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Exterro/EDRM Judges Survey 2019 Series: Part 1, Failure to Comply with Federal Rules

by Association of Certified E-Discovery Specialists (ACEDS)

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This is the first in a series of posts evaluating the results of Exterro and EDRM's 2019 survey of Federal district court and magistrate judges. With information from over 250 judges, the survey data offers a rich trove to mine. And mine it we will.

This post focuses on responses to the first substantive question in the survey, "In your opinion, which e-discovery rules do attorneys neglect to comply with most often?"

Before we get there, however, it is worth spending a few paragraphs on the survey and demographics of its respondents.

About the survey

In late 2018, EDRM and Exterro conducted a survey (and the second for EDRM. The survey contained over Federal district court and magistrate judges responde

Exterro and EDRM published survey results in early : available here. EDRM's compilation of results, includ responding to specific questions, is available here.

The astute observer will notice that tallies used in this those appearing in the EDRM and Exterro materials. efforts on my part to reconcile answers to choose-an- provided by the judges.

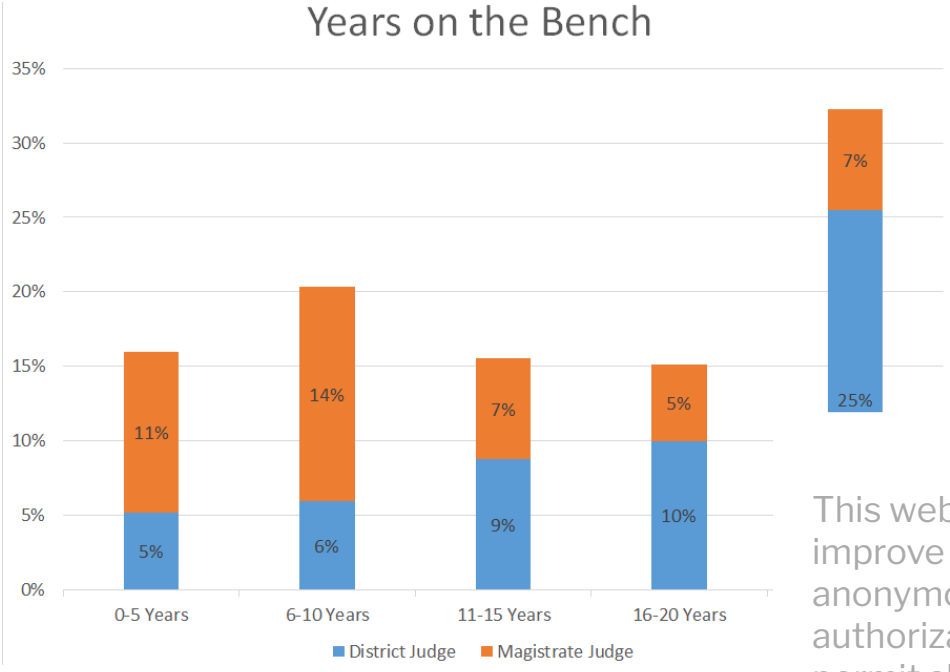
Demographics

Roles

Respondents are pretty evenly divided between district court and magistrate judges. Of the 251 Federal judges responding to the survey, 55% identified themselves as district court judges and 44% said they are magistrate judges. Of the district judges, 4% reported that they are chief judges, 6% are retired, and less than 1% are on senior status. Just over 1% of the magistrate judges noted that they are chief magistrate judges and less than 1% said they are retired.

Years on the bench

The responding judges are a seasoned group. Overall, 63% of the judges have been on the bench for at least 11 years; 83% for six years or more. District court judges have more experience – their largest cohort, at 46%, has been on the job for 21 years or more – while responding magistrate judges have not served as long – their biggest group, at 33%, clocks in at between 6 and 10 years. These differences are not surprising as district court judges have lifetime tenures while magistrate judges are appointed for renewable eight-year terms.



Failure to comply with Federal rules

Judges were asked, "**In your opinion, which e-dis comply with most often?**" They were offered sevei two. The choices were:

- FRCP 16(f) – Obey Scheduling Order and/or be
- FRCP 26(g)(3) – Ensure that Discovery Reques

- FRCP 37(b)(2) – Follow a Court Order
- FRCP 37(c) – Duty to Disclose, to Supplement an Earlier Response, or to Admit
- FRCP 37(e) – Preserve Electronically Stored Information
- FRCP 37(f) – Participate in Framing a Discovery Plan
- 28 U.S.C. 1927 – Do not submit unreasonable filings

Responses

A clear plurality of judges selected Rule 26(g)(3), at 54%, and Rule 37(c), at 43%, as their top two choices. District court judges were evenly divided between the two, with 47% opting for 26(g)(3) and 46% for 37(c). Magistrate judges showed a clear preference for 26(g)(3) at 61% compared to 37(c) at 39%.

Next came Rules 16(f), 37(f), and 28 U.S.C. 1927, all in a group. After that there was drop to 37(e), and, in last place, 37(b)(2).

By Percentage of Respondents

Rule	Description	All	District	Magistrate
26(g)(3)	Ensure that Discovery Request/Response is "Complete and Correct"	54%	47%	61%
37(c)	Duty to Disclose, to Supplement an Ear Response, or to Admit			
16(f)	Obey Scheduling Order and/or be prep Pre-Trial Conferences			
37(f)	Participate in Framing a Discovery Plar			
28 U.S.C. 1927	Do not submit unreasonable filings			
37(e)	Preserve Electronically Stored Informa			
37(b)(2)	Follow a Court Order			

What do these judges seem to feel attorneys are failing to do?

Rule 26(g)(3)

First and foremost, responding judges feel attorneys are failing to meet their Rule 26(g)(3) obligations to ensure their discovery disclosures and requests and responses are complete and correct.

Rule 26 sets forth parties' duties to disclose various categories of information. Section (a) of the rule requires that parties disclose certain categories of information. Section (b) addresses the scope and limits of information parties may obtain through discovery. Section (e) makes clear that parties have a duty to supplement their disclosures and responses.

Section (g)(1) states that attorneys for parties must sign every initial and pretrial disclosure and every discovery request, response, or objection. By signing, the attorneys certify two things.

Attorneys are required to certify that each disclosure is complete and correct to the best of their "knowledge, information, and belief formed after a reasonable inquiry".

Attorneys also are required to certify that each discovery request, response, or objection meets three requirements. It must be consistent with the Federal Rules of Civil Procedure and warranted by existing law or a non-frivolous argument for changing an existing law or establishing a new one. It cannot be made for in improper purpose. And it cannot be unreasonable or entail undue burden or expensive.

Rule 37(e)

Next, attorneys are failing to meet their Rule 37(e) obligations to disclose information, supplement earlier disclosures, and make proper adm

Rule 37 is the sanctions rule. Section (c) states that pa identify witnesses as required by Rule 26(a) or (e), as to Rule 36, can be sanctioned.

Comments

Judges were given the opportunity to comment about frequently neglect to comply with – and comment the

EDRM organized the comments into six groups – thr

- Neglect/Abuse (-)
- Common Mistakes (-)
- Judges' Frustrations (-)

- Attorney Compliance (+)
- Clarifications
- Suggestions

I won't fill out this post with the full set of comments; those are available on the EDRM site. Following, instead, is my distillation of the comments.

Neglect/abuse

Many litigators "read the rules of Civil Procure in law school, and haven't read or followed them since."

Often attorneys don't even do the basics: "I am amazed at how many times order deadlines are not followed, and no request for extension is ever submitted to the Court"; "many lawyers continue to 'rubber stamp' case management reports"; and "attorneys in small cases do not meaningfully confer".

Lawyers "spend too much time pursuing unnecessary discovery to generate bills" and deliver "too many slick answers designed to mislead".

Common mistakes

Lawyers fail to realize until too late that there is an "e" preceding "discovery". Discussions about discovery seem to be an after-thought, not well thought out and jointly discussed by the parties early in the case. Attorneys act first and confer later, for example collecting ESI – often the wrong ESI – before discussing scope with the other si

Attorneys fail to file targeted and reasonably limited
objections, and produce the parts of ESI and other in
assert a variety of general and boilerplate objections

Judges' frustration

Attorneys continue to ask for the kitchen sink; assert
objections and deliver sloppy responses; and treat Ru
rather than serious hearings. They need to understan
they don't.

Attorney compliance

Not all the comments about attorneys are negative. S
attorneys generally handle e-discovery well, offering comments such as: "Lawyers comply with

all of the above"; "I've had no problems of any sort"; "The great majority of cases in this district do not raise discovery issues"; "I have surprisingly few e-discovery disputes".

Clarifications

The two most interesting clarification comments were:

"Ironically (maybe) the more complicated the e-discovery is likely to be, the more likely the attorneys are to do what they are supposed to do vis-a-vis formulating a plan."

"I do not think most lawyers violate these rules on purpose. I think most lawyers fail to understand how electronic systems work…."

Suggestions

There are two suggestions that caught my attention. The first is aimed more at judges than attorneys: "active case management by the court minimizes these short-comings".

The second is a reminder to attorneys to take full advantage of the Rule 37(f) planning conference, where format and scope issues can be discussed before parties embark on gathering and reviewing ESI, search techniques can be ironed out, and a written discovery can be put in place as part of the court's scheduling order.

What should attorneys do?

It is clear the responding judges feel too many attorneys pay too little heed to both the spirit and the letter of procedural rules addressing e-discovery. The judges' responses and comments suggest attorneys would fare better before these judg

- Read and thoroughly understand the 2015 FRC
- Confer with opposing counsel about ESI issues
- Find common ground with opposing counsel w about what they can't agree on, and be prepare what they agree on, what they don't, and why.
- Seek to discover only that information likely to proving or defeating claims and defenses.
- State discovery demands, responses, and objec straight-forward language, eschewing boilerpla

- Assert only pertinent discovery objections, and for each objection be clear about what is being withheld and what is being produced.

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