

Critical Considerations for Dealing with Electronic Data

By James E. Gordon and David P. Stenhouse

The Amendments to the Federal Rules of Civil Procedure pertaining to the discoverability of electronically stored information (ESI) require that ESI be identified and produced in more detail than ever before. Now, more than ever, it is crucial for lawyers and clients to have an understanding of their ESI resources and their identification and production responsibilities.

A party's obligations, with respect to ESI, start with the Rule 26(f) conference between counsel. The Amendments require that a discussion of ESI be included in this conference. A comprehensive inventory of potentially responsive data is the foundation for a dialogue regarding timing of discovery, collection methods, and costs of ESI. The data inventory is the base element for discussion of preservation issues and is also a key component required for disclosure by the responding party. Failures to agree on a preservation protocol, or claims of spoliation, are frequently the result of one party failing to understand the scope and nature of the data collection. The inventory needs to contain enough detail regarding retention policies and procedures to enable the parties to reach common ground on preserving what is necessary while not unduly disrupting the responding party's ability to do business. This is particularly true when the responding party is a larger business entity.

The greatest risk to the responding party is the failure to identify and/or properly preserve relevant responsive data. From a historical perspective, with the exception of deliberate malfeasance, allegations of spoliation and exploding costs associated with the electronic discovery

process stem from the failure to identify and "properly" preserve responsive data. Once data is preserved and secured in such a manner that metadata is not altered and the data is "locked" down so it cannot be inadvertently altered or accidentally disposed of, future options are maintained. Sanctions, or the costs of defending allegations of spoliation, inevitably arise from the failure to take these steps effectively.

Form of Production

As critical as identification and preservation are to the process of avoiding unexpected costs and surprises during the discovery process, misunderstandings as to the type of data that is available and how it is going to be reviewed and produced are probably the areas that drive the greatest amount of avoidable costs. It is critical to work closely with in-house or outside IT personnel to fully understand the form or forms in which a party's data is maintained, and whether those forms are user-friendly. For example, ESI stored as Word files might be very easy to review for relevancy and privilege, but unless it can conveniently be numbered or otherwise identified, it may be difficult to produce in that form. Other forms of production might be easy to track but difficult to review. Cost is also a key driver. While conversion of electronic data to a common format (most typically TIFF or PDF images and text) may sometimes be desirable from a review perspective, it may also be cost-prohibitive because of volume, or it may be impractical for certain types of data, such as databases. Additionally, production of the native file is sometimes necessary to ensure complete and accurate

production; conversions to another format may cause some embedded data not to be converted correctly, eventually losing information in the process.

Native production also has the potential for unexpected risks, such as the possibility that the requesting party will have access to changes that have been retained by the documents through the track changes function. Hidden fields in spreadsheets may be produced without having been previously reviewed for substance and privilege.

Without an understanding of both the requesting and responding parties' "IT Architecture," making business decisions as to how to approach the general identification, preservation, collection, and review effort are difficult at best. Accordingly, it is important for outside counsel to gain this understanding through interviews with the client, discussions with the client's IT personnel, and sometimes working with outside consultants.

Production Schedules

Another area that has historically created problems for responding parties has been agreeing to unrealistic review and production schedules. Gathering electronic data, converting it to a usable form, and reviewing it for privilege and relevancy takes time. Data that has been collected for review will often need to be first catalogued and then processed into a format for review. Once processed for loading into an internal or a third-party review tool, there can be a substantial time lag to get the data indexed for searching. Finally, the amount of data collected for review can be staggering. It is quite common to find that two or three people's

email data files can amount to 300,000 or more pages of documents on a DVD.

Although the method of locating responsive data has traditionally been the sole purview of the producing party, technology has opened the door for the requesting party to become actively involved in the methods, services, and tools used to locate electronic data. For example, it is not unusual for a requesting party to have input into what search terms are employed to identify responsive documents. Often, the parties negotiate such word searches and reach agreement as to what searches will be run. Similarly, the parties can now negotiate and agree on specialized review tools such as online repositories. Technological advances will continue to shape the process, so parties have an opportunity to work together to minimize the cost and burden of review by discussing options early on. Recent cases have also approved, or insisted upon, sampling or statistical analyses of data where the parties disagree over cost and relevance.

De-Duplication

The need to deal with duplicate documents in the collection and review of electronic data is far greater than it was when discovery was primarily paper-based. The volume of electronic documents presented for review can easily increase as much as tenfold or even more if duplicates and near-duplicates are not eliminated early. Technologies exist to eliminate both exact and near duplicates, such as those that result from the common practice of adding a superfluous “thank you” comment to an original email and passing it along. Parties are encouraged to discuss ways to cull these additional documents well in advance of further processing and review.

“All”

Finally, the greatest cost driver in electronic discovery is the use of the word “all.” There are too many duplicate, historical, and unknown sources of data

that may contain some “unique” data. For 99 percent of respondents, it is economically impracticable to drill down deep enough to represent that all sources of ESI have been identified and that all documents from those sources have been produced. A better approach to the word “all” is to identify the process that was engaged for identification and preservation, the technology used for processing the data, the manner in which the data was reviewed, and the format being used for production.

In using the analogy of comparing electronic document production to hard-copy collection, in electronic document production, you have numerous potential warehouses full of banker’s boxes of documents lurking on two-inch drives. Common examples of non-existent data stores we routinely find are: millions of responsive documents in an executive’s briefcase on a USB drive; the garage of the desktop support person’s home being used for off-site storage; a replaced but still active email server being stored in an electrical room storage closet; and numerous loose media storage devices kept in a file cabinet drawer. It is critical to understand that by

training, IT team members are trained to make backups and backups of backups.

The Rule 26(f) conference provides a great opportunity to take control of the e-discovery process. Accurate and verified knowledge of your client’s IT systems and data stores creates a competitive advantage as to what steps are cost-effective from a responding perspective and allows the most informed party to control the pace, direction, and costs of the discovery process. Knowledge of your adversary’s systems will form the foundation for surgical discovery tailored to identify the documents that add the greatest value to the litigation without risking uncontrolled and expensive reciprocal discovery.

JAMES E. GORDON is a managing director of Navigant Consulting, Inc., in Los Angeles, CA, and **DAVID P. STENHOUSE** is a director in Seattle, WA.

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