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e-Tips and Traps: Is Connecticut ready for new e-discovery rules?

Published: Sunday, December 18, 2011

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Connecticut state courts leap into the modern world on Jan. 2, 2012 with the implementation of new electronic discovery rules.

In theory, this will make it easier for victims of medical malpractice or corporate wrongdoing to secure “smoking gun” evidence. As with any cases, a lot will depend on the competence of

judges and litigators. Still more critical in this rapidly-evolving arena could be the experts hired by opposing parties to either ferret out hidden evidence or demonstrate good faith in the evidence production.

Very few professionals – including vendors, lawyers and judges – know how to collect data for litigation.

“I don’t think the judges know a lot – even the ones who write the opinions,” attorney Julia Brickell of Columbia University told the New Haven Bar Association last month. Brickell, a former vice president and deputy general counsel for Philip Morris USA, currently runs an automated document review firm in New York. She said the costs of electronic discovery – if not managed properly – can be wildly disproportionate to the value of a case.

Most states now have electronic discovery rules, based somewhat on the federal rules adopted in 2006. Basically, the rules force lawyers for opposing parties to meet at the onset of a civil action to work out the sharing of electronically stored information. This will have a huge impact on business because more than 90 percent of business documents are created and stored electronically. Electronic data can be located pretty much anywhere, from sources including flash drives, audio and video files, corporate servers, home and work computers, hard drives, DVDs, CDs and social media.

“The new rules shine a light on electronic data and make it clear it is a fair subject for thorough discovery,” said attorney Alinor Sterling of the Bridgeport firm Koskoff, Koskoff & Bieder. “It’s my job as a lawyer to persuade the judges as to why I am entitled to certain data.”

Sterling’s firm, founded in 1936, has a track record of winning massive civil awards for workplace injuries and medical malpractice, including a \$58 million judgment in May 2011. Koskoff, Koskoff & Bieder has won claims against most of Connecticut’s major hospitals.

“We have been asking for electronic data as a matter of course for years,” Sterling said. She noted that some courts will no longer accept paper motions: “In a lot of cases, there is no place to put paper.”

Sterling, a Princeton grad, formerly served on Branford’s Representative Town Meeting. She clerked for U.S. District Judge Lourdes Baird of California after serving as an editor of the UCLA Law Review and the UCLA Women’s Law Journal.

Plaintiff attorneys can expect to run into many protective orders seeking to limit discovery beginning Jan. 2. Judges will have wide latitude to impose cost sharing for evidence recovery, taking into account “the resources of the parties, the importance of the issues and the importance of the requested discovery in resolving the issues.”

Let’s picture a simple land dispute involving a number of maps. Building officials generate communication with the town engineer, the mayor, maybe even the town attorney. Some, if not most of this information could be admissible and not privileged.

One potentially big loophole is Sec. 13-14, which allows judges to excuse the “loss” of electronically stored information “as the result of the routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations.”

Qualified computer operatives could easily present a good-faith showing while hiding information in a series of widely-divergent databases. In such cases, it would be up to opposing counsel and the court to employ equally-competent computer operatives.

This could be good news for certain segments of the job market.

Bill Murray is president of EdocMasters LLC, a company that takes the mystery out of e-documentation for the legal industry. Andy Thibault, author of books including *Law & Justice In Everyday Life*, blogs at The Cool Justice Report, <http://cooljustice.blogspot.com>.