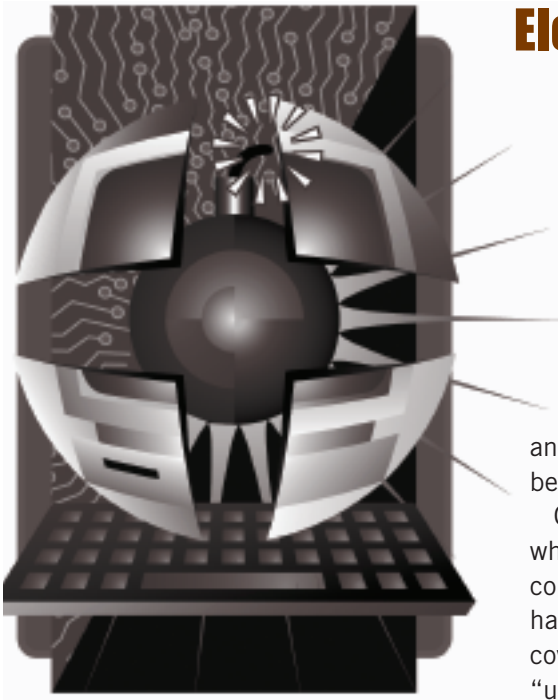


Electronic Discovery and Business Law Alternative Dispute Resolution

By Linda G. Sharp, Esq., MBA and Tommy Sangchompuphen, Esq.!



Winning or losing a case may hinge on that one piece of evidence that could be buried among the pages of produced documents resulting from a broad-scale discovery request. That's why lawyers in America spend more time on discovery than they spend on most other aspects of their case. In fact, document discovery represents one-half of the litigation costs in the average case and up to 90 percent of the costs in an "active" discovery case.² Lawyers spend, on average, more time on discovery than on conferring with clients, working on pleadings, negotiating settlements, or conducting legal research.³

While litigation has traditionally been the preferred method of resolving legal disputes, alternative dispute resolution – including arbitration, mediation, mini-trials, and the like – has become a common alternative to the traditional lawsuit in court. In fact, 78 percent of business attorneys find that arbitration provides faster recovery than lawsuits, and 56 percent of trial attorneys find arbitration less expensive than lawsuits.⁴

Nevertheless, attorneys should not equate the sometimes simpler, quicker process of an arbitration or mediation with a relaxed document retention and preservation plan. Whether attorneys are arbitrating or mediating a case or engaging in full-scale litigation, the retention

and preservation of documents should be relatively identical.

Courts are now recognizing the ease in which relevant electronic data can be collected and preserved. Attorneys who have stayed clear of that CLE on e-discovery and made a point of not getting "up to speed" on the issue may face unsympathetic judges in the halls of justice.

Take, for instance, the stern instructions given to the defense lawyers by U.S. District Judge Shira Scheindlin in *Zubaluke V*: "Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."⁵ Indeed, attorneys have a duty to monitor preservation compliance – or face penalty from the bench, including judicial sanctions, ethical violations, and malpractice claims – whether litigation or an alternative dispute process lies ahead.

Retention and Preservation

Perhaps the single-most important sub-topic under the umbrella of electronic evidence is retention and preservation — that is, the retention of electronic documents, databases, and e-mails in an organization's ordinary course of business and the preservation of those documents when litigation is either anticipated or pending.

Practitioners can easily be overwhelmed by the multitude of challenges presented by electronic evidence. Those familiar with the relevant issues, both legal and technical, understand that electronic discovery requires, at a minimum, careful planning at each step within an information handling process. The Manual for Complex Litigation high-

lights some of these issues and recommends a detailed discovery plan related to electronic evidence.

Planning truly cannot begin too early in the process. In fact, some of the most beneficial preparation a litigant can do comes well before litigation is commenced or is even anticipated. Simply put, litigants both large and small can save themselves a tremendous amount of time and money by developing and following a solid document retention program for their electronic data.

Too often litigants today keep multiple years' worth of backup tapes from e-mail and file servers that serve no legitimate business purpose. Then, when faced with a discovery request in litigation, they end up in a position where they must collect, organize, restore, search, review, and produce electronic documents from that media.

To proactively limit the challenges of discovery, an organization should have an aggressive but appropriate document retention policy. This being said, a policy that is right for one organization and one industry might not be right for the next one. Moreover, the timing for implementation of such a retention policy is crucial. The investment of time to clean up and purge one's files must occur long before any litigation is imminent.

Once litigation is either pending or impending, or an alternative dispute process has been agreed upon, a solid document retention policy proves to be particularly beneficial. From that point forward, counsel should focus on properly preserving electronic records for use in litigation. Specifically, counsel should

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act quickly to ensure that the opposing party does not end up in a position to claim spoliation of evidence due to a failure to properly preserve e-data. This is especially true in a non-binding arbitration, where the potential of a subsequent bench trial looms.

Once the initial preservation and retention considerations have been addressed, counsel should keep in mind the ongoing need to manage electronic discovery using legal tactics and technical tools. The e-discovery process can best be broken down into five basic steps.

Step 1: Define the Scope of E-Discovery

Fed.R.Civ.P. 26(a)(1)(B) specifically requires the disclosure of “data compilations” (e.g., electronic files, databases, emails) following a full investigation of the case. This requires, at a minimum, locating all sources and locations of electronic data, including data possessed by third parties, such as Internet service providers, and on the computer systems of other peripherally involved entities in the suit.

Counsel can reduce the scope of electronic documentation subject to discovery through either stipulation or protective order. In doing so, four classes of electronic data should be addressed: (1) *active data* (i.e., that which is immediately and easily accessible on the client’s systems today) (2) *archived data* (i.e., that which resides on backup tapes or other storage media) (3) *deleted data* (i.e., that which has been deleted from a computer hard drive but is recoverable through computer forensic techniques, and (4) *legacy data* (i.e., that which was created on old or obsolete hardware or software).

In addition, counsel should come to an agreement as to whose data is being sought within the organization, (i.e., is it the executive’s or is every single employee’s data necessary?). Although there may be literally hundreds or even thousands of people’s data stored in various storage devices, there may be only a handful of custodians whose data is subject to the litigation. Counsel should consider whether all of the company’s data is necessary. For example, most

organizations maintain separate servers and backup systems for email, documents, accounting, etc. Thus, if counsel does not need the accounting data, there may not be a need to continue to preserve that data.

Further, come to an agreement as to time frame. It may not be necessary to maintain current and future data for this particular litigation. More than likely, new data will be irrelevant to your litigation. By either agreeing that discovery will not encompass certain of these data sets or obtaining a court order preventing discovery of them, all parties and the court will benefit.

Step 2: Collect the Data

After identifying the data sought, locating where it resides, and exhausting all objections to limit the production, counsel must collect the data. The collection of the data should not be any less thorough or complete depending on whether the resolution of the dispute ends in an alternative dispute process or litigation.

Before the e-explosion, a partner in charge of litigation, when faced with a discovery request, typically sent a team of associates into a client’s offices to collect and copy documents from the key users or “document custodians” who likely possessed discoverable materials. On average, this “discovery sweep” could amass as much as 50,000 documents per case – or enough documents to fill 15 to 20 standard bankers’ boxes. While this was a feat, it certainly was not unconquerable as long as the number of documents and emails only totaled in the several thousands of pages. But with regard to electronic evidence in the modern era, producing parties might very well have to sift through as much as three million documents, making opening and printing each and every document simply untenable.

Going the route of an alternative dispute process does not necessarily change the way a partner in charge of litigation handles document collection. The partner should still send a team to collect the entire universe of relevant information. But document collection teams in ADR matters may only need to

review and produce only a portion or subsection of the documents collected. It will be critical to preserve all relevant data in the event that the matter does not settle or one of the parties moves the matter forward. One can easily imagine unsympathetic response from a court if one were to state that “I thought that the matter was going to settle at arbitration so I didn’t instruct my client to preserve its data.”

Step 3: Filter & Process the Data

In most cases, keeping the data in an electronic format makes sense. Typically parties retain a computer expert to convert the data to a common, read-only format such as “tiff” (tagged image file format) to ensure authenticity. This conversion allows documents and e-mails, including all attachments, to be processed rapidly without the need to open the file in its original format. It also permits documents to be automatically Bates numbered and “branded” with overlays in the margins (e.g., “Confidential” or “Work-Product”), if desired. Other benefits include the ability to search for keywords more quickly and efficiently and to allow for annotations and redactions directly on the documents without altering the original electronic file.

As noted earlier, the producing party might very well have millions of pages of documents to wade through. Of course, not every electronic document found within the files retrieved from a document custodian or on backup tapes is responsive or relevant to a discovery request. Automated data filtering technology – filtering by custodian, time and date, file size, keyword, or duplication – is one revolutionary advancement defense counsel should consider when preparing for an electronic discovery document review. Clients using all of the filtering techniques described below typically experience a 75% reduction in the number of documents they need to review for production.

1. Custodian filtering – segregating the key custodians who may be relevant to the case and isolating the files associated with those specific individuals;

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2. **Time and date filtering** – targeting discrete periods of times, which are particularly relevant to a case or which are required to be produced in accordance with a pending court order;
3. **File Size Filtering** – capturing files between a certain size range in order to isolate mid-sized files from exorbitantly large files;
4. **Keyword searching** – applying a set of keywords and terms to segregate potentially responsive information for further review and scrutiny; and,
4. **De-duplication** – identifying documents that are duplicates of one another and eliminating these duplicate documents from the review and production set of documents.

Whether attorneys are engaging in an alternative dispute process or preparing for trial, they should filter and process the electronic data similarly in an attempt to find relevant or privileged material.

Step 4: Choose Review Options & Conduct Review

After gathering the data on hard drives, floppies, backup tapes, and servers and reducing the universe of discoverable documents using a variety of filtering techniques, the coordinating attorney in an ADR matter must determine how much of the data to review and produce. If the parties have agreed to an alternative to trial, the parties may wish to only review and produce only a portion of the universe of documents collected – based on key individuals, date ranges, or other selected criteria.

The parties would also need to contemplate how much they will produce to the opposing party and/or third-party neutral. Since non-court-ordered ADR is oftentimes an alternative to expensive litigation and subsequent trials, counsel needs to carefully determine how much of the collected data needs to be reviewed to appropriately make their case.

If the coordinating attorney chooses a paper review, the electronic documents are printed. This process requires counsel to verify that each document's metadata will be burned to a slip-sheet or

cover sheet in front of the document text. In the alternative, counsel may choose to brand the document with a printed overlay on the corners of the document containing the same pertinent metadata information.

Failure to provide this valuable information about the document (such as create, access, or modification dates) and email (such as "bcc" recipients and attachments) could potentially lead to the loss of this information since it might not print when the "print" button is pushed. Once the documents are printed, they are shipped to a team of reviewers who divide up the boxes and review them document by document.

Using some type of local litigation support database or Web-based document review repository provides another option for reviewing documents for responsiveness or privilege. Litigators faced with electronic document productions have found using an electronic reviewing option more appealing since it typically provides greater flexibility and efficiency over paper review.

Such a review can generally occur in three ways: (1) looking at a collection of "loose" electronic files in their "native" format on a CD-ROM or DVD, (2) using a local database (like Summation or Concordance) or (3) working with an online document review repository – a Web-based database into which the data files have been loaded for viewing, categorization and searching. While a review team may conduct an electronic review exclusively in one of the three general forms mentioned above, the size and nature of the case may dictate the use of all three in varying amounts.

Step 5: Choose Production Options & Produce

Once completing the review and identifying documents as responsive, non-responsive, privileged, or the like, counsel must focus on producing the responsive documents to the opposing party or third-party neutral. Counsel must address these two questions: (1) what format will the documents need to be produced in, and (2) in what timeframe must the production occur? Counsel are advised to address these questions long

before the document review ever begins, typically at some of the first discovery planning conferences with the opposing party or court.

Conclusion

Many independent studies, including those conducted by the Litigation Section of the American Bar Association, reveal that consumers and attorneys favor arbitration over the lawsuit system by wide margins in terms of timeliness and cost. However, attorneys should not relax their retention and preservation plans for matters taking advantage of the sometimes simpler, less expensive process of an arbitration or mediation.

Whether attorneys are arbitrating or mediating a case or engaging in full-scale litigation, the retention and preservation of documents should be relatively identical. Failure to properly preserve electronic data could potentially lead to significant spoliation.

Endnotes

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