Chapter 9

Handling Costly E-Discovery Demands in "Smaller" Cases

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E-discovery and its management costs and time consumption are expected in "bet the company" litigation among corporate parties. In those cases, the amount in controversy may often justify the high cost of extensive data searches, privilege reviews, and the uncovering of metadata as necessary litigation tasks. But take a look at any daily new-case filing list and be reminded: the great majority of cases occupying the docket of federal and state courts do not involve exposure justifying even the most basic expenditure necessary to manage a meaningful e-discovery exchange. Indeed, "common-place litigation," *i.e.*, the typical contractual disputes, employment litigation, and the broad variety of slip and fall and motor vehicle related tort matters that constitute most cases, frequently involve exposure not exceeding six-figures.

The impact of electronically stored information ("ESI") upon the merits of the case is no less prevalent in common-place litigation. For most companies lacking a streamlined management protocol, however, ESI management costs limit a meaningful pursuit of e-discovery in such cases. For example, how does a defendant manufacturer in a product liability action, faced with a legitimate request to reformat and search thousands of emails, design reviews and testing protocol stored on accessible back-up tapes, perform a responsible search and privilege review, when the cost is estimated at $200,000, but where the value of the plaintiff's case is less than $1 million. Courts have developed a variety of tests for deciding such issues, including the *Zubulake* decision, and the application of this test to smaller controversies will be discussed briefly below. The specific factors and the weight given to such factors may vary by jurisdiction and even by judge, so it is important to understand the precise test and how it may apply strategically, to help protect (or acquire) the subject ESI.

Whether to Raise the Issue

A preliminary question is whether counsel should raise the issue of e-discovery at all. This depends in part on whether the case is in federal or state court. In federal court, the Rule 26(f) meet and confer and initial disclosure requirements require a party to identify any ESI on which it intends to rely affirmatively to support claims or defenses. Many state courts do not have such an initial disclosure rule, however, and the decision as to whether to identify, wait or withhold the information in state court is more discretionary and dictated by the parties' specific discovery requests. Nevertheless, the Federal Rule Amendments and corresponding state court adaptations should not be over-read. Fed. R. Civ. P. 26 and the few state courts whose rules require initial disclosures require counsel to be prepared to address the management of e-discovery at the Rule 16 conference.[1] But it is important to understand what this does and does not mean with respect to e-discovery. Without question, this does require counsel to confer with the company to identify categories and the location of data, and to secure a technical company liaison prepared to help manage data that most lawyers without such skills could not handle alone. In a case in which active e-discovery is anticipated, securing your adversary's stipulations and a court order providing, for example, claw-back agreements to guard against inadvertent disclosure of privileged data is often a good idea. In such a case, involving the court at the first possible stage to manage these issues is one of the main goals of the Rule Amendments.

While the Rules require counsel to be prepared to help the court manage the issues, being prepared is not the same thing as affirmatively raising the issue. Even in federal court, for example, there is no obligation *to raise* issues about ESI if a party does not intend to rely affirmatively upon the ESI as evidence. Unless and until

[1] *See*, *e.g.*, D.N.J. L.R. 26.1(d) (creating duty for counsel to investigate their clients' data systems and information files and identify person with knowledge of systems prior to Rule 26(f) conference; requiring party seeking electronic discovery to notify responding party as soon as possible; and creating duty of counsel to discuss digital discovery matters, if relevant, including who will bear costs of preservation, restoration and production, at the Rule 26 conference).

a party explicitly expresses an intent to pursue e-discovery, there may be no obligation to address it at all. Courts have the authority to raise e-discovery issues on their own initiative pursuant to the management powers afforded by Rule 16. *See*, *e.g.*, Fed. R. Civ. P. 16(a)(3) ("… the court may in its discretion direct… the parties… to appear… for such purposes as… establishing early and continuing control so that the case will not be protracted because of lack of management."). And indeed, perhaps because of the topical nature of the Amendments, federal district courts frequently include specific provisions in orders scheduling the Rule 16 conference, which seem to impose an affirmative obligation to raise the issue. Yet, the Rules state no such requirement to raise the issue. In practice, at least in smaller cases, federal courts at Rule 16 conferences frequently do not raise the issue at all unless prompted by counsel. As defense counsel, in smaller cases or cases in which a company is opposed by an individual who is not faced with this dilemma, calmer heads prevail when you are prepared, but patient in waiting to see whether the e-discovery issue is raised at all.

E-Discovery as a Sword

So much attention has been focused upon defense compliance with the e-discovery rules that using e-discovery as a sword is often overlooked. Without question, the decision to open the door and affirmatively pursue ESI, particularly in common-place litigation, must be based on whether one's "own house is in order." Company litigants that have stream-lined the management of existing, accessible data, and who have protected inaccessible data through prudent retention policies will necessarily be better able to pursue ESI, knowing that it may withstand reciprocal requests. Perhaps most importantly, having an efficient system for managing one's own ESI may enable a company to aggressively pursue accessible discoverable data from one's adversary, while not experiencing the same cost concerns upon a reciprocal request.

Given the leverage that an effective ESI request may cause, being prepared to pursue such requests may dictate the outcome of common-place litigation. It should not be difficult to discover from one's adversary active files residing on hard drives, key fobs, or PDAs, regardless of whether it is an individual or an entity, where the propounding party is prepared to do the same cost effectively. At least in the present pre-Amendment environment, most counsel will not be prepared to handle ESI in a small case. Being prepared also will enable the propounding party to evaluate how the content of its own actively residing data impacts the merits of the case more efficiently. Thus, whether the issue is compliance or pursuit, there is a competitive advantage to having systems in place to manage e-discovery.

Applying the Test: Balance the Controversy with the Request

The most widely accepted test for determining the discoverability of ESI and cost-shifting considerations was stated by the Southern District of New York in *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).[2] Most courts recognize and apply at least some variation of seven factors stated by *Zubulake*, including: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.[3] Ordinarily, these factors are weighted in descending order with the greatest weight being given to factors one and two, and the least amount of weight to factors six and seven.[4] However, in cases involving a smaller amount in controversy, a different approach applies.

[2] The Zubulake test is an extension of the test created in Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002), and is touted as bringing the Rowe test analysis closer to the requirements of Rule 26. Hagemeyer North America, Inc. v. Gateway Data Sciences Corp., 222 F.R.D. 594, 602 (E.D. Wis. 2004).

[3] Zubulake, 217 F.R.D. at 322.

[4] *Id.* at 323; Hagemeyer, 222 F.R.D. at 602.

Although *Zubulake* did not squarely address such a situation, the court recognized that "where the cost… is significant compared to the value of the suit… even… minor effort *may* be inappropriate." *Zubulake*, at n.77 (comparing the cost of initial sampling to the amount in controversy).

In common-place litigation, the *Zubulake* factors are prioritized differently, and factors three, five, and seven are likely to be more significant. In deciding, over an objection, whether the costs of a particular discovery request seeking a search and privilege review of extensive email will be discoverable, or borne by the requesting party, a court will necessarily consider the relative cost in relation to the amount in controversy. This cannot be a precise determination. Although the parties may be able to agree upon a range of the subject production costs, the amount in controversy is not always so easily calculable. In personal injury cases, for example, the parties often are not able to agree upon ranges as to potential damages for purposes of the ultimate outcome, much less as a basis for determining discoverability. It is similarly difficult to evaluate the value of a cause of action for equitable or injunctive relief, which by its very nature may involve irreparable harm and sometimes matters of the utmost public importance, but which nevertheless are difficult to quantify.

Determining the importance of the information in relation to the amount in controversy is done on a sliding scale. ESI may be critical to the merits of the case and unavailable from another source, but nevertheless undiscoverable unless the propounding party wishes to pay for the cost of responding if the costs significantly outweigh what is at stake in the case.

Acquiring comparatively costly ESI is, therefore, largely a cost-benefit analysis for the propounding party. How much are you willing to spend to improve your case? In cases where financial gain is not the primary goal, it is a different inquiry. However, one way in which to avoid e-discovery cost obstacles is by using sampling.

Using Sampling to Avoid Costs

Many of us learned in law school how to perform legal research by formulating effective Boolean searches on Westlaw and Lexis. The same skills apply to developing effective sampling terms to search for ESI. Sampling narrows the inquiry to a smaller grouping of interrelated search words relevant to the case issues. Because the search may typically be performed by simply asking the target system to search itself, and perhaps not involving substantial man-power to format or review the data, substantial time and costs savings are achieved. Sampling also is favored by courts because it is quicker, and may be handled on a step-by-step basis, sometimes in multiple, successive waives, depending upon what each layer of sampling results yields. *See*, *e.g.*, *Zubulake* at 324 (the responding party, at its own expense, must restore and produce responsive documents from appropriate sampling of requested documents). Because definite terms and search processes are defined and identified to the court, there is a greater degree of accountability. Cost-shifting becomes less of an issue where the bill is a fraction of the more intrusive request that the responding party perform a full search. Of course, as with any process, it is necessary for counsel and the court to test the integrity of the sampling process.

Conclusion

Responding to and pursuing e-discovery in smaller cases requires a particular emphasis upon managing costs in relation to the scope and goals of the litigation. Proper planning, an understanding of how the applicable legal test will apply, and the use of effective sampling, may enable a party to avoid the impediments that costs often present to meaningful treatment of e-discovery in smaller cases. It might make the difference in winning or losing the case.