DISCOVERY DILEMMA: HOW TO PLAN FOR THE "BIG ONE" WITHOUT INCURRING BIG FEES

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"eDiscovery is expensive." This is a common refrain, particularly among attorneys and companies for which the bulk of litigation involves smaller matters with relatively limited exposure – slip and fall cases, routine employment litigation, and the like. It is inspired by tales (not unfounded) of large eDiscovery cases in which the cost of discovery alone runs into the tens and even hundreds of thousands of dollars. For the vast majority of USLAW NETWORK firms, those types of cases are simply not part of their reality.

Still, we all know the risk. eDiscovery aside, we all understand that among the daily fare of routine cases with modest exposure there may lurk the "big one" – the case in which issues arise that multiply the potential exposure and transform the case from routine into bet-the-company litigation. USLAW NETWORK attorneys are excellent lawyers fully capable of handling the toughest issues in the most challenging case. But, when the case gets more complex, it is very likely that the scope of discovery, including eDiscovery, will as well.

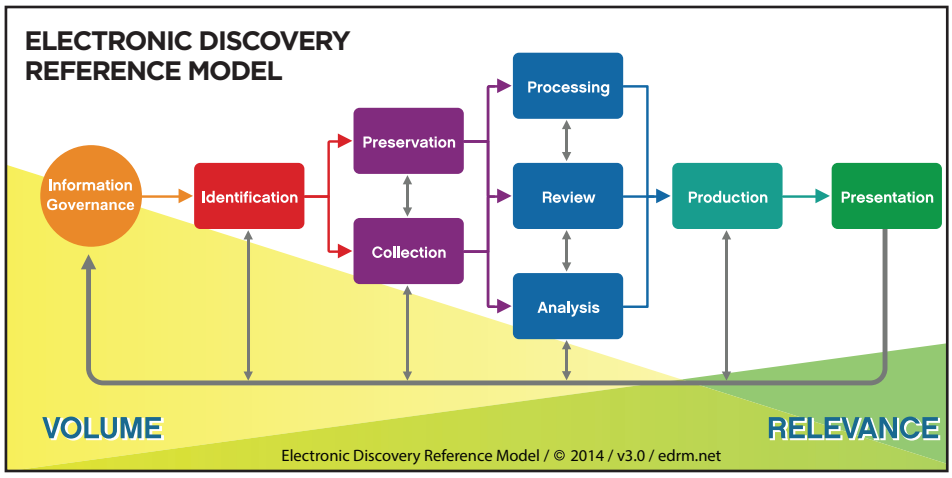
Consider some of the most well-known cases in the eDiscovery milieu. If any eDiscovery case can properly be described as venerable, it is *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*). Spanning four major eDiscovery opinions in addition to *Zubulake I*, Judge Shira Scheindlin helped to define eDiscovery case law for the following decade and beyond. What kind of case was *Zubulake*, you ask? Surely some multi-district litigation or class-action, or perhaps a large commercial case between multi-national corporations? No, *Zubulake* was an employment discrimination case in which the plaintiff (who has since become something of an eDiscovery celebrity in her own right) alleged sexual discrimination. The case ultimately resulted in a $29.3 million verdict – including $20.2 million in punitive damages, at least some of which were no doubt a result of the court's adverse inference instruction regarding deleted emails.

Zubulake is not an anomaly in eDiscovery lore. Perhaps the best decision on the admissibility of electronically stored information (ESI) in support of motions for summary judgment or at trial is *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), authored by Judge Paul Grimm. Well worth the read for its excellent presentation of evidentiary law and the corollary impact on how ESI should be collected, the case involved a pretty simple insurance coverage dispute. The plaintiffs sought compensation for a boat that suffered $36,000 in damages during a storm. The insurer contended that only $14,100 of the damage was covered, so the parties were litigating over the vast sum of $22,900. It is likely neither side suspected their small matter would be the subject of an 80-page decision.

More recently, in an age discrimination case, Judge Terence Kemp of the Southern District of Ohio imposed discovery sanctions including the preclusion of evidence that the plaintiffs were terminated for performance reasons (somewhat significant in a discrimination case), as well as attorney's fees and costs. *Brown v. Tellermate Holdings Ltd.*, No. 2:11-cv-1122, 2014 WL 2987051 (S.D. Ohio July 1, 2014). The court noted:

> Over the past decade, much discussion has been devoted to the topic of how the prevalence of electronically stored information (ESI) either has impacted, or should impact, discovery in civil actions filed in state and federal courts. While the preservation, review, and production of ESI often involves procedures and techniques which do not have direct parallels to discovery involving paper documents, the underlying principles governing discovery do not change just because ESI is

involved. Counsel still have a duty (perhaps even a heightened duty) to co-operate in the discovery process; to be transparent about what information exists, how it is maintained, and whether and how it can be retrieved; and, above all, to exercise sufficient diligence (even when venturing into unfamiliar territory like ESI) to ensure that all representations made to opposing parties and to the Court are truthful and are based upon a reasonable investigation of the facts. As another Judge of this Court has observed, "trial counsel must exercise some degree of oversight to ensure that their client's employees are acting competently, diligently and ethically in order to fulfill their responsibility to the Court," *Bratka v. Anheuser–Busch Co.*, 164 F.R.D. 448, 461 (S.D.Ohio 1995) (Graham, J.). That holds true whether the bulk of the information relevant to discovery is ESI or resides in paper documents.



Though it is true that many of the significant eDiscovery cases over the past decade have involved large-scale litigation, these opinions are by no means outliers. eDiscovery can become an issue in virtually any case. And, while attorneys may be prepared for the "big one" in terms of trial skills and litigation expertise, the question remains how lawyers and their clients can be prepared for the big eDiscovery case without incurring unreasonable expenses in every routine case? The answer lies in how attorneys approach identification, preservation and collection of information. If done properly, attorneys can take steps to ensure that their clients are adequately prepared for virtually any eDiscovery issue in every case without incurring unreasonable costs.

IDENTIFICATION

eDiscovery attorneys and experts are fond of presenting the subject as a process, as shown above in what is known as the Electronic Discovery Reference Model.

The first step in the process from a discovery standpoint is "identification," but many attorneys give this step far too little attention and generally leap directly to the preservation stage. Particularly with regard to ESI, identification is critical. It is important that attorneys think about possible sources of ESI in every case, regardless of whether that information will ever be collected or used. The client's duty is to preserve potentially relevant information, and it is the inadvertent destruction of ESI – largely as a result of failing to identify that information in the first place – that has likely resulted in more sanctions than anything else. By taking sufficient time at the start of a matter to identify potential sources of ESI, including not only email and documents created by individuals, but also enterprise data such as the salesforce.com data that was the subject of the *Brown* case, attorneys can help their clients avoid inadvertent destruction of ESI without incurring any significant costs. Moreover, lawyers should deliberately revisit the identification step as the case matures and the issues become more clear to ensure that potentially relevant information remains available should the need arise.

PRESERVATION

Having identified potentially relevant information, companies must take reasonable steps to preserve that information. Most often, this involves simply issuing a written legal hold notice and monitoring compliance. In some situations, however, preservation may require more. A good example is with departing employees. It is very common for IT departments to erase the hard drive and repurpose the computer equipment used by terminated employees. If the employee is subject to a legal hold, steps must be taken to preserve potentially relevant information on that computer before it is wiped and reissued. Similarly, there are often enterprise systems (again, consider salesforce.com) that are in active and constant use. The data in those systems can change minute to minute. It is sometimes necessary to capture data from such systems to ensure it is properly preserved.

COLLECTION

As noted at the start of this article, most routine cases do not require that attorneys collect a great deal of ESI. There may be exceptions for preservation reasons, but, quite often, preparing for the "big one" involves only identification and preservation of potentially relevant ESI. When collection is necessary, either as part of the response to routine discovery or for preservation purposes, it is critically important that it be done properly to ensure that the collected information is not changed in the process. Common methods of "dragging and dropping" to a flash drive or printing to PDF will permanently change the document being collected. Whenever collecting ESI, attorneys should ensure that the person responsible for the collection has the necessary qualifications and tools to do so properly, so that, in the event, however unlikely, that the collection procedures are challenged, they can be defended.

CONCLUSION

I have written before that every case is an eDiscovery case. This is true because virtually all information is generated and stored electronically. That does not mean that every case is a *big* eDiscovery case, any more than every matter that you handle will turn into major litigation. However, just as you hone your skills and plan your trial strategy so that you are prepared if and when the worst happens, so too should you plan your discovery response so that you are prepared if the big eDiscovery case hits.

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