KEEPING THINGS IN PERSPECTIVE: 7 WAYS TO STREAMLINE E-DISCOVERY
By D. Mark Jackson

We're now familiar with the electronic discovery horror stories: the tens of thousands of missing emails and multi-million dollar sanctions in Qualcomm, the dismissal of claims in Bray & Gillespie, and the adverse inference jury instruction based on the failure to preserve data in Pension Committee. Not to mention the dozens of other decisions this year where courts have issued sanctions for failure to properly handle electronically stored information (ESI).

Fortunately for most litigators, few claims involve the stakes or scope of these disputes. But your clients and adversaries may still have significant volumes of ESI to consider. With the first anniversary of California's Electronic Discovery Act, and other state law changes, there's less chance to ignore e-discovery issues in state court, as many litigators might prefer to do. So how can you keep e-discovery costs and efforts reasonable?

As a starting point, consider that discovery should be proportional to the controversy. Not dealing with five million barrels of spilled oil in the Gulf of Mexico? Then you probably don't need to preserve, review, and produce every piece of electronic data related to your client's business operations. State courts and federal courts recognize the principle of proportionality. Rule 1 of the Federal Rules of Civil Procedure provides for "the just, speedy, and inexpensive determination of every action and proceeding." Federal Rule 26(b)(2)(C) and section 2031.060(f) of the California Code of Civil Procedure require the parties to weigh the costs and benefits of discovery, taking into account the amount in controversy and importance of the issues and information sought. So keep things in perspective.

With this as a framework, consider these seven ways to keep your e-discovery efforts proportional to what's at issue:

1. **Cooperate**. No matter what the case, if so motivated, any party can use e-discovery to make things expensive and cumbersome for their opponent. Without making compromises, even small cases involve more data than can be reasonably managed. E-discovery veterans will attest that the only way to navigate the process is to negotiate and agree on the process. (The need to cooperate is compelling set forth in the Sedona Conference Cooperation Proclamation.)

So why would your opponent agree to anything short of perfection from you? For one thing, they can't be perfect themselves and don't want to be held to the same standard. And more importantly, they wouldn't want the results of perfection: your production might yield more ESI than they can afford to deal with. It's in everyone's interest to negotiate a reasonable plan. It's worth your time -- and your client's money -- to negotiate as much as possible to reduce the burden of e-discovery.

But whatever you agree to, just confirm it in writing -- not because you don't trust your opponent, but because the agreement will involve details which neither of you will remember otherwise.

2. **Educate your opponent**. Or as e-discovery veteren Helen Marsh puts it: "Go to the danger." This will sound counterintuitive to many hardened litigators. But most also will concede that, for example, it's easier to settle with opponents who know their case. Same with e-discovery: it's easier to resolve disputes about ESI if your opponents understand the facts and legal issues. So be willing to share your own information, including facts about your client's data and information systems, as well as your legal knowledge. And if you're on the other side, don't be afraid to ask questions.

3. **Limit preservation and collection**. As Judge Shira Scheindlin wrote in her amended order in *The Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC, et al*., 685 F. Supp. 2d 456, 471 (2010): "[T]he failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to just the key players, could constitute negligence." For even a modest-sized case, "all" employees with "any" involvement could equate to a huge amount of data.

But there's nothing stopping parties from negotiating a limited preservation and collection of records. For example, after an initial round of client interviews, it may be obvious that only three people in your client's organization were significantly involved with an employment dispute. Explain this to your opponent and get permission to limit your preservation to these three custodians. Not only will this save time and money, it will diffuse charges of spoliation if you later discovery a fourth custodian.

4. **Collect data intelligently**. Commentators have warned against "self collection," citing dangers ranging from malfeasance to simple technical incompetence. It's true that, in many cases, a party has no business collecting its own records. But to paraphrase general counsel for one of the world's largest corporations, speaking at a Sedona Conference gathering last year, "why do companies spend all of this money to organize their data for business purposes, only to hire an outside vendor to make it less organized for litigation purposes."

So take advantage of your client's existing information systems and structure. For example, if all the relevant email surely resides in a particular Outlook user folder, just collect from that folder. Or if relevant sales information can be obtain by running a simple search on the organization's enterprise resource planning system, just run those searches and print out the reports. There's no need to pay for an expensive forensic collection of all custodian data. Of course, your opponent may not immediately see the wisdom of this path, so it's important to talk through the issues in advance and confirm in writing any agreement to take this approach.

5. **Rely on your vendor**. Hire a vendor you can trust and is willing to explain things to you. Build on this relationship, because you'll each benefit from the shared experience of repeat business. It can be difficult to choose between the many competitors in the vendor market. Shorten the selection process by getting recommendations from trusted colleagues with actual experience with a vendor.

6. **Use hosted databases**. Nearly all litigants can now afford the world's most sophisticated review platforms. It's true. Many vendors will not only store your collected electronic data, they can supply some of these most advanced review tools and databases, such as Clearwell or

Relativity. You can negotiate the setup fees, and monthly charges are usually in the range of several hundred dollars per user. You may be able to negotiate free training. All you need is an internet connection and the appropriate web browser -- no need to buy expense software and hire the even more expensive litigation support employees needed to maintain it. And once you've completed your review and production of documents, you can store the production in-house, archive the database, and stop the monthly incurring charges (with the option to reactivate it later in the case).

7. **If all else fails, go to court**. What if you can't get your opponent to be reasonable? While it should be a last resort, there's nothing wrong with getting relief from the court. In California, a responding party may simply object to producing records on the grounds that the information is "from a source that is not reasonably accessible because of undue burden or expense . . . ." Just be able to back this claim up in your motion for protective order or in response to a motion to compel. Use your vendor as a resource to develop the technical facts of your dispute (they should be willing to sign declarations or testify if necessary, on your behalf). And if your opponent is being unreasonable about producing ESI, bring a fact-based motion to get the information to which you're entitled.

As e-discovery becomes more common, negotiating with opponents and working with vendors will get easier. And as you work through e-discovery issues, you'll develop your own methods and tricks for resolving these problems. Through cooperation and reasonableness, you can keep e-discovery in perspective.