

eDiscovery In The Months Ahead

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The first two months of 2009 have seen a deepening economic crisis that is impacting the way that cases are litigated, especially with respect to eDiscovery. Even in the best of times, eDiscovery is expensive, with anecdotal reports estimating that eDiscovery costs may be as much as 30% to 40% of the litigation budget. Today, litigants face greater pressures to reduce these costs, and we expect cost-cutting measures to drive the trends in the months ahead from both technological and legal perspectives.

Litigants are reducing costs in obvious ways. Among other things, corporate litigants are opting to handle more eDiscovery tasks in-house, and they are more closely supervising their outside counsel and vendors. They are also securing more favorable pricing, as vendors are increasingly willing to negotiate processing fees and database costs.

But these steps are not enough. What is needed are more fundamental changes in the way that eDiscovery is managed. Towards that end, we anticipate that litigants will begin to emphasize more focused collection procedures, with greater reliance on culling queries and word searches, rather than “by hand” reviews. We also foresee a greater willingness to employ contract attorneys, including nearshoring and offshoring solutions. And we expect to see greater efforts from litigants and judges alike to limit the scope of discovery and ensure that it is proportional to the case.

Greater Emphasis on Identification and Collection Efficiencies

We are already seeing increased efforts to reduce the amount of data that enters the eDiscovery process. That process typically begins with the collection of data from corporate information systems. Traditional collection tools capture a large amount of data that is unrelated to the litigation, whether in the form of documents relating to other transactions or irrelevant “let’s do lunch” emails. Litigants must then rely on electronic culling techniques and manual document review to identify the documents that are actually needed.

Each step in this process typically involves charges and fees that are based on the volume of data. Vendors charge per gigabyte fees to cull and process the data so that it can be loaded on to a review database. These fees can run from about \$400 per gigabyte to \$1,600 per gigabyte, depending on the vendor’s pricing structure and the database it uses. And there is also a monthly charge to host the data on the database platform. Document review is even more expensive. Vendors estimate that for every dollar spent to collect and process electronic data, four or more dollars are spent on document review. Indeed, some sources estimate that document review costs can be as much as 80% of the overall eDiscovery costs.

In the past, litigants have been reluctant to narrow collection efforts for fear of missing relevant evidence.

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But cost pressures and improved technology may now trump this concern. Such decisions must be made on a case-by-case basis, but among the tools now available are enterprise-wide search utilities that can be deployed across a litigant's entire information systems network. With the use of such utilities, in-house personnel can identify and index files meeting designated criteria (such as specific search terms) throughout the company, including remote branches and data centers. Even less sophisticated products, which rely on the deployment of small, executable files to specific network resources, can facilitate streamlined "surgical" document collection and minimize the quantity of irrelevant data collected for review.

To reduce the risk of missing something important, the use of these technologies can be complemented with validation testing. Validation testing of eDiscovery software helps to ensure that the software successfully captures responsive files and reduces the risk of excluding potentially relevant evidence. Such testing, which is common in design and engineering settings, can also help litigants defend their search methodology. *See, e.g., Victor Stanley Inc., v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008) ("The implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.").

More Outsourcing – Nearshoring and Beyond

Recent years have seen significant improvements in technology, but when it comes to document review, we have not yet reached a point where technology can substitute for human beings. Litigants who want to protect privilege, trade secrets, or confidentiality, litigants who want to avoid over-production, and litigants who have other case-specific issues, still need lawyers to review each document.

To reduce the costs of such a review, litigants typically use "contract" attorneys obtained from a third-party agency. Reliance on contract attorneys is particularly common in litigation involving large volumes of data, and we expect that it will start to become more prevalent in smaller cases. As a general rule, such lawyers are billed at a rate that currently starts in the range of \$50 per hour, and are given responsibility for the first-level review of the documents, while law firm associates supervise their work, conduct quality control review, and make determinations regarding the attorney-client privilege, work product, and trade secrets.

In today's job market, there are an increasing number of attorneys seeking document review work. This should result in competitive pricing and help ensure the quality of the reviews. As a consequence, we expect to see greater use of contract attorneys in the months ahead, and more delegation to them of higher-level review decisions. It will be especially interesting to see how litigants structure their privilege reviews. We do not expect the clawback provisions of Federal Rule of Evidence 502 to have a large impact on the way that litigants handle high stakes litigation, but in some cases it may give litigants more comfort in allowing contract attorneys to take a greater role in privilege review.

Given that the use of contract attorneys is already commonplace, the real trend in the months ahead may be the increased use of nearshoring or offshoring solutions. Nearshoring involves the use of domestic contract attorneys in areas of the country that have a less-competitive pay scale. Offshoring involves sending the review work to other countries – typically to India – and can result in even greater cost savings. In August 2008, the American Bar Association removed one potential barrier to this practice, issuing a formal ethics opinion that permits U.S. lawyers to outsource work to lawyers in other countries, as long as the work of the foreign lawyers is directly supervised and the client for whom the work is being done consents to the arrangement.

We are not predicting that there will be a tidal wave of new cases heading to India. But we are anticipating a greater willingness to test those waters. This can be done with a smaller case or by adopting a hybrid approach in which documents deemed less likely to be relevant (for example, those containing fewer search terms) are reviewed in India, and documents deemed more likely to be relevant (such as those with a higher incidence of search terms) are reviewed in the United States.

Legal Developments – Will the Judiciary Lend a Hand?

The courts have not been blind to the increasing costs of eDiscovery and the effects of these costs on litigants. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court cautioned trial judges to “retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Id.* at 558 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n.17 (1983)). The Court stated:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. *See, e.g., Easterbrook, Discovery as Abuse*, 69 B. U. L. Rev. 635, 638 (1989) (“Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves”). And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries,” . . . ; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.

Bell Atlantic Corp., 550 U.S. at 559.

Courts have the tools to limit eDiscovery abuses. Federal Rule of Civil Procedure 26(b)(2)(C)(iii) authorizes federal courts to limit discovery when “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 in the action, and the importance of the discovery in resolving the issues.”

Going forward, we expect the judiciary to more actively encourage cooperation among litigation adversaries and, failing that, an increase in motion practice based on the proportionality principle. As Chief Magistrate Judge Paul Grimm has noted, “It cannot seriously be disputed that compliance with the ‘spirit and purposes’ of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation.” *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008).

Published in Law360 on April 6, 2009