Easing the Burden

Curbing E-Discovery Costs by Promoting Predictability

By Caroline Tinsley and Allison Lee

If parties have the tools to progress through e-discovery in a more focused manner, the process could become an asset.

Electronic discovery has become one of the most critical issues facing corporate counsel today. One important role of defense attorneys is to help their clients avoid the well-publicized minefields associated with spoliation claims, motions for sanctions, and the like. But there is a second, equally important role for defense attorneys to fulfill in the electronic discovery arena: developing creative, cost-effective means of approaching e-discovery to meet the needs of clients overwhelmed by the costs of preserving, collecting, processing, reviewing, and producing electronically stored information (ESI).

The 2006 amendments to the Federal Rules of Civil Procedure were enacted to ease the burdens of electronic discovery by forcing parties to the bargaining table to negotiate targeted and efficient discovery of ESI. Unfortunately, the amendments provide little comfort to companies facing substantially similar litigation involving different adverse parties throughout the country—the norm for many product manufacturers, particularly in pharmaceutical and medical device tort litigation. These companies cannot predict the agreements that they will reach with opposing parties or the rules that judges will apply when they cannot reach agreements.

Responding to the overwhelming costs of e-discovery in patent litigation, the U.S. Court of Appeals for the Federal Circuit Advisory Council recently adopted a "Model Order regarding E-Discovery in Patent Cases" to streamline the process. By borrowing from this approach and adopting binding e-discovery orders individualized for certain practice areas, the Advisory Committee on the Federal Rules of Civil Procedure to the Judicial Conference of the United States could recommend converting e-discovery into a vehicle for prompt and just resolution of cases. Companies would benefit from greater predictability on both the timing and the scope of their obligations to produce ESI, as well as on the protections afforded to privileged materials.

The Case for Reform

Many of the e-discovery problems that law

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firms face are attributable to the sheer volume of ESI created by their clients. At least 90 percent of all corporate information is now created or stored in an electronic format. Mia Mazza *et al.*, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Electronically Stored Information*, 13 Rich. J.L. & Tech. 11, at ¶2 (Spring 2007). The digital universe of all information created, captured, or replicated in electronic form amounted to at least 1.8 zettabytes or 1.8 trillion gigabytes in 2011. John Gantz & David Reinsel, *Extracting Value from Chaos*, IDC IView 1 (June 2011), http://www.idcdocserv.com/1142.

Companies suffer much of the costs needlessly because the majority of information exchanged during discovery is not truly relevant to the claims and defenses at issue in the cases.

This wealth of ESI translates into astounding costs when companies then must preserve, review, and produce that volume of information. In even "mid-sized" cases, companies can be saddled with as much as $2.5 to $3.5 million in e-discovery costs alone. Inst. for the Advancement of the Am. Legal System, *Electronic Discovery: A View from the Front Lines* 5 (2008), http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_Front_Lines2007.pdf. One survey, which involved a small, nonrandomized sample, even found that e-discovery in product liability cases added an extra $8.4 million per case in costs. Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditure for Producing Electronic Discovery* 17–18 (Rand 2012).

These exorbitant costs can force companies to settle meritless claims to avoid the costs associated with e-discovery. *See, e.g.*, David M. Greenwald, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues under the Attorney-Client Privilege and the Work Product Doctrine*, in 864 PLI Litigation & Administrative Practice Course Handbook Series 291, 375 (2011). Moreover, companies suffer much of the costs needlessly because the majority of information exchanged during discovery is not truly relevant to the claims and defenses at issue in the cases. *See, e.g.*, *DCG Sys., Inc. v. Checkpoint Techs., LLC*, No. C–11–03792 PSG, 2011 WL 5244356, at *1 (N.D. Cal. Nov. 2, 2011) (explaining that one analysis found that only 0.0074 percent of the documents produced were included in the parties' trial exhibit lists).

Some practitioners have claimed that the solution to this dilemma lies in negotiating a reasonable discovery plan with opposing counsel early in the litigation. *See, e.g.*, Millberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules…*, 4 Fed. Cts. L.R. 131, 161–63 (2011). However, many product manufacturers, such as pharmaceutical companies and medical device manufacturers, have to negotiate with plaintiffs across the country, face lawsuits filed by additional plaintiffs years after they have already reached agreements with the earliest-filing plaintiffs, and rely on different standards in various jurisdictions that the courts apply inconsistently when the parties unsuccessfully negotiate e-discovery parameters. These companies cannot predict the breadth of their duties; yet they must make decisions regarding preserving, collecting, and reviewing ESI well before the various jurisdictions can hear and resolve conflicts. Their only recourse then becomes abiding by the "most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions." *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 523 (D. Md. 2010). Even though many lawsuits may eventually become consolidated in multidistrict litigation (MDL), this consolidation often occurs well after the parties or courts make early ESI decisions. Additionally, each MDL court is free to determine its own standard, depriving companies of predictable obligations across their product lines.

The Pathway Forward

The Federal Rules of Civil Procedure generally do an admirable job of applying a single set of rules to many diverse types of civil litigation. But a "one-size-fits-all" approach to e-discovery is not easily adapted to highly diverse types of cases. Further, the tried-and-true reliance on judicial modification to achieve the necessary flexibility in other procedural contexts only exacerbates the uncertainty of e-discovery. Accordingly, we propose that the Advisory Committee on the Federal Rules of Civil Procedure recommend adopting binding orders regarding e-discovery tailored to certain types of cases to help litigants navigate the pitfalls and costs of e-discovery better.

The Rules Enabling Act for the Federal Rules of Civil Procedure provides few guidelines about the form of the rules of civil procedure. While the U.S. Supreme Court is empowered "to prescribe *general* rules of practice and procedure," the "general" requirement could merely refer to the applicability of rules to all district courts than to areas of practice. *See* 28 U.S.C. §2072(a); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 Duke L.J. 669, 701 (Dec. 2010). Yet, the original drafters sought to develop a single set of rules that would apply to all cases regardless of size or type. *See* Gensler, *supra*, at 702.

Rather than continue a unified approach to e-discovery in every type of civil case, embracing reforms that recognize the vast differences among practice areas will achieve greater predictability for litigants and will greatly enhance parties' ability to negotiate effective e-discovery plans. *See* Gensler, *supra*, at 702–04 (noting that several legal voices have called for rules based on the type of case to realize more expeditious and efficient resolution of cases).

The world of patent litigation has already recognized the need for greater clarity and limits on parties' e-discovery obligations than what the 2006 amendments to the Federal Rules of Civil Procedure provided. Judge Randall Rader and his colleagues on the Federal Circuit Advisory Council proposed a "Model Order Regarding E-Discovery in Patent Cases," which establishes an efficient e-discovery process

involving production of certain core documents, limits on e-mail production, and greater protection for privileged materials.

Other practice areas can build on Judge Rader's model order to provide their constituents with a better means of managing the e-discovery process. In particular, an order addressing first, the scope and stages of litigants' obligations, and second, the protections applied to privileged materials could transform e-discovery from a costly and burdensome exercise to a targeted and efficient means of evaluating and resolving cases.

This approach would first provide companies with the predictability that they need in the federal courts and could well have the additional benefit of adding certainty in state court proceedings because state courts often adopt federal standards in discovery matters. *See*, *e.g.*, Thomas Y. Allman, *E-Discovery in Federal and State Courts after the 2006 Amendments* 3, (K & L Gates LLP May 13, 2012), http://www.ediscoverylaw.com/uploads/file/2012FedStateEDiscoveryRules%28May3%29.pdf.

Limiting the Scope and Staging Discovery to Promote Meaningful Discovery

An effective, binding e-discovery order must limit the parties' preservation duties, address collection and review methods, define production formats, compel initial disclosure of core documents from all parties, stage discovery, preserve reasonable defenses, and account for dispositive motions.

Scope of Preservation Duties

Unpredictability about the data that parties litigating in more than one jurisdiction across the United States must preserve particularly burdens these parties. Parties that choose less rigorous culling technologies or relevance determinations will still have access to the data if courts force them to review the data to comply with a court's more exacting standard, but at a cost. Conversely, companies that underestimate their duty to preserve data face the very real risk of costly sanctions because the failure to take steps to preserve data often results in the destruction of the data. This risk has become all the more threatening because some courts now impose sanctions for negligent destruction even without "bad faith" by a company. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002).

A discovery order should require that litigants only preserve metadata regarding the date sent, date received, date last modified, author, and recipients of documents. Additionally, an order should adopt the teachings of the Seventh Circuit electronic discovery pilot program and expressly state that parties do not need to maintain "deleted," "slack," "fragmented," or "unallocated" data on hard drives; online access data such as temporary internet files, history, cache, and cookies; and backup data that substantially duplicates data that is more accessible elsewhere. *See* Seventh Circuit Electronic Discovery Committee, Principles Relating to the Discovery of Electronically Stored Information, Principle 2.04(d) (2010), http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf. Then companies could avoid the heightened costs associated with forensic data collection in most instances.

Further, upon a showing of "good cause" to a court that additional metadata was necessary to evaluate some material aspect of a case, the court could order a party to preserve additional metadata fields. However, the requesting party would have to share the cost of the preservation equally, and the duty to preserve would not operate retroactively. This measure both provides the flexibility that parties' individual needs require while also using cost-shifting principles to preempt parties from using the provision as a harassment tool.

Finally, a discovery order should specify a discovery cutoff date. In a pharmaceutical case, the last day that a plaintiff used the product would be an ideal cutoff date because how the company acted after that would not be relevant to the prescriber's decision to prescribe or to the plaintiff's decision to ingest the product.

Initial Disclosures

Federal Rule of Civil Procedure 26(a) requires that parties provide in their initial disclosures either a copy or a description by category and location of that party's ESI. While mass tort litigants cannot feasibly produce all ESI under this schedule, most litigants substitute cursory statements for the meaningful description and categorization envisioned by the rule. Responsible counsel should investigate and categorize the sources of their client's ESI to ensure proper preservation and collection. Yet, rather than receiving inventories of ESI, parties would benefit more from receiving certain core documents, which they would always request in a specific practice area and which courts certainly would deem relevant to issues in that practice area.

Although a defendant may sometimes be tempted to abide plaintiffs' broad discovery requests and bury plaintiffs in a sea of documents, this comes at a tremendous financial cost.

For example, in a pharmaceutical or medical device case, each plaintiff would provide, without request and as applicable, the following: (1) a full copy of the plaintiff's medical and pharmacy records; (2) an executed HIPAA-compliant authorization for the company to obtain medical records; (3) any e-mail regarding use of the drug or device or alleged injury, except for e-mail between a plaintiff and his or her attorney or spouse; (4) archives of all of the plaintiff's social media accounts from the date that the plaintiff first used the drug or device to the present; (5) any journal or diary entries regarding the drug or device, the condition treated, or the alleged injury; and (6) documents the company or its agents distributed or published in the possession of the plaintiff.

The pharmaceutical or medical device defendant would have an obligation to produce, without request and as applicable, the following: (1) the IND, NDA, ANDA, PMA, and/or 510K; (2) Medwatch forms regarding the drug or medical device at issue; (3) all versions of the labeling for the drug or medical device distributed to the

market; (3) all correspondence between the company and the U.S. Food and Drug Administration (FDA) regarding the drug or device; (4) final versions of promotional materials and advertisements; (5) "Dear doctor" or "Dear healthcare professional" letters; and (6) sales or field representative call notes regarding a plaintiff's prescriber.

The litigating parties would have 60 days from the Federal Rule of Civil Procedure 16 conference to produce these "core documents," unless they could prove "good cause" for a delay to the court. Under this framework, companies could predict their obligations and should have sufficient time to produce the materials, especially given pharmaceutical companies' need to maintain well-organized records due to their regulatory reporting responsibilities.

By eliminating the need to search for needles in haystacks, both parties can better, more efficiently, and honestly assess the value of a case.

Collection and Review

Due to the volume of ESI, most companies use some form of technology-assisted review (TAR). While keyword searching has become the most popular tool, it is often the least effective. Robert C. Manlowe *et al.*, *Paradigm Shift in E-Discovery Litigation: Cooperate or Continue to Pay Dearly*, 79 Def. Couns. J. 170, 171 (Apr. 2011) (reporting that Boolean keyword searching is only 22 to 57 percent effective in locating responsive documents). Thus, many companies prefer to use more robust resources such as predictive coding. However, the size of the data set may not always support resorting to these more expensive tools. Therefore, the e-discovery order should allow companies to select among keyword searching, conceptual searching, or predictive coding in collecting data and making responsive determinations, as long as they have the appropriate quality control measures for the method.

To ensure fairness, a plaintiff, or a substantially similarly interested person, must be able to participate in selecting search terms and analyzing nonprivileged, nonresponsive documents in quality control cycles. *Id.* at 171–72. Companies with national litigation concerning similar claims would still face uncertainty due to the number of plaintiffs involved in the litigation and some plaintiffs' delayed arrival to the bargaining table. As long as companies have negotiated with some plaintiffs, companies should not be forced to re-collect and re-review documents based on the demands of plaintiffs who sue companies later and who would have had the same interests as those who negotiated with the companies already. Alternatively, if companies could demonstrate that their process retrieved 90 percent of the relevant documents, the companies could forego their obligation to negotiate with opposing counsel. However, ESI discovery should take this approach in particular practice areas for which parties can easily define the scope of relevant material.

Production Form

While many plaintiffs push for production in native formats, many companies prefer the TIFF format (tagged image file format) for production due to the necessity of redactions. An e-discovery order should specify that companies can produce documents with load files in either native file format or TIFF format as long as searchable text was provided in some fashion. Companies would not need to provide metadata or indices to plaintiffs covering more than the file name, file extension, date sent, date received, date last modified, author, and recipients of documents, to the extent available. However, plaintiffs would have to share the cost of preparing the optical character recognition (OCR) and limited index as described above.

Staged Discovery

To rein in e-discovery costs effectively, courts must find a way to limit the volume of information that litigating parties must produce. Thus, e-discovery orders should also employ staged discovery, making subsequent stages available only upon a showing of "good cause." Too often plaintiffs request the custodial files or depositions of all employees who have had at least some responsibility regarding a drug or device. Yet, many of those custodians are involved only tangentially with a case or have responsibilities duplicated by other custodians. By conducting discovery in stages, companies can curb their e-discovery expenses by collecting, processing, reviewing, and producing the most relevant custodial files.

Simultaneously with or before producing core documents, a company would also produce an organizational chart and a list of the 10 employees whose job responsibilities and knowledge of the company's activities relate the best to the claims and defenses in the litigation. A plaintiff would have 30 days to select five of those employees or another employee in the department of a designated employee to receive the employee's custodial file. A company would then need to begin producing custodial files in 30 days on a rolling basis with at least one collection every 60 days.

A plaintiff could not request production of other documents under Federal Rules of Civil Procedure 34 or 45 until he or she certified to the reviewing court that they had conducted a meaningful review of the already produced documents. Production of documents would then continue for other custodial files in rounds of no more than five employees if a plaintiff could demonstrate "good cause" and a need for further production. For example, in a pharmaceutical or medical device case, if a plaintiff chose to receive collections for employees in the clinical, medical, regulatory, marketing, and product safety departments, a plaintiff could demonstrate "good cause" and need for the custodial file of the sales representative who had contact with the plaintiff's prescriber. However, a plaintiff would be expected to make the best use of each round of discovery so that he or she did not create the need for subsequent stages needlessly. If a plaintiff opted to receive the custodial files of five employees in one department with substantially similar materials, a court could deny that plaintiff future discovery stages opportunities.

Additionally, before a plaintiff could take a 30(b)(1) deposition of a company

employee, a plaintiff would have had to request that employee's file under the staged procedure described above. Similarly, a plaintiff could not take a 30(b)(6) deposition until a company had produced documents regarding the noticed topics through the staged procedure. However, a plaintiff could avoid this requirement upon a showing of "good cause," such as if a witness was leaving the company and a court then would no longer have the power to subpoena him or her.

This staged approach would allow companies to identify the core individuals associated with litigations. While companies would need to ensure that all responsive data was preserved, they could postpone reviewing and even collecting certain custodial files for employees who were only marginally involved with litigated products. Because discovery would focus on the most relevant materials first, the parties should not need several discovery cycles to evaluate a case effectively, translating into significant discovery savings. Further, the limitations on the parties' use of Federal Rules of Civil Procedure 30, 34, and 45 would also ensure that discovery adopts a targeted and focused approach. Yet, plaintiffs could always decide to "pay-to-play" by covering the costs of discovery that courts denied.

Preservation of the "Proportionality Principle"

A discovery order expressly would also need to preserve the parties' access to the proportionality principle under Federal Rule of Civil Procedure 26(b)(2)(C) to contest production of materials when the benefits did not outweigh the burden of producing them. Additionally, courts would evaluate applying the principle with a strong presumption against applying it to excuse parties from producing the core documents significantly relevant to cases.

Rule 12(b) Motions and Motions for Judgment on the Pleadings

Finally, a discovery order should include a provision that a court would stay all obligations regarding initial disclosures, production of documents, and production of witnesses for depositions by a defendant if that party had filed a Federal Rule of Civil Procedure 12(b) motion or a motion for judgment on the pleadings that would resolve that party's liability. The stay would not apply to discovery that the court ordered to resolve the merits of one of these motions, such as jurisdictional discovery. Further, the stay would expire if the filing party failed to notice its motion for a hearing within 30 days of the Federal Rule of Civil Procedure 16 conference or as soon as the court would allow a hearing.

Defendants would greatly benefit from this predictability and efficiency. Although a defendant may sometimes be tempted to abide plaintiffs' broad discovery requests and bury plaintiffs in a sea of documents, this comes at a tremendous financial cost, and plaintiffs will almost always find the core documents and discover the key custodians. By limiting the ESI produced, firms representing corporate clients will have less material to review for deposition and trial preparation, further decreasing the costs of litigation and increasing the firms' familiarity with the universe of documents. Courts today also increasingly require parties to reach agreements on search terms, date ranges, and key players and impose sanctions on parties for failing to satisfy the negotiated duties then outlined in case management orders. *Electronic Discovery Deskbook* 11–33 (Thomas Y. Allman, *et al.*, eds., Practicing Law Inst. 2012). Therefore, companies could either benefit from a predictable order or have to negotiate these items on an ad hoc basis.

While plaintiffs might view this proposal as one-sided due to the significant limitations regarding a plaintiff's use of Federal Rules Civil Procedure 30, 34, and 45, defendants simply do not have the opportunity or basis to serve extremely broad requests for production or notices of depositions to most noncorporate plaintiffs. Additionally, plaintiffs should realize substantial savings by a more targeted discovery process. At least 37 percent of plaintiff attorneys reported that their litigation costs increased when they served but did not have to respond to discovery requests for ESI. Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis* 5 (Fed. Judicial Ctr. 2010).

Most importantly, by eliminating the need to search for needles in haystacks, both parties can better, more efficiently, and honestly assess the value of a case. Parties should reach reasonable settlements sooner and forego the expense associated with the protracted manner of e-discovery that most parties use now.

Reducing the Burdens of Privilege Review

While this staged approach would greatly reduce the costs associated with e-discovery, privilege review still accounts for one of the largest cost drivers in e-discovery. Greenwald, *supra*, at 64. Some attorneys estimate that preparing a privilege log for ESI can routinely exceed $1 million. Richard L. Marcus, *The Impact of Digital Information on American Evidence Gathering and Trial: The Straw that Breaks the Camel's Back?*, in Electronic Technology and Civil Procedure: New Paths to Justice from Around the World 29, 33 (Miklós Kengyel & Zoltán Nemessányi, eds., Springer 2012).

Armed with a robust claw-back agreement, defendants can rethink their approach to privilege.

While Federal Rule of Civil Procedure 26(b)(5)(A) provides the elements of a privilege log, courts interpret what those elements require very differently. *Cf. N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 502 (4th Cir. 2011) (holding that only minimal information such as nature, date, author, recipient, type of privilege, and subject of the document was sufficient to preserve privilege); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 673–74 (D. Kan. 2005) (requiring a robust description of nine elements and separate entries for each e-mail in an e-mail string); *Muro v. Target Corp.*, 250 F.R.D. 350, 364 (N.D. Ill. 2007) (requiring extensive descriptions of job responsibilities for each author and recipient).

Therefore, to address the true problems posed by ESI, a practice-specific e-discovery order would have to impose limits on privilege log requirements and reduce the need to eyeball every page to complete a privilege review.

Privilege Logs Elements

A discovery order should provide that if a party wishes to claim a privilege, a privilege log should be created that identifies the type of document, the date of the document, the author, the recipients, the subject of the document, and the privilege claimed for each document. E-mail strings should be treated as one document unless they address more than one subject. Corporate defendants should also produce a searchable organizational chart of relevant business units with a privilege log to allow opposing counsel to test a party's claims of privilege better. Additionally, if a party elects to challenge a claim of privilege and the reviewing court requires the preparation of a more detailed privilege log, the challenging party should bear the cost of preparing each entry for which the court found that the claimed privilege protected the corresponding document.

As all players fear e-discovery less, they will become more willing to embrace creative solutions that curb the astounding costs currently associated with e-discovery.

Under this approach, parties have a clear standard for preparing privilege logs. Further, by limiting the fields necessary for a privilege log, especially the description of a person's role in the communication or job responsibilities, a discovery order would significantly decrease the time that attorneys spend preparing these logs. Finally, a discovery order adopting these parameters accounts for the judiciary's need for more detailed information when parties present challenges to a court for resolution. Adopting cost-shifting principles for more detailed logs should mitigate meritless claims of privilege initially and needless challenges later.

Claw-back Provisions

While a definite standard for the contents of a privilege log would reduce costs, the page-by-page privilege reviews, the most significant factor of privilege review cost, would still burden companies. Federal Rule of Civil Procedure 26(b)(5)(B) provides for the return or destruction of privileged material that a party inadvertently produces but does not speak to whether the production waives the privilege. Federal Rule of Evidence 502(b) was subsequently adopted to create a universal standard for determining waiver of privilege, to limit subject matter waiver of privilege, and to determine the effect of waiver in other proceedings. However, to avoid waiving a privilege, the claiming party must demonstrate that it took reasonable steps to avoid disclosure.

Again, this leaves companies with a standard that is open to interpretation. Thus, the advisory comments to Federal Rule of Evidence 502 encourage parties to enter into claw-back agreements to provide more protection to their privileged documents. Therefore, a discovery order should include a claw-back provision that inadvertent production of privileged material (1) must be returned to the producing party, (2) cannot be used by the receiving party, and (3) does not waive the privilege for that document or the document subject matter. Further, the provision should expressly provide the order will have the effect of Federal Rule of Evidence 502(d) to provide the same protection to privileged materials in other federal and state proceedings.

Armed with a robust claw-back agreement, defendants can rethink their approach to privilege. An attorney will still have to conduct a thorough privilege review as a "rung bell cannot be un-rung." However, the protections of a claw-back agreement should reduce claims of privilege waiver and also make more companies comfortable using technology-assisted-review to identify privilege.

Formerly, the deep concern about waiving privileges fostered excessively inclusive entries in privilege logs. Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. 1, 39 (Fall 2011). With claw-back protections in place, parties no longer have to develop privilege log entries for doubtful claims or agonize over identifying every possible instance of privilege—particularly for documents that reveal favorable information. Additionally, because companies will not have to defend TAR techniques to a court as a "reasonable step to avoid disclosure" under the Federal Rules of Evidence, parties can rely on conceptual searches or predictive coding to identify the critical, privileged documents, reducing the need to review all ESI manually before producing it. Both effects should significantly reduce the expense of conducting privilege reviews and preparing privilege log entries when needed.

Practical Tools to Confront Unpredictability in E-Discovery

Unfortunately, we do not live in a utopia where such a well-defined, carefully circumscribed discovery order controls discovery obligations, and we cannot assume that we will live there any time soon. Yet, practitioners still have some practical means to reduce the costs of e-discovery that implement these ideas in our current structure. Practitioners can rely on the proportionality principle, cooperation, and educational opportunities to help curb the costs of e-discovery.

Proportionality Principle

While companies subject to national litigation often must play by the rules established by the strictest court, no court believes that ESI discovery is without limits. Instead, practitioners should embrace the proportionality principle contained in Federal Rule of Civil Procedure 26(b)(2)(C) when they identify sources of their clients' ESI and develop a discovery plan for their clients. By taking an objective and reasonable view of whether the value of *relevant* information outweighs the costs associated with each phase of e-discovery, firms can evaluate obligations in perspective and limit the amount of ESI subject to a discovery plan. Attorneys should also rely on honest assessments of the proportionality principle when addressing with a court whether discovery is warranted. Attorneys should be well prepared to discuss in concrete terms the financial burdens and other impositions of unreasonable requests.

Cooperation

While cooperation alone cannot resolve

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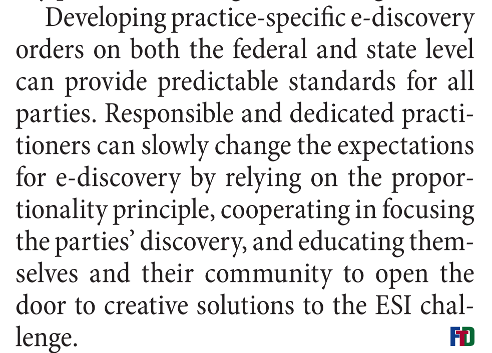
unpredictability, companies should still pursue cooperation and negotiate with opposing counsel to obtain reasonable limitations on discovery. However, the plaintiffs' bar needs to be able to trust opposing counsel for these negotiations to produce helpful discovery schedules. Judge David Waxse, one of the bench's leading experts in e-discovery, offers a valuable commentary on cooperation that all attorneys should embrace in all aspects of litigation to build trust with opposing counsel and limit costs for clients. *See* David Waxse, *Cooperation: What Is It and Why Do It?* 18 Rich. J. L. & Tech. 8 (2012), http://jolt.richmond.edu/v18i3/article8.pdf.

Education

Practitioners and judges, regardless of experience, can benefit from more education regarding e-discovery to understand better their options and the pitfalls that they really need to avoid. Attorneys should begin by educating themselves. The Sedona Conference provides wonderful resources, including the Cooperation Guidance for Litigators and In-House Counsel. Firms should also support educational programs for the local bar and judiciary. As all players fear e-discovery less, they will become more willing to embrace creative solutions that curb the astounding costs currently associated with e-discovery.

Conclusion

Companies are often stunned by the expense associated with e-discovery and view the process as a drain on resources. However, if parties have the tools to progress through e-discovery in a more focused manner, the process could become an asset—a means of resolving claims efficiently, permitting all the parties to evaluate the value of a case quickly. Instead, the current framework guiding e-discovery leaves clients without the predictability to plan and prepare for litigation or to focus the discovery process once litigation has begun.



Developing practice-specific e-discovery orders on both the federal and state level can provide predictable standards for all parties. Responsible and dedicated practitioners can slowly change the expectations for e-discovery by relying on the proportionality principle, cooperating in focusing the parties' discovery, and educating themselves and their community to open the door to creative solutions to the ESI challenge. FTD