The Editor interviews Brian H. Pandya, Partner, Wiley Rein LLP.

Editor: Brian, please tell us about your background.

Pandya: I am an IP litigator who has been involved in a number of patent cases in courts around the country with significant e-discovery aspects. My first experience with e-discovery came when I was working on a large biotech case shortly after the 2006 e-discovery amendments to the Federal Rules. Being originally an engineer by training, it was something I took a natural interest in. Since then, nearly every case I’ve tried has had some major e-discovery issues, and although the rules and thinking on best practices have greatly changed, clients are still wrestling with many complex issues on ESI preservation.

Editor: Is fear of sanctions the principal reason for preserving documents? Great concern has been expressed about the cost and other burdens of preserving so many documents.

Pandya: The risk of sanctions scares people – as it should – but to say the fear of sanctions is the principal reason for preserving documents implies that people would otherwise not comply with discovery obligations. That is not the case.

Yes, there have been a number of high-profile cases where terrible sanctions were imposed for the loss or destruction of documents. The Rambus cases in the Federal Circuit immediately come to mind. There have also been a number of high-profile district court cases, especially in the Southern District of New York. But I don’t think those cases are representative of the day-to-day reality of litigation.

I believe the reason many companies hold documents for too long – or even indefinitely – is that they get swept into litigation and put a litigation hold in place, but then get caught in a cycle of always being in litigation-hold mode, which can be expensive and burdensome.

And some companies may have good document retention policies, and are good at preserving documents, but they don’t have as good of procedures for disposing of documents after their shelf life has expired. They then get into litigation and are forced to hold and review far more data, at far greater time and expense, than if they had a proactive policy for both retaining needed documents and data, and discarding unneeded documents and data.

Editor: Under the proposed amendments, documents are permitted to be destroyed if that is not done in bad faith or willfully. Should the proposed rules be amended to say “not in bad faith and willfully” so that the issue of intent is linked to bad faith?

Pandya: It doesn’t matter from a practical standpoint. You can speculate about situations where something would be done in bad faith but not willfully or vice versa. But I’ve been before federal judges all over the country, and I cannot think of a single judge who, when faced with an evidence spoliation issue, would act differently whether the standard says and or or.

I served on an e-discovery panel at an ABA conference last year with a federal magistrate judge, and he said that if he has to sanction a party, he has failed to manage the case. So I believe most judges will look at the totality of the situation and want to reach a fair outcome. And as a general rule it is good to give the trial court discretion on these sorts of matters.

Editor: Do you help companies identify documents that can in good faith be destroyed?

Pandya: Yes, and it is important that companies have policies and procedures in place for discarding documents once they are no longer needed, in addition to policies and procedures for retaining documents that should be kept, either for business purposes or to comply with laws, court orders and regulations.

The Federal Circuit’s Rambus cases recognized that it is expensive to keep unneeded documents and that there are legitimate reasons to discard them. And about 10 years ago, the Supreme Court in the Arthur Andersen case also recognized that there are legitimate reasons for discarding documents when they are no longer needed for business purposes. Documents are not only costly to preserve, but they can contain confidential information that could inadvertently be breached if the documents fall into the wrong hands. So my general view is that companies should keep documents only as long as they are needed to be kept to comply with laws, regulations and court orders, and for as long as

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keeping the documents serves a business purpose.

For example, some documents may have no business purpose two years after creation, and as long as those documents are not subject to a litigation hold and there is no regulatory or legal requirement to keep the documents beyond two years, such documents should be discarded. If you don’t discard those documents, you are incurring unnecessary costs. And when you then get into litigation, you may have data or documents that otherwise should have been properly discarded but now become discoverable and need to be reviewed. The materials likely have no bearing on any issue in the matter at hand, but you’re now incurring extra discovery costs. And that’s all separate and apart from the issue of whether you are taking unnecessary risk by holding data or documents that could be disclosed in the event of a security breach.

**Editor:** The proposed rules provide that e-discovery must be proportional to the needs of the case. Based on your experience, is this a helpful change?

**Pandya:** This change would be helpful. In fact, many courts have already begun imposing similar rules, limiting the number of custodians that can be searched, or putting in place procedures to serve interrogatives or take 30(b)(6) depositions on e-discovery practices.

Two examples are in the Eastern District of Texas and the District of Delaware, both courts where I have litigated patent cases. Those courts have taken a nod from the Federal Circuit Model E-Discovery Order, which set presumptive limits on custodians and search terms. The thinking is: if you start with a reasonable number of search terms and custodians to be searched, that forces parties to be more precise in their discovery demands. Then if there is a broader need for e-discovery, there are means to obtain additional discovery.

Starting with the presumption that you are entitled to wide-open discovery can be very costly and time consuming for both plaintiffs and defendants and usually does very little to advance the case. Litigation is contentious and adverse by nature. It can be difficult for one side to agree to less discovery, especially at the outset of the case when the issues are not always neatly framed. So, in my experience, it is more practical to start with a limited but reasonable amount of e-discovery and then seek additional discovery if there is a demonstrated need for such discovery.

**Editor:** So the introduction of the concept of proportionality is a good step forward?

**Pandya:** Proportionality is a very good concept, but I have some concern about how it is being implemented in the proposed rules. But I certainly agree that the best way to control e-discovery costs is to start with defined limits on custodians and search terms. Then, if there is a greater need for e-discovery, you can get that discovery. But I like the idea of proportionality. No one wants to be in a case where the cost of discovery is greater than the liability and you are forced to enter into a cost of litigation settlement.

**Editor:** What you are saying is that something perhaps can be worked out during the meet-and-confer stage based upon the case itself.

**Pandya:** The difficulty at the meet-and-confer stage is that it is often early in the litigation when there is uncertainty as to the claims and defenses and therefore as to the scope of the needed e-discovery. Litigation is adversarial, so there is always some natural skepticism between opposing counsel. Limiting discovery or deciding on the proportionality or scope of discovery at the meet-and-confer stage is a good idea in theory, but you need to back that up with presumptive limits on custodians, locations, and search terms. It’s always then easier to ask for more rather than less at the meet and confer.

**Editor:** It is being contended that proposed Rule 37(e) be further changed by the Rules Advisory Committee to eliminate the irreparable deprivation standard. Based upon your experience, do you agree?

**Pandya:** I think 37(e) is good the way it’s written, but I’m generally in favor of giving protection to litigants that have lost documents as part of the routine, good faith operation of their electronic information systems. I have never worked with a client or adversary that as far as I know has ever intentionally destroyed evidence with the intent to impede the case. I have, though, seen instances where in the course of the normal operation of highly complex document management systems, a document gets lost or deleted. As long as there is no bad faith or willfulness, there should be a safe harbor. That sounds fair. It’s not fair to demand perfection. That just is not possible when you are working with complex and dynamic electronic information systems.

**Editor:** Should state rules of civil procedure be reviewed to determine if the proposed federal rules should be substituted?

**Pandya:** Everyone likes certainty, so consistency between state and federal laws is a good thing. I do almost all of my work in federal court, but clients have business problems that get litigated in federal and state courts, before agencies, and even in foreign courts. It can be very difficult for clients to navigate the requirements of different jurisdictions, and that often results in an inefficient, least common denominator approach to document retention.

**Editor:** The suggestions that I have mentioned are being promulgated by the Lawyers for Civil Justice. How do you see the changes that we have discussed being implemented? Do you feel that defense counsel and organizations like LCJ play a useful role in that?

**Pandya:** It is important that a broad range of views are considered, and that business interests and their lawyers get involved in these proposed changes to the e-discovery rules, because ultimately, it is the client that bears most of the burden of e-discovery.