Discovery, Technology, and the General Litigator

by Erin W. Hapgood and Richard N.P. Naylor[1]

New and developing court rules, case law and even some state bar ethics opinions[2] send a clear message: the modern litigator must have a basic understanding of the process of discovering electronically stored information (ESI),[3] including the capabilities and limitations of technology and how the process is viewed by a judiciary increasingly comfortable with the topic. The proliferation of electronic data associated with litigants of all types and sizes, whether corporate or individual, means a litigator must understand not only how to identify where clients and opposing parties keep documents,[4] but how to leverage the available tools to efficiently analyze those documents and opponents' productions.

When developing a plan for requesting documents from an opposing party, or assisting your client in preservation or collections, you must understand where and how electronic documents are stored. An effective discovery plan must also take into account the cost implications of collecting from those sources. The emphasis will always be on whether these efforts are proportionate to the case, particularly in federal court where the rules will soon require an increased emphasis on that factor.[5]

Parties with large volumes of data, and a commensurate discovery budget, have a host of tools at their disposal to aid in the efficient analysis of ESI. Attorneys managing small volumes of data and correspondingly small budgets are not, however, precluded from taking advantage of what technology has to offer. While tools such as predictive coding, a form of analytics where attorneys teach the computer what types of documents are relevant, may presently only be appropriate for very large volumes of data (if at all), its costs are decreasing. Additionally, there are other tools that can help general litigators in cases with smaller volumes of data. Today's technology can create conceptual clusters of documents with other similar documents with no attorney input required. Virtually all electronic review platforms include filtering on any number of fields and "tagging" documents for production, privilege, and topical issues, allowing for easy organization and analysis of ESI. By understanding how technology can streamline the process, small firms and solo practitioners can manage a greater volume of documents than was practical in the past and enjoy the attendant potential benefits to the merits of their claims or defenses. Understanding this process will permit counsel to be able to articulate with confidence the actual cost of the search and review.

One technological issue that can take litigators by surprise is the production format. Responding parties are generally free to produce ESI in whatever format they choose where the requesting party does not specify the format for production, provided the format is the format in which the ESI is ordinarily maintained or is otherwise reasonably usable. Sophisticated litigants have the capability to accept tiff image files delivered with an accompanying metadata load file, while such a production would be effectively useless to a general litigator without access to a proprietary review platform. It is therefore advisable to consider one's capabilities and specify the desired production format. Documents can be produced natively, permitting both parties to have the ESI as it was created at a much reduced cost. A searchable PDF format is available, but the searches will not be as effective as those conducted in other formats. Counsel must be familiar with each of these formats and their advantages and disadvantages. Obviously, demanding that the ESI is produced in a format that is most usable is where counsel must start. Failing to do so may create protracted and expensive motion practice over what should be a practical problem that is resolved by counsel's agreement.

There are, of course, costs associated with using eDiscovery technology, but high costs are no longer a given. Litigators can control costs with a thoughtful discovery plan and understanding how much, or how little, additional support they might need from technology. Most software is fairly user friendly and relatively intuitive. Some firms or vendors will simply host the data for you, allowing an attorney to search, filter, or otherwise analyze the documents, flag the ones that are responsive or important and have them prepared for production.

Regardless of the types or volume of data to be managed, technology can help facilitate a discovery plan. Understanding the technology helps in developing a defensible and efficient plan for evaluating the sufficiency of the opposing party's responses, is much simpler than many believe and can help litigators add value to their cases.

Endnotes:

1 The authors would like to thank U.S. Magistrate Judge John M. Facciola (ret.) for his insights and assistance with this article.

2 *See*, State Bar of California Standing Comm. On Prof'l Responsibility and Conduct, Formal Op. 2015-193 (2015) ("An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI")).

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3 *See, e.g.* Rules of the Supreme Court of Virginia, Rule 4:9(a) ("electronically stored information" includes "writings, drawings, graphs, chart, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form").

4 The location of documents is explicitly included in the topics for which discovery is available under the current Federal Rule of Civil Procedure 26(b)(1). The revised FRCP 26(b)(1) does not specifically list the topics for discovery, but maintains the same language allowing discovery for information "relevant" to a claim or defense, so long as it is "proportional" to the needs of the case. Fed. R. Civ. P. 26(b)(1) (effective December 1, 2015 absent contrary Congressional action). Elimination of the express listing of topics, including document location, from Rule 26 does not change parties' obligations. "Discovery of such matters is so deeply entrenched in practice that is it no longer necessary to clutter the long text of Rule 26 with these examples." Committee Notes, 2015 Amendments, FRCP 26(b)(1). Typical locations include personal and business hard drives, email accounts, file share sites, network locations, online storage, cameras and mobile devices.

5 Fed. R. Civ. P. 26(b)(1) (effective December 1, 2015 absent contrary Congressional action).

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