. Their approach would basically revamp the federal rules to substitute the norm of limited discovery for the current norm of wide-open discovery.

The reforms embodied in the ACTL and IAALS approach are driven in part by the massive amount of information we now create in our hi-tech world – so much that it has become enormously expensive to collect and to maintain. But, in litigation it imposes the even greater expense of having to review and become familiar with this information. However, in my own experience, I have not had a case where the threat of extensive e-discovery meant that I needed to settle the case.

Editor: Are there cases where there was extensive e-discovery, but the amount of useful information developed was very small?

Schneider: Yes. In the "Issues and Overview" editorial by Barry Bauman, executive director of the LCJ, in your March issue, he urged corporate counsel and their law firms to provide data about the cost of e-discovery. One of the pieces of data asked for is the volume of information produced in discovery as compared to that marked in deposition or for trial. In the cases I have had over last five years involving e-discovery, 95 percent or more of the information collected never sees the light of day, and five percent or less does.

Does that mean that we need to do away with a process that only generates five percent wheat and the rest chaff? Is it inherent in the process that you've got to go through and harvest the whole field and collect one hundred percent in order to get the five percent, or are there processes that can lighten that burden? The ACTL and IAALS



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approach suggests processes that can do this.

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

Schneider: This is a very interesting question. It all relates to the *Twombly* and *Iqbal* cases. Since *Conley v. Gibson* was decided in 1941, the federal rule has been notice pleading. In *Twombly*, the plaintiffs alleged that there was a conspiracy to control telephone rates. They pointed to some circumstantial evidence that rates were controlled, but they didn't have any evidence of an agreement. Until *Twombly*, it was accepted practice to file a good faith claim while realizing that you are going to have to use discovery to try to flesh out and even find the facts. How are you going to know about a secret conspiracy, but to do discovery?

Interestingly, the ACTL and IAALS approach takes account of the need for discovery in the pilot program rules where it is recognized that a person with a facially valid claim could lack some key facts requiring pre-suit discovery. The pilot program rules offer a carefully tailored provision for pre-complaint discovery.

Editor: The Supreme Court in *Iqbal* mentioned that unnecessary discovery could distract government officials from their work. To what extent does e-discovery have a similar effect on corporate employees? What other direct and indirect costs are triggered by e-discovery?

Schneider: Undoubtedly, e-discovery management has been costly – but a key question is whether it is simply a fair and unavoidable costs of doing business in the modern world. The first caveman who had to turn over cave drawings probably found it burdensome – but it could be argued it comes with the territory. It is the price of perpetual civilization and advancement.

What the ACTL is rightfully asking is how much should come with the territory? What is the right proportion?

Clearly, the stress of e-discovery can distract employees from focusing on the business of a company. While the United States Supreme Court might worry about distracting government employees with such mundane tasks as discovery, I am not sure the same level of understanding will be extended to corporations who complain that e-discovery compliance cuts into corporate employee time, to say nothing of company revenues.

The key is to find a way to keep things in balance, in moderation – proportionate. That is what the Principles are designed to achieve.

Editor: The issues you have mentioned seem to suggest that there is a need for reform, do you think that the ACTL and IAALS approach would help?

Schneider: Yes. The principles and associated rules are aimed at finding a balance, limiting discovery to what is truly warranted and to requiring plaintiffs to filing cases where they know there is a claims as opposed to filing cases fishing for a claim.

In cases where the plaintiff has the ability to be specific, they should be specific, and the ACTL and IAALS approach includes that requirement.

As I mentioned earlier, it also addresses the situation where plaintiffs think they have a claim but they don't have the facts to support it. Rule three of the IAALS pilot program rules provides for precomplaint discovery and basically says that on motion by the proposed plaintiffs with notice to the proposed defendants, the proposed plaintiffs may make a motion to obtain precomplaint discovery on the basis that they cannot prepare a legally sufficient complaint without discovery, they have probable cause to believe that it will lead to a sufficient complaint and the discovery is narrowly tailored.

The essence of the proportionality principle is that the legal system ought not to make e-discovery so burdensome that people with meritorious claims are deprived of their ability to win. The legal system ought not to be a game that can be used to extract settlements from people who fear being thrown into the mill of litigation.

Editor: Based on the concerns you expressed, do you feel it would be useful for our corporate counsel readers and their law firms to supply anecdotal evidence and hard data in connection with the Duke Conference in May being sponsored by the Federal Rules Advisory Committee?

Schneider: I suspect that if you asked all the corporations in the country what percent of their legal budgets last year was spent paying damages, what percent was spent paying lawyers to try cases and what percent was spent in the pre-trial process in various forms of discovery, I would estimate that at least 80 percent of that budget is attributable to pre-trial discovery and that much of that is generated by e-discovery.

It would do the Rules Committee good to collect data on that subject and corporations should be willing to provide it.

It may be that the costs now being paid are simply unavoidable costs of getting the right answer, but if there are other ways and other principles that we can test to see whether they work just as well without incurring the same economic costs, they are worth exploring.

A most important element in persuading the Federal Rules Advisory Committee to go forward with changes in the current rules is anecdotal evidence and data reflecting the burden placed on corporations by those rules. I believe it is critical for corporations and their law firms to submit whatever information is readily accessible and not privileged so that the Committee comes to an informed view.

The Federal Rules Advisory Committee is an impressive group and includes one of my partners, Chilton Varner, who is also a member of the ACTL. Come to think of it, Al, I really should transfer this call to Chilton. I wish I would have thought of that earlier. But it is always fun talking with you and scaring myself all over again about e-discovery.

It will be interesting to see how the Principles fare before the Committee in May. The matter is not without controversy and you will hear strong voices on either side.

Please email the interviewee at dschneider@kslaw.com with questions about this interview.