BP Suits to Show Challenge of Taming Discovery
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Electronic discovery has changed the economic profile of litigation surrounding high-stakes disputes. The volume of information that now arrives in the form of electronically stored information is reflected in the "e" before "discovery." The altered economic profile of discovery comes from the new and different expenses associated with making ESI accessible for document review and analysis in relation to any given piece of litigation.

There have been several instances of what many have considered overzealous advocacy during discovery; instances when parties have tried to drive outcomes through strategies that force discovery costs as high as possible. The use of this particular strategy has resulted in some very expensive discovery, and the use of sanctions, special masters, and discovery masters by some judges, in an effort to focus outcomes on substantive issues rather than cost.

As these new expenses have changed the profile of cases worth taking to trial, nonprofit best-practices groups, such as the Sedona Conference, which identifies itself as a research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights, have begun to lobby and educate within the profession to encourage responsible cooperation during discovery. See the Sedona Conference Cooperation Proclamation.

An abundance of legal actions will arise from the oil spill in the Gulf of Mexico. The litigation that followed the Exxon Valdez spill of March 24, 1989, is still crawling to a close in 2010. Already, there are articles appearing that discuss the preservation dilemmas in relation to e-discovery related to the spill. For each lawsuit that proceeds past a motion to dismiss, additional and increased discovery will occur.

Technology is often touted as the answer to the cost of dealing with the enormous amounts of data -- colloquially known as "data dumps" -- that are now gathered during the discovery phase of litigation. Technology is good, and better technology is better and can be more useful for well-defined tasks, but electronic tools have not progressed to the point where the technology is capable of making nuanced decisions. Threading tools such as Equivio can be helpful in showing where in a data set one might want to look first, but it is a judgment about whether a particular document bears some relationship to themes and issues outlined by counsel that make it relevant.

Privilege issues pose additional relationship issues, since they can be driven simply by the parties between whom something is exchanged -- i.e., the nature of the parties and whether they both are covered by the privilege. The use of technology during review and analysis requires relationships that are clear, but it is far less helpful when the relationships and themes are murky or evolve as the learning base expands. While predictive coding shows much promise in aiding document review and analysis, it has not reached the point at which it can be applied across multiple terabytes without hesitation and without concern.

ESI is not going away. In fact, it will only multiply. And it is a cost center about which the legal community has begun to experience push back from its clients. Because it is a new and, at times, disputed cost center, it is incumbent upon the legal community to make use of the best means possible to control client's e-discovery costs.

The Deepwater Horizon oil spill will undoubtedly become a good example of the fact that, when the stakes are high and even if opposing counsel have agreed to cooperate during discovery, requests for production will still yield enormous volumes of information. When the stakes are high, it becomes proportionally more difficult to agree to exclude custodians who

show even small probability of harboring relevant information. The end result is a proportionally greater volume (potentially multiple terabytes) of discovery materials that will require analysis and review.

Because the arguments in high-stakes cases are frequently more nuanced, the identification of evidence to support them requires the culling of vast volumes of information.

THE PROCESS WILL BE A BEAST

The discovery process is the re-creation of "what occurred" for the purposes of the advocate for each party in the dispute. Re-creation of "events" requires the review and analysis of the discovery materials, and the steady winnowing of them, to seek out and identify the most informative and effective documents. For litigation related to the Deepwater Horizon, the process will be a beast, and it will consume enormous financial resources. Fortunately, there are ways to ensure that the money is spent in a rational and informed manner.

Because when there is an "expectation of future litigation," there is an attendant "duty to preserve," corporations often begin to tally their e-discovery costs before litigation is even filed, since litigation holds and the preservation of potentially relevant information escalates costs. In high-stakes litigation, decisions concerning preservation tend to be more inclusive, and thus more expensive, often requiring counsel to advise on appropriate litigation holds and preservation in the face of anticipated litigation.

Once the e-discovery process begins, the requirement to collect information in a defensible, documented manner pursuant to a specific plan is set in motion. One response of corporations that desire greater control over e-discovery costs has been the creation of in-house e-discovery response teams to undertake preservation and collection duties. And while an in-house team can be perfectly proportional and appropriate for a majority of disputes, in the case of an event such as the Deepwater Horizon, a professional forensic collector like Guidepost Solutions (formerly SafirRossetti) directed by outside counsel is likely to be engaged to "collect" the electronic portion of the discovery materials.

Although at first glance this may appear more expensive, the use of an outside expert vendor to collect the agreed-upon electronic discovery materials will help head off future accusations of discovery misconduct. The use of an outside vendor with its own professional reputation provides admissible, properly documented evidence on how the responding company met its discovery obligations and may head off future discovery disputes. In an event of this magnitude, avoiding unnecessary disputes avoids potential monetary sanctions; orders to redo the collection and production; and, if relevant information has not been preserved, possible evidentiary sanctions. If the collection of ESI is not properly undertaken, as documented in numerous court decisions, the responding company may also be subject to substantive sanctions.

Discovery-related ESI in larger cases will need to be hosted in a secure and accessible litigation database for at least the duration of the litigation to enable access by the many litigants and to avoid repetitive collection efforts. A reputable third party to host information can often add significant costs, which mount with the amount of information and duration of the litigation.

Following collection and hosting, the discoverable ESI and hard-copy materials that have been collected have to be processed to enable the use of specialized web-based review tools to help sift the collected information during review and analysis by counsel, and to enable appropriate production to the opposing party. Because the litigation surrounding the Deepwater Horizon will involve a broad range of issues and several concurrent pieces of litigation, tens of millions of documents will need to be tagged for general relevance and their relationship to the various issues identified by counsel.

When terabytes of information are exchanged, hosting at $35 gigabytes per month, processing at $550 gigabytes per month and user costs for reviewer access to the

information at $100 per user per month, the costs add up quickly. When the number of reviewers required and the hourly rate charged for them is added, costs continue to escalate.

Teams of document-review specialists will have to be engaged in a multiple-stage process in which documents are first sorted and tagged for general relevance and potential privilege claims, and then, once irrelevant documents are removed, are analyzed to determine whether particular documents are excludable based on appropriate privilege claims. A detailed record of what is produced and a log of the documents that have been deemed privileged is required. The hourly rate of the document-review specialists used has a direct impact on the total cost of discovery, particularly when one realizes that the first stage of document review is a culling process to reduce the total set of materials to those that are relevant.

Because the cost of separating chaff from wheat is probably not one for which a firm wishes to pay its lead counsel's hourly rate, how the first stage of review for general relevance and issue tagging is conducted can have a significant effect on the total cost of discovery. Traditionally, this first-stage review is done by law firm associates and billed out at more than $100 an hour. Because the first stage of document review and analysis is largely an exercise in culling discovery materials, some firms have successfully used document-review specialists in countries such as India and the Philippines to control costs during the first stage of review and analysis in civil and criminal antitrust matters since 2007. For example, hiring Filipino law graduates and new attorneys, who average $25 an hour, can generate significant savings for clients.

There are three significant cost areas associated with e-discovery: collection and processing, hosting, and document review and analysis. Each of these areas must be effectively managed to ensure compliance with discovery obligations and to avoid substantial unnecessary expenses.

Laying the e-discovery beast to rest simply requires making informed and proportional choices about several things: cooperation between counsel, the use of appropriate technology, and access to competent document reviewers at an appropriate price point for the type of analysis and review in which they will be engaged. Discovery is a process. There is no silver bullet. However, there are intelligent ways to control discovery costs by making informed and proportional choices throughout the process.

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