CORPORATE COUNSEL

3 E-discovery Trends You Can't Afford to Ignore

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The Federal Rules of Civil Procedure are supposed to be "construed and administered to secure the just, speedy and *inexpensive* determination of every action and proceeding." Yet, as anyone who has ever been tasked with handling discovery in complex litigation knows, the judicial system has struggled to reconcile this overarching goal with the explosion of electronically stored information (ESI) and the corresponding skyrocketing of e-discovery costs.

Despite various attempts at e-discovery reform over the past decade, studies indicate that discovery continues to account for the vast majority of the cost of civil litigation. Indeed, according to one survey, discovery is responsible for 70 percent of total litigation costs in cases that are not tried. Litigants can spend upwards of $18,000 to collect, process and review a single gigabyte of data. And in large cases, potentially responsive data can measure in the hundreds or even thousands of gigabytes. We are facing the very opposite of *inexpensive*.

Yet the potential costs of *not* managing e-discovery properly also are enormous. Thus, the first trend in e-discovery that inside counsel cannot afford to ignore is the rising cost of mismanaging the process.

Trend No. 1: Rising Stakes

According to a 2010 Duke Law Journal study, sanctions for e-discovery violations have mushroomed over the last decade. In 2009, e-discovery sanctions were awarded in more federal cases than in all the years before 2005 combined. While more recent data suggests that the growth in e-discovery sanctions litigation may have leveled off, courts are continuing to impose monetary and issue sanctions for e-discovery misconduct at a rate that would have been unimaginable a decade ago. In late 2013, for example, a federal judge issued sanctions relating to e-discovery mismanagement of almost $1 million, warning that more could be imposed. *In re Pradaxa Products Liability Litigation.* And earlier this year, another federal court considered terminating sanctions for e-discovery violations in a trade secrets case, but ultimately settled on a spoliation instruction. *Quantlab v. Godlevsky*.

Trend No. 2: Help from New Model Orders

Fortunately, real relief from the e-discovery scourge may arrive soon at a court near you. Over the last three years, more than two-dozen federal courts, including such IP-litigation-heavy venues as the District of Delaware, the Eastern District of Texas and the Northern District of California, have utilized their local rule-making powers to enact new e-discovery model orders and guidelines. These new e-discovery rules are the second e-discovery trend that counsel cannot afford to ignore.

The new rules generally call for phased discovery of ESI, limits on email discovery, limits on the obligation to preserve and collect certain categories of ESI, increased cooperation between litigants on e-discovery issues and enhanced cost-shifting provisions to discourage e-discovery overreaching. The new rules impose new obligations on litigants. But they also create significant opportunities for creative, well-prepared attorneys to secure more rational and cost-efficient e-discovery frameworks. Now more than ever, courts are willing to entertain creative proposals for reigning in e-discovery, provided that they are tailored to the circumstances of the case and transparently describe what will be covered and why.

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To take advantage of the new rules, you need to do your homework at the outset of a case. This includes realistically assessing the risk posed by the litigation and your own discovery needs. You also must understand where your relevant data resides, how much there is and how hard it will be to collect. You then need to use this information to craft a comprehensive, justifiable e-discovery plan. Depending on the circumstances, the plan could include limits on noncustodial sources of ESI that need to be preserved and collected, limits on ESI custodians and limits on email discovery. Such limits can significantly reduce the volume of ESI that ultimately will need to be reviewed—the most expensive part of the e-discovery process. But such limits also will restrict the discovery that you will be able to obtain from your opponent. Consequently, the decisions that go into a well thought-out e-discovery plan often are strategic ones and should be treated as such.

Trend No. 3: A Proliferation of Tools

The third trend that no attorney managing complex litigation can afford to ignore is the proliferation of new e-discovery tools. One of the hottest is predictive coding. Virtually every major e-discovery vendor now offers some type of predictive coding tool. Predictive coding involves using computer algorithms to determine which documents are relevant based on a review of test documents by humans. Humans code an initial subset of documents, and the computer "learns" what is relevant from the human coding and applies it to other documents. While predictive coding does take some up-front effort, when dealing with a large volume of documents the benefit of its use can be substantial. Predictive coding has the potential to curb e-discovery costs by reducing the amount of data requiring expensive human review.

But few courts have addressed the use of predictive coding and other emerging e-discovery tools either in their new local e-discovery rules and guidelines or in published decisions. Indeed, Magistrate Judge Andrew Peck in the Southern District of New York is one of the few judges who has. *See Moore v. Publicis Groupe* (2012). Peck's thoughtful order is required reading for anyone considering using predictive coding technology.

Because the law governing their use is still being written, litigants wishing to use the new generation of e-discovery tools must tread carefully, plan ahead and, most critically, negotiate with opposing counsel early and transparently. While transparency may be counterintuitive to most litigators, it is important if you want to minimize your cost of production by using predictive coding. Your opponent needs to know what you plan to search, how you plan to search it and who (or what) will determine responsiveness. While this may require disclosing more information than you are used to, courts so far have conditioned their approval of this technology on such transparency.

One caveat: It is tempting to believe that technology such as predictive coding allows you to look at only a subset of documents and then forego further human review. Not so. As even e-discovery vendors touting the new technology likely will concede, additional document sets will have to be reviewed and quality-controlled to provide assurance that the predictive coding is working. This can and will take time, and will require input from opposing counsel. But if done properly and fairly, it also can save significant resources in the long run. And if not done properly, the court may force you to go back to the drawing board.

In short, to stay out of e-discovery trouble, to take full advantage of the new wave of e-discovery rules and technologies, and to keep the costs of e-discovery as low as possible, it is critical to plan ahead, know your data and cooperate with opposing counsel early in the discovery process. Doing so will enable you to come out on top in the brave new e-discovery world.

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