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Where Did My Discovery Dollars Go? Cost Savings in the Era of E-Discovery

In 2010, approximately 294 billion emails were sent every day, and the amount of data generated equalled 1.2 trillion gigabytes, which, if printed, would cover every inch of the United States in a stack of paper three feet deep. The amount of potential data created or entering your company's computer network, combined with the increasing ability to store it cheaply, has created problems when it comes to the production of documents during litigation. While you may have so far avoided the difficulties associated with the discovery of electronically stored information (ESI), eventually, as in-house counsel, you will have to deal with it.

In this article, I hope to give a brief overview of cost-saving suggestions when e-discovery comes up during litigation. Each of the recommendations I make below could be the subject of an article by itself, and my hope here is to impart some initial guidance concerning some of the issues you might face when the discovery of ESI presents itself. What should you do, then, after you receive the notice of claim and issue an appropriate legal hold to all the correct potential custodians of relevant ESI? Please consider the following.

Discovery really has not changed. Just as it has been, discovery remains the searching, collection, and review of relevant information or documents. The differences between "traditional" discovery and e-discovery are that the storage repositories of potentially relevant documents are much larger than they ever have been, and the tools and processes to deal with the new volume of ESI are more complex. Unfortunately, if you attempt to deal with the discovery of ESI the same way as paper, you will be in for a long struggle and very high bills.

Insist your outside counsel become knowledgeable about the discovery of ESI. Gone are the days of simply being able to ignore ESI and hope that the issue does not come up. If information related to a claim or defense resides on an electronic medium (and likely it does), then the suit involves ESI. Your outside counsel will need to be conversant with ESI discovery to advise you regarding possible next steps when faced with a discovery request, which could include printing the ESI out and producing it in the "traditional" way. The suggestion here is to make a conscious, informed decision about the discovery of ESI, rather than just defaulting to "Well, that's the way we've always done it." Instead, when the discovery of ESI is at issue, you should collaborate with your outside counsel and discuss questions concerning many topics, including: The type of collection; the selection of an e-discovery vendor; and the type of ESI review needed.

Insist on cooperation between your outside counsel and opposing counsel. Recently, the Sedona Conference®, a legal think tank dedicated to the advanced study of law and founded to develop best practices in areas including e-discovery, observed, "The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system." The best way to avoid costly discovery disputes is for all the parties, at the outset of litigation, to engage in frank discussions regarding the breadth of ESI discovery. The reigning paradigm of blanket objections, reading discovery narrowly, and "giving them nothing" will assuredly come to end because "[t]he alternative [to cooperation] is that litigation will become too expensive and protracted in a way that denies the parties an opportunity to resolve their disputes on the merits."

This is not to say that cooperation is capitulation. Importantly, cooperation is consistent with zealous advocacy. Cooperation encourages parties to collaborate in such a way that they save *(Continued)*

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money, maintain more control over the information they disseminate, and engender goodwill with the court. In so doing, the more costly route of motion practice and judicial intervention will be limited to legitimate discovery disputes between the parties.

Insist on a meaningful "meet and confer." Many attorneys perfunctorily participate in "meet and confer" discovery conferences, such as the one mandated by Federal Rule 26(f). Doing so, however, wastes one of the best opportunities to shape the way discovery will proceed and the costs attendant to the process. Even when not required by rule, if ESI is involved, a discovery conference in which the parties thoroughly address ESI questions should always be something in which you want your outside counsel to participate. There, counsel can discuss issues like sources of ESI and whether those sources are "reasonably accessible," appropriate timeframes, search terms, and the forms and timing of productions.

Your outside counsel's preparation for the meet and confer is critical and should always include a meeting with one of your company's IT personnel. To have a meaningful conversation about ESI your counsel will need a good working knowledge of, among other things, the overall IT architecture, how data is stored, what software applications are involved, and limitations on the export of ESI and what data might not be accessible because of undue burden or cost.

Two final points regarding discovery conferences: First, a face-to-face meeting is preferable as they tend to be more productive than telephone conferences. Second, have a knowledgeable company person (usually someone from IT) available, at least by telephone, to answer the harder technical questions about the possibly discoverable ESI, especially if your counsel is going to assert that certain data is not reasonably accessible.

Even with cooperation, legitimate discovery disputes will arise and your outside counsel needs to know what options are available. When it comes to ESI under the Federal Rules, your outside counsel should be proficient with Rules 26(b)(2)(B) and 26(b)(2)(C)(iii). These rules provide the basis for limiting the scope of ESI discovery and for cost shifting. In federal court, particularized, informative objections with these rules in mind should be part of any litigator's toolkit. Unfortunately, Missouri and Illinois do not have these specific e-discovery rules, but comparable arguments for limiting the scope of discovery and cost allocation, when needed, should be made pursuant to Missouri Rule 56.01(c) and Illinois Rule 201(c).

Evaluate whether an e-discovery vendor is cost effective. Arguably the most expensive component of ESI discovery is the review of the data collected. Two things account for this: (1) The costs associated with processing and storing ESI; and (2) attorneys fees for reviewing ESI.

If the case calls for it, the right vendor is an asset, and finding the correct vendor should be a collaborative effort between in-house counsel (who is paying the bills) and outside counsel (who will use the vendor's products). Counsel should evaluate multiple vendors to determine an appropriate (*Continued*)

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fit. Here, experience with hiring e-discovery vendors is a benefit because these vendors tend to have radically different ways of pricing their services.

But not all cases require a full-blown e-discovery platform and vendor involvement. Many cases involving ESI can be handled in-house, with the data stored on outside counsel's servers and a desktop application like Summation sufficing as the review tool. For the right case, this is a cost-effective litigation option. Your outside counsel should be able to perform a proper initial evaluation to determine if self-hosting is appropriate.

Make sure outside counsel consider different tools to cull down the collected ESI. The fundamental components of an e-discovery vendor's typical pricing model include: (1) The amount of data being reviewed; (2) the number of reviewers; (3) and the amount of time the review will take or how long the data will be stored. Reduce any one (of all) of these factors and you reduce the overall costs associated with review.

In 2011, "predictive coding" (software-based mathematical algorithms used to perform analyses of documents to find those documents most likely relevant) and "early case assessment" (ECA) were the hot topics. The goal: Use these tools and analytics to help counsel understand the data collected and to review it as efficiently as possible. While not cheap, these tools, used correctly, can lower review costs in the long run by decreasing the amount of data to be reviewed and by streamlining the process. Skilled and experienced ESI counsel should be able to evaluate the pros and cons of these tools.

Planning is the key. Good planning and execution as it relates to the searching, collecting, and reviewing of ESI can offer significant savings of litigation dollars. Knowing, up-front, what ESI to collect, how to collect it, and the efficient methods to review it provides some predictability in developing a litigation budget. Having experienced ESI counsel, who can advise on best practices and potential pitfalls of an e-discovery plan, is invaluable. With counsel appropriately versed in the nuances of the discovery of ESI, when you are faced with the discovery of ESI, you will not be caught unprepared, and you will better be able to manage and predict the costs of discovery.

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