**"ACTIVE MANAGEMENT OF ESI IN 'SMALL' CIVIL ACTIONS"**

**by**
**Hon. Gill S. Freeman, Eleventh Judicial Circuit, State of Florida**
**Hon. Paul S. Grewal, U.S.M.J., Northern District of California**
**Ronald J. Hedges, former U.S.M.J., District of New Jersey**
**Hon. Craig B. Shaffer, U.S.M.J., District of Colorado***

(Opening Note to the Reader: This article expands on an earlier and shorter one co-authored by one of the authors that appeared in the July 2013 issue of the *FMJA Bulletin* titled, "Small Stakes Claims Can Mean Big ESI Headaches.")

## Introduction

This article, authored by two sitting United States Magistrate Judges, a former United States Magistrate Judge and a trial judge from the State of Florida, focuses on the management of electronically stored information ("ESI") in what might be defined as "small" or "small stakes" (hereinafter "small") civil actions.

The volume and complexity of ESI in various forms and from various sources is constantly expanding. That volume and complexity is making its way into discovery- and evidentiary-related disputes in federal and State courts. At the same time, State and federal judicial resources are being strained by limited court budgets (for example, resulting from "sequestration" at the federal level).

This article explores possible techniques that judges might use to manage the pretrial process in civil actions when the cost and burdens associated with ESI may exceed reasonable monetary recoveries and imperil the "just, speedy, and inexpensive" resolution of civil actions on the merits.

## What is a small civil action?

As with many words and phrases used throughout civil litigation, neither "small" nor "small stakes" have precise definitions. Perhaps small actions in federal courts could be defined as those that appear to barely exceed the $75,000 amount-in-controversy pleading requirement for diversity jurisdiction under 28 U.S. Code Sec. 1332(a)(1), but which, once past the pleading stage, have demonstratively less value. Or, perhaps, a small action might be one based on the existence of a federal question and the likely recovery is, at best, minimal.

Civil actions filed in State courts, such as those filed in the Florida circuit court where one of us sits, presents an entirely broader meaning of what might be small. State courts, subject to legislative minimum or maximum jurisdictional amounts, run the gamut from traditional small claims to landlord-tenant disputes to foreclosure actions, etc.

We should avoid any attempt at formal definitions. And we should step away from any discussion of "large" civil actions where monetary recoveries may be enormous and litigation costs, at least to the uninitiated in the ways of civil litigation, appear obscene. For the purposes of this article, small actions should simply be those in which, unless the presiding judge and the parties are careful, the race may not be worth the prize.

* Since the first publication of this article, Judge Freeman retired from the Bench and is now a neutral with JAMS. Judge Grewal left the Bench and is now Vice President and Deputy General Counsel with Facebook. Judge Hedges left the Bench and is now a Senior Counsel with Dentons. Sadly, Judge Shaffer, one of the original thought leaders on eDiscovery, passed away. We miss Craig.

**The Active Case Management Model**

Broadly speaking, there are two case management models in State and federal courts: "active case management" and, for lack of a better phrase, "discovery management." These models are driven by, among other things, the manner in which civil actions are assigned (either to one judge throughout the life cycle of the action or to multiple judges at different stages of that life cycle), the volume of actions that might be filed in a particular court and the judicial resources available to that court, as well as the culture and history of a judicial system. For a more detailed discussion of these concepts, *see The Sedona Conference Cooperation Proclamation: Resources for the Judiciary* 1-2 (Dec. 2014).

In essence, active case management departs from the traditional notion that courts should "sit on the sidelines" while parties have the exclusive responsibility to engage in discovery and prepare for trial. In the federal judicial system, active case management is apparent in Rule 26, which has evolved to recognize the essential role of the judge in managing the pretrial stages of civil litigation and promoting the objectives of Rule 1, "the just, speedy, and inexpensive determination of every action and proceeding."

This article proposes that active case management of ESI-related issues is *essential* to ESI in small actions. Active case management *should* be the norm in federal courts given that civil actions are generally assigned to one district judge and one magistrate judge. Active case management may prove more difficult in State courts, which often use discovery management as the model. Nevertheless, *any* judge, federal or State, can take steps to control costs and delay.

Indeed, small actions might be ideally suited for active case management. Solutions to ESI-related disputes might be simpler than in large, "bet the business," actions in which exotic sources and volumes of ESI are more likely to be in issue. Such solutions should enable judges to minimize costs and avoid unnecessary delay in small actions.

**What a Judge Can Do**

Judges are, in a sense, "reactive." After all, discovery is party-, not judge-driven. Judges can only learn about disputes when parties choose to bring those disputes to a judge's attention, either informally or by formal motion.

Nevertheless, judges and parties are both responsible for the efficient management of civil actions. There are opportunities for judges to control ESI-related cost and delay.

These opportunities are most available when judges engage in active case management at the earliest stages of litigation. Therefore, to enable parties and judges to conserve their available resources, active case management should, ideally, begin before the parties have begun to engage in discovery or soon thereafter.

Here are some active case management techniques:

1. Encourage the parties to prepare litigation budges for examination at the initial or an early case management conference. (There is a caveat to this technique: Depending on the nature of the action, it may not be realistic to expect parties to develop litigation budgets at the earliest stages of litigation.)

2. At the initial or at an early case management conference, set an early and firm trial date that will focus the parties on what discovery is truly needed in a limited time span and that might prevent or at least discourage the parties from seeking discovery of "marginal" ESI.

3. At the initial or at an early case management conference, engage the parties in a discussion of the anticipated "value" of the action and do so in the context of the parties' own estimates of litigation costs. (Referring back to #1 above, this might or might not be done in the context of budgeting.)

4. At the initial or at an early case management conference, encourage the parties to address the volume and sources of ESI that might be discoverable, taking into account what might be asymmetrical volumes and sources of ESI, including social media accounts, and also encourage the parties to limit the scope of preservation of ESI.

5. At the initial or at an early case management conference, encourage the parties to consider their mutual obligations to engage in "proportionate" discovery. In States that do not have a formal proportionality rule, encourage the parties, in the interest of conserving their own resources and avoiding discovery of marginal ESI, to engage in proportionate discovery.

6. Assuming the parties are unwilling or unable to agree on proportionate discovery, take active measures to impose proportionality in discovery. Such measures might include, among other things, restricting discovery of ESI to a limited number of custodians in the first instance or to active and readily accessible sources of ESI within a party's control rather than allowing parties to serve subpoenas on nonparties or to seek discovery of ESI from sources that are not reasonably accessible.

7. Encourage (and, if possible, require) staged or phased discovery including, for example, the completion of "written" discovery before allowing any depositions or the bifurcation of fact and expert discovery.

8. Encourage (and, if possible, require) parties to present discovery disputes in an informal manner such as submitting short letters or arranging telephone conferences in lieu of often expensive and protracted motion practice.

9. Encourage the parties to enter into an agreement (and/or, if reasonable and appropriate, execute an order) that protects the parties from waiver of the attorney-client privilege or work product protection. See *Federal Rule of Evidence* 502(e) and (d).

10. Encourage the parties, if a small action proceeds to trial, to stipulate to the admissibility of ESI.

Perhaps above all else, a judge should demand "ESI competence" from attorneys. This should not be a forlorn hope. After all, the Model Rules of Professional Conduct were amended by the ABA House of Delegates in August of 2012 to reflect the role of ESI in the practice of law. But what should competence mean in the context of the small action? Competence might, for example, mean:

1. Expecting an attorney to be able to explain, *after consultation with the client*, what ESI the client has.

2. Expecting an attorney to be able to explain, *after a meaningful discussion with adversary counsel*, why certain ESI should be subject to discovery.

3. Expecting an attorney to be able to explain, *after a meaningful discussion with adversary counsel*, why certain ESI that has been demanded by the adversary would be difficult or costly to produce.

There is one area of attorney competence that is discomforting. In preparation for this article, one of us asked a number of attorneys how they "deal" with ESI in small actions. Several attorneys (whose identities shall assuredly remain anonymous) responded along the lines that they did not understand ESI, did not want to deal with ESI, and agreed with their adversaries to "avoid" ESI. That cannot – and should not – be deemed the hallmark for competent counsel.

**Conclusion**

ESI can – and should – be managed by judges in small civil actions. There are many opportunities to do so.

Hopefully, this article will encourage judges, federal and State, to take steps to limit the cost and delay that is often associated with the discovery and use of ESI in small actions and to move small actions to resolution, either by settlement or trial.

(Closing Note to the Reader: For an introduction to discovery of ESI, *see* R.J. Hedges, B.J. Rothstein & E.C. Wiggins*, Managing Discovery of Electronic Information*, Third Edition (FJC: 2017), https://www.fjc.gov/content/323370/managing-discovery-electronic-information-third-edition.