Managing Discovery Costs in the Information Age

by Susan M. Usatine

Today, litigators are facing an emerging lexicon of new words, terms, and acronyms, such as de-duping, inaccessible data, and ESI. The days of transfile boxes filling law firm war rooms and 'eyes-on' document reviews have made way for terabytes of electronically stored information (ESI) and technology-assisted review (TAR). As a result, e-savvy litigators who grasp the new technology's impact on strategy, and even trial outcomes, are positioned to limit their clients' e-discovery costs. This article proposes three steps litigators can employ to build a cooperative and largely transparent e-discovery process that ultimately reduces collection, review, production, and hosting costs while still producing quality results.

Developing a Quality e-Discovery Process

Litigators should familiarize themselves with The Sedona Conference's (TSC) recommendations and guidelines. TSC is a nonprofit, 501(c)(3) 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, and as such, is a leading resource in the e-discovery world. Specifically, TSC's *Commentary on Achieving Quality in the e-Discovery Process* lists four considerations useful in the development of a quality e-discovery process.[1] These considerations are as follows:

1. Failure to employ a quality e-discovery process can result in the failure to uncover or disclose relevant evidence, which can affect the outcome of litigation.
2. An inadequate e-discovery process may allow privileged or confidential information to be inadvertently produced.
3. Procedures that measure the quality of an e-discovery process allow timely course corrections and provide a greater assurance of accuracy.
4. A poorly planned e-discovery effort can also cost more if the deficiencies require that e-discovery be redone.[2]

Given these considerations, there are three steps every litigator can take to develop an e-discovery process that will produce quality results and increase the likelihood the client will prevail on a motion to shift e-discovery costs.

Step One: Protect (and Get) What is Needed: Containing Collection Costs

As all litigators know, preserving, identifying, and collecting information today is more complicated than it was 10 years ago. It does not help that the court rules governing discovery have not evolved as quickly as technology. Currently, New Jersey's discovery rules largely mirror the Federal Rules of Civil Procedure (FRCP), which prescribe the procedure for obtaining discovery, including e-discovery in the federal courts. These federal rules include:

- FRCP 16: pretrial conferences, scheduling, and management;
- FRCP 26(f): discovery, duty of disclosure;
- FRCP 33: interrogatories, options to produce business records;
- FRCP 34: production of documents, ESI;
- FRCP 37(f): failure to make disclosures, ESI, and good faith; and
- FRCP 45(d): subpoena practice.

In New Jersey, the laws governing ESI collection, obligations, and best practices are substantially similar to the aforementioned federal rules. The New Jersey rules include:

- Rule1:9-2: subpoenas;
- Rule 4:10-2(a): scope of discovery;
- Rule 4:10-2(f): claims that ESI is not reasonably accessible;
- Rule 4:10-2(g): limitations on frequency of discovery;
- Rule 4:17-4(d): option to produce business records, including ESI, in response to interrogatories;
- Rule 4:18-1: production of documents and ESI;
- Rule 4:23-6: failure to make discovery, sanctions; and
- Rule 4:5B-2: providing that in most cases the pretrial judge may conduct a case management conference if it appears the conference will, among other things, address issues relating to ESI discovery.

Based on the rapid increase in technology and its relationship to both the federal and state rules, building an effective and defensible e-discovery process will largely depend on the litigator's active participation in all phases of ESI discovery. Thus, actively participating in the identification and preservation of ESI is the first step in establishing the defensibility of an e-discovery process, in addition to being a critical component of ESI motion practice (such as motions for protective orders, to compel, and/or to shift costs). ESI's dynamic nature requires that counsel act quickly and intentionally to preserve/identify potentially relevant ESI. Satisfying the preservation obligation and timely suspension of automatic purge/archive procedures requires counsel's understanding of the nature of the action *and* the types of records (email, databases, word processing files, calendars, and spreadsheets) that are subject to preservation. At the inception of the case, or when litigation becomes reasonably foreseeable, counsel should consider the following:

- the characteristics of the client's current computer system and the system at the time of relevant events;
- the physical location of ESI, including: 1) user-controlled data, including hard drives, flash drives, smartphones, CDs, DVDs, personal laptops, and email accounts; and 2) corporate-controlled data, including server-based shared (structured and unstructured) data and email files, custom (accounting, purchasing, and client relationship management) systems on local networks and the cloud;
- the accessibility of the ESI, including: 1) active data (for instance, a hard drive), which is the most accessible, 2) near-line data (such as CD-ROMs), and 3) offline storage archives (for example, removable optical disks). Less accessible data includes: 1) back-up tapes (sequential access devices are largely unorganized), and 2) erased, fragmented, or damaged data (data retrieval is not always achievable and requires significant processing); and
- defining the goals of filtering, applying the filter, and testing the outcome.

Finally, counsel should be actively involved in determining answers to the following questions: 1) Who will conduct and document the ESI collection? Will it be the client, information technology (IT), and/or a third party?; 2) Will the client, IT, or a third party conduct the collection remotely or onsite?; and 3) Will it be a targeted collection, or will it be a staged collection?

It is important for counsel to remember that all of the ESI decisions should be documented, and largely disclosed to opposing counsel.

Step Two: Manage a Quality Review and Production

Efficient ESI review and production requires a defensible process that is led by an attorney who understands: 1) the complexities of ESI, and 2) that the best practice for counsel to follow is cooperation with opposing counsel and transparency regarding the steps taken to preserve and produce ESI. Many New Jersey judges have endorsed TSC's cooperation proclamation, which acknowledges cooperation in discovery is consistent with zealous advocacy.[3] The proclamation unequivocally states, "[t]he effort to change the culture of discovery from adversarial conduct to cooperation is not utopian. It is instead, an exercise in economy and logic."[4] In short, the proclamation interprets the FRCP pertaining to e-discovery as a mandate for counsel to act cooperatively, a proposition supported by case law indicating the Judiciary's agreement with this principle.[5] Methods to accomplish cooperation include:

1. utilizing internal ESI 'point persons' to assist counsel in preparing requests and responses;
2. exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of ESI;
3. jointly developing automated search and retrieval methodologies to cull relevant information;
4. promoting early identification of form or forms of production;
5. developing discovery budgets based on proportionality principles; and
6. considering court-appointed experts, volunteer mediators, or formal alternative dispute resolution (ADR) programs to resolve discovery disputes.

Indeed, counsel's failure or refusal to cooperate violates what TSC recognizes as a lawyer's twin duties of loyalty: acting as a zealous advocate for clients while fulfilling his or her professional obligation to conduct discovery in a diligent and candid manner.

Similarly, the cooperative and largely transparent use of TAR can greatly reduce review and production costs while producing predictable quality results. For these reasons, counsel should consider using TAR to assist in identifying potentially responsive material through automated searches and protocols designed by counsel,

de-duping identical or near identical ESI, and eliminating from the data set irrelevant file types, including obviously irrelevant SPAM.

Furthermore, counsel can take additional steps to manage e-discovery reviews and productions. For instance, counsel should employ quality control measures to ensure the consistency between reviewers throughout each stage of the review. In addition, defensibly minimizing the number of records being reviewed for privilege leads to a more efficient cost-effective review, since the privilege review is generally more nuanced than the responsiveness review. Counsel should consider filtering file extensions, document sources, keyword searches, metadata, and any internal designations of privilege to automatically designate these records as potentially privileged. Finally, counsel should thoroughly consider implementing a Federal Rule of Evidence 502 clawback order or similar protocol.[6]

Step Three: Motions to Accomplish Cost Savings

Litigators in New Jersey should be aware of Judge Michael A. Hammer's decision in *Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth.*,[7] the seven-part *Zubulake v. UBS Warburg, L.L.C.*[8] test, and, more generally, the doctrine of proportionality. Generally speaking, counsel seeking to limit discovery must establish that the requesting party's requests are "unduly burdensome," and, as a result, the scope of the requests should be narrowed and/or the cost of collection should be shifted, in whole or in part, to the requesting party. Discovery of ESI, as provided in Rule 34, is specifically limited by Rule 26(b)(2)(B), which provides, in pertinent part:

> A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.[9]

Briefly stated, Rule 26(b)(2)(C), referred to as the proportionality rule or proportionality doctrine, requires the court limit discovery in a proportional manner if it determines the discovery sought is unreasonably cumulative, duplicative, or can be obtained from another source that is more convenient, less burdensome, or less expensive.[10] In short, in these situations the burden or expense of the proposed discovery outweighs its likely benefit considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the discovery in resolving the issues.

Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth.[11] is a recent decision illustrating the importance of knowing the ins and outs of a client's data in the context of a motion for a protective order and/or to shift e-discovery costs. Specifically, in this multi-million dollar breach of contract case, Juster Acquisition Company submitted a request for production to North Hudson Sewerage Authority (NHSA) that included 49 requests for documents and a list of 67 proposed search terms.[12] In response, NHSA sought a protective order and claimed the search terms were overly broad and likely to produce results duplicative of the 8,000 pages of documents NHSA had previously produced.[13] In the alternative, NHSA sought an order shifting the costs of the new searches to Juster.

Judge Hammer denied NHSA's motion for a protective order due to NHSA's failure to present any facts, analysis, or sufficient legal authority to support its claim that the proposed new search terms were unreasonably cumulative and/or duplicative given the nature of the dispute.[14] Furthermore, Judge Hammer denied NHSA's motion to shift fees to Juster due to NHSA's failure to meet its burden of demonstrating the requested data was inaccessible, such as by alleging the backup data tapes were erased, fragmented, or damaged.[15] Instead, "by asserting that it has hired an outside vendor to perform the word searches, NHSA acknowledged that the ESI is accessible."[16]

Moreover, Judge Hammer also analyzed the facts presented by the motion under the seven-part proportionality test in *Zubulake v. UBS Warburg, LLC*.[17] Specifically, these seven factors include:

- the extent to which the request is specifically tailored to discover relevant information;
- the availability of such information from other sources;
- the total cost of production, compared to the amount in controversy;

- the total cost of production;
- the relative ability of each party to control costs and its incentive to do so;
- the importance of the issues at stake in the litigation; and
- the relative benefits to the parties of obtaining the information.[18]

In utilizing this test, the court found the balance of the factors fell in Juster's favor, particularly because the alleged cost of running the keyword searches and eliminating duplicates was approximately $6,000 to $16,000 in a multi-million dollar contract dispute.[19] Accordingly, it is apparent from this precedent that when filing motions to accomplish discovery cost savings, counsel should be prepared to provide detailed information regarding the accessibility of the requested information and the corresponding cost and burden associated with providing it.

Key Takeaways

Magistrate Judge Andrew J. Peck, of the United States District Court for the Southern District of New York, states: "Counsel must be *competent* and must *cooperate* with each other to cost-effectively preserve and produce ESI."[20] Efficiency in this arena can only be accomplished by litigators who actively manage ESI preservation, collection, and review. While it is beyond cavil that technology is what caused the ESI explosion, e-savvy counsel realize that technology is also the best tool to tame the ESI beast.

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Endnotes

1. The Sedona Conference, *Commentary on Achieving Quality in the E-Discovery Process,* (May 2009), available at https://thesedonaconference.org/download-pub/65.
2. *Id.* at 1.
3. The Sedona Conference, The Sedona Conference Cooperation Proclamation, (July 2008), available at https://thesedonaconference.org/download-pub/1703.
4. *Id.* at 1.
5. *See, e.g.*, *Bd. of Regents of Univ. of NE v. BASF Corp.*, No. 4:04-CV-3356, 2007WL 3342423, at *5 (D. Neb. Nov. 5, 2007)("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. [citations omitted]. If counsel fails in this responsibility—willfully or not—these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.").
6. The Sedona Conference, *supra* note 3 at 20.
7. *Juster Acquisition Co., L.L.C. v. N. Hudson Sewerage Auth.*, No. 12-3427, 2013 WL 541972 (D.N.J. Feb. 11, 2013).
8. *Zubulake v. UBS Warburg, L.L.C.*, 217 F.R.D. 309 (S.D.N.Y. 2003).
9. Fed. R. Civ. Pro. 26(b)(2)(C).
10. *Id.*
11. *Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth.*, No. 12-3427, 2013 WL 541972 (D.N.J. Feb. 11, 2013).
12. *Id.* at *2.
13. *Id.* at *3.
14. *Id.* at *4.
15. *Id.*
16. *Juster Acquisition Co., L.L.C. v. N. Hudson Sewerage Auth.*, No. 12-3427, 2013 WL 541972, at *4 (D.N.J. Feb. 11, 2013).
17. *Id.* at *4 *citing Zubulake v. UBS Warburg, LLC,* 216 F.R.D. 280, 284 (S.D.N.Y. 2003).
18. *Id.*
19. *Juster Acquisition Co., L.L.C., v. N. Hudson Sewerage Auth.*, No. 12-3427, 2013 WL 541972, at *6 (D.N.J. Feb. 11, 2013).
20. Magistrate Judge Andrew J. Peck, The Federal Rules Governing Electronic Discovery, *Electronic Discovery for Employment Lawyers* (Dec. 10, 2008) 1, 29 (emphasis supplied), available at https://www.cgoc.com/files/Federal_Rules_Governing_Electronic_Discovery.pdf.

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