"Right-Size" the Scope

Understanding E-Discovery Cost Drivers and Levers to Adjust

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Greater insight helps empower organizations to make important strategic decisions regarding their people, technology, and cases.

In today's business environment, legal costs are under a microscope. For companies on the receiving end of litigation, understanding the key cost drivers can help in-house counsel strike the right balance in setting relationships with external legal counsel, and in setting overall case strategy.

The discovery phase alone can represent more than 50 percent of total litigation costs. These costs are driven up by the sheer volume of a company's electronic data, and also by the strategies—or lack thereof—implemented by in-house and external legal counsel to accomplish the preservation, collection, review, and production of documents. Below are insights on some of the more significant cost drivers in e-discovery, and the levers counsel can adjust to save on the bottom line.

Preservation

Parties are required to demonstrate reasonableness and good faith in their preservation conduct; however, preservation efforts are also measured by the concept of proportionality. *See, e.g.*, *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 496, 522 (D. Md. 2010) (*Victor Stanley II*) (("[A]ssessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence."); *Rimkus Consulting Group, Inc. v Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."); The Sedona Conference, Commentary on Proportionality in Electronic Discovery, 11 Sedona Conf. J. 289, 296 (2010) (noting that a court should look to the party's good faith and reasonableness when evaluating that party's preservation decisions). Parties cite a current lack of guidance in the Federal Rules of Civil Procedure as to preservation duties, and fear the economic and reputational costs associated with becoming the next spoliation sanctions headline. Thus, they tend to over preserve in an abun-

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dance of caution. While it may reduce spoliation risk, over preservation tends to have its own costs relating to storage of large amounts of electronically stored information (ESI) and the resources needed to manage it; leads to increased downstream e-discovery costs associated with collection, processing, and review; and creates potential litigation risks relating to retaining material not subject to legal hold obligations.

Shifting from a "preserve everything" to a more targeted preservation strategy can comply with the good faith and reasonableness requirements, while also taking proportionality into account. Courts have recognized the costs and burdens associated with having to maintain large amounts of data and, when contemplating preservation orders, often refuse to require parties to preserve "all" data. *See*, *e.g.*, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations."). At least one court has specifically suggested that if it is too expensive to preserve all data, a party can search for relevant data, preserve that data, and delete the irrelevant material. *See Wiginton v. CB Richard Ellis*, No. 02-C-6832, 2003 U.S. Dist. Lexis 19128, at *17–18 (N.D. Ill. Oct. 27, 2003). Moreover, in *Zubulake v. UBS Warburg, LLC*, 228 F.R.D. 422, 432 (S.D.N.Y. 2004), the court suggested the use of keyword searching for preservation purposes, stating

> To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.

Along these lines, the Advisory Committee on Civil Rules is currently considering proposed amendments to the Federal Rules of Civil Procedure, including Rule 37(e) and the potential sanctions for failure to preserve discoverable information. Although it is unclear what the final form of Rule 37(e) may take at this time, the proposed amendments represent a significant step forward in aiming to set a uniform sanctions standard, which attempts to address challenges presented by the growth of data and help eliminate ambiguity for organizations striving to strike the right balance and implement reasoned approaches to information management, litigation readiness, and preservation-related practices.

In light of the above, a company considering a targeted preservation approach should involve members of legal, IT, and records management and carefully plan and document all aspects of the development and implementation of the process to enhance defensibility. The targeted approach should lead to lower preservation and downstream e-discovery costs over time. However, parties should consider discussing the targeted preservation process with opposing counsel to potentially avoid later challenges.

In addition to tailoring the scope of preservation, releasing a legal hold is just as important as issuing one. Accumulation of unneeded data can continue to increase data storage costs, cause business disruption, and create litigation risk. Organizations should regularly inventory their legal matters to determine which holds may be released. When a matter has concluded and there is no need to retain related information (*e.g.*, for business or records retention purposes, or where another legal hold applies), companies should instruct their employees and IT departments accordingly.

Processing

Data processing typically includes reducing the volume of ESI for review through techniques such as deduplication, converting ESI to a more suitable format for review and production, and any contextual analytics used to group or categorize the ESI. Some organizations have invested in technology, and perform various processing steps in-house, while others outsource these steps to e-discovery vendors. Vendors typically charge on a per-unit basis (*e.g.*, per expanded gigabyte of data received), and may also have hourly or other fees for services outside of processing. The size of the per-gigabyte processing fee is directly related to the volume of data exported to the vendor. Organizations that take even a broad cut at the data in-house, by using simple keywords for example, can save on the downstream processing costs.

It should be noted, however, that even when outsourcing e-discovery steps to a vendor, the organization remains responsible for supervising that vendor. Parties "cannot place the burden of compliance on an outside vendor and have no knowledge, or claim no control, over the process." *Peerless Indus., Inc. v. Crimson AV, LLC*, No. 1:11-cv-1768, 2013 WL 85378 (N.D. Ill. Jan. 8, 2013). Therefore, there are likely to be internal resource and potential outside counsel costs associated with overseeing vendor processes.

Review

Document review can account for the majority of a party's e-discovery costs and review of ESI can take many forms. Typical focus areas for review are relevance to the matter or responsiveness to discovery requests, confidentiality, attorney-client privilege and work product, and perhaps issue codes that may help counsel further narrow their analyses of the reviewed materials. The traditional case counsel document review model uses outside counsel handling the case to put eyes on each of the collected and processed documents to make these key decision points prior to production. This approach has been seen as low risk, but typically comes with higher costs for service models that charge hourly rates for attorneys completing the review.

To decrease these expenses, organizations can look at different ways to staff document reviews using lower cost options (*e.g.*, using contract resources, LPOs, or a

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hybrid law firm-contract attorney model). However, it should be noted that a model where the lead law firm for the litigation manages and oversees a non-law firm document review provider may not save the intended costs, particularly where the law firm is providing the management and oversight at its hourly rates.

Centralizing document review with a single hybrid law firm-contract attorney review provider, rather than having it dispersed among multiple law firms and vendors, can bring consistency across matters and should create efficiencies since the wheel is not being recreated for each project. Moreover, where document reviews can be sourced via alternative fees (*e.g.*, per page or per document), it brings a level of budget predictability to the litigation.

In addition to staffing and alternative fee arrangements, organizations should consider whether technology assisted review (TAR) is appropriate for their matters. Predictive coding, as one form of TAR, offers an alternative and often an empowering view of a data set. These technologies allow counsel to "train" the software to recognize documents of a particular sort (*e.g.*, relevant, irrelevant, and privileged). Other forms of TAR include text recognition, contextual analytics, and autocoding, which, like predictive coding, can categorize documents and then be used to streamline workflows and to potentially reduce the scope of information requiring analysis by human beings.

TAR workflows have been approved by courts, *see, e.g., Da Silva Moore v. Publicis Groupe*, No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 23350 (S.D.N.Y. Feb. 24, 2012) (permitting consenting parties to engage in computer-assisted review), but TAR may not be the solution for all matters and is not likely to completely replace the need for human input. However, it is an option that in-house and outside counsel should become familiar with to evaluate the potential efficiencies to be gained.

The Need for Better Tracking of E-Discovery Spend

While it may be easy to understand that e-discovery is expensive, not all legal departments are able to accurately track e-discovery spend and to allocate it among different phases of discovery and different resources. Organizations may need to make strategic decisions on insourcing versus outsourcing based on the historical financial impact of certain processes, or may need to present to a court the burden and cost associated with preserving, collecting, and reviewing a large volume of data.

Greater insight into the various cost drivers of litigation and e-discovery helps empower organizations to make important strategic decisions regarding their people, technology, and cases. Including legal, IT, and finance will help best position the organization to leverage existing tracking capabilities, and to develop integrated solutions. Organizations that implement practices up front to perform detailed tracking of e-discovery spend are also better positioned to advocate to right-size the scope of e-discovery, and to help achieve real and impactful cost efficiencies. FD