New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
E-Discovery
An ALM Publication
WWW.NYLJ.COM
MONDAY, OCTOBER 6, 2014

Eliminating **Asymmetrical Discovery** To Resolve Disputes on the **Merits**

BY GEORGE A. ZIMMERMAN
AND GIYOUNG SONG

The public comments to the proposed amendments to the Federal Rules of Civil Procedure "made clear that the explosion of ESI will continue and even accelerate," and "the litigation challenges created by ESI … will increase, not decrease."[1] Judges have noted that the growth of ESI, and the rise of e-discovery have been "most jarring to the system" of legal justice.[2]

Continuous Explosion and Rising Costs

Discovery in litigation is measured in gigabytes, terabytes, and now even in petabytes. A study quantifying discovery costs reported that more than half of the cases examined involved at least 100 gigabytes of ESI.[3] For perspective, 100 gigabytes of ESI is equivalent to 6.5 million pages of Word files; 1 million pages of email; 16.5 million pages of Excel files; and 1.7 million pages of PowerPoint files.[4] The study shows that in almost half of the cases "production costs," which cover collection, processing and review, ranged from over $40,000 to $900,000 per gigabyte, with total production cost reaching as high as $27 million.[5] Not included in this estimate are preservation costs, which extend to matters that never reach discovery and even to situations where no complaint is ever filed. Preservation triggers internal costs, including attorney, paralegal, IT personnel, and other employee time, as well as costs to store archived data, and purchase and license applications and hardware to manage preservation.[6] For large organizations, annual preservation costs, by conservative estimate, exceed $40 million.[7]

While the cost is skyrocketing, evidence shows that most of the ESI subject to discovery is unlikely to be used in litigation: "On average, only one-tenth of one percent (0.1 percent) of pages produced in litigation are used as exhibits at trial."[8] Microsoft similarly reported that for every 141,450 pages produced, only 142 are actually used.[9]

ISTOCK

GEORGE A. ZIMMERMAN *is a partner and* GIYOUNG SONG *is discovery counsel at Skadden, Arps, Slate, Meagher & Flom.*

Disputes Involving Asymmetrical Discovery

In complex, high-stakes litigation where there is a wide disparity in the volume of discovery each party controls—as in class actions, securities, patent, antitrust litigation, employment discrimination and product liability cases—the incentive for the requesting party to seek broad discovery is high because imposing excessive costs upon the producing party (without the requesting party incurring comparable costs) can be sufficient, by itself, to force settlements and prevent adjudication of cases on the merits.

In proposing to amend the federal rules, the Civil Rules Advisory Committee noted: "Excessive discovery occurs in a worrisome number of cases," particularly those that are "complex, involve high stakes and generate contentious adversarial behavior."[10] The Duke Subcommittee, which proposed the amendments to Rule 26 governing the scope of discovery, highlighted the importance of proportionality in cases involving "'asymmetric information.'"[11] Unless Congress acts to nullify or modify the proposed amendments, which, as set forth below address key issues including over-preservation and over-production of ESI, they could go into effect in December 2015. The current trend in jurisprudence also emphasizes the need to limit discovery to what is necessary for the just, speedy and inexpensive resolution of disputes.

Seeking to Achieve Proportionality

Preservation: Proposed Amendments to Rule 37(e). While the common law duty to preserve does not deviate significantly among

jurisdictions, there is a wide variation in the standard for imposing sanctions for failure to comply. The Second Circuit, for example, permits adverse inference instructions for negligent or gross negligent loss of ESI while other circuits, like the Seventh Circuit, require a showing of bad faith.[12] This uncertainty in the law often causes potential litigants who operate in multiple jurisdictions to default to a standard of over-preservation, essentially preserving everything although the law does not require it.[13]

The proposed amendment to Rule 37(e) rejects authorization of sanctions for loss of ESI resulting from negligence or gross negligence, and requires "intent to deprive another party of the information's use in the litigation."[14] Establishing a uniform national standard is intended to encourage reasonable (not perfect) preservation efforts:

> The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Resolving this circuit split with a more uniform approach to lost ESI remains a primary objective of the Subcommittee.[15]

Preservation: Local Rules and Guidelines Governing Preservation. Both federal and state courts have undertaken initiatives to address over-preservation. A program adopted in the U.S. District Court for the Southern District of New York expects parties to discuss potentially relevant ESI and methods for preservation.[16] Similarly, the New York State Commercial Division provides that parties confer regarding preservation of potentially relevant and reasonably accessible ESI.[17] The purpose of these initiatives is to encourage parties to reasonably limit the scope of preservation.[18]

Consistent with this purpose, discovery guidelines recommend types of ESI to be excluded from preservation. The Seventh Circuit limits the need to preserve certain ESI including deleted data, temporary files, frequently updated metadata, duplicative backup data, and other forms of ESI requiring "extraordinary affirmative measures."[19] The District Court of Delaware excludes certain instant messages and voice messages,[20] and the Northern District of California limits preservation requirements by date restrictions, and by excluding inaccessible data and ESI that may be relevant but whose costs of preservation are not proportional to the needs of the case.[21]

For the producing party, identifying potential sources of ESI could result in the requesting party seeking broad preservation despite the actual need for the information to resolve the dispute on the merits.[22] To address this concern, courts have protected litigants by granting protective orders where the producing party voluntarily disclosed information about preservation in the spirit of cooperation and transparency, and the requesting party "violated the spirit of cooperation" by using that information to request additional discovery.[23]

A study quantifying discovery costs reported that more than half of the cases examined **involved at least 100 gigabytes of ESI**. For perspective, 100 gigabytes of ESI is equivalent to 6.5 million pages of Word files; 1 million pages of email; 16.5 million pages of Excel files; and 1.7 million pages of PowerPoint files.

Proportionality: Proposed Amendments to Rule 26(b)(1). "A principal conclusion of the Duke conference was that discovery in civil litigation would more often achieve the goal of Rule 1—the just, speedy, and inexpensive determination of every action—through an increased emphasis on proportionality."[24] As part of a comprehensive revision to tailor discovery, the proposed amendments would relocate the proportionality factors currently listed in Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). The Duke Subcommittee explained: "The purpose of moving these factors explicitly into Rule 26(b)(1) is to make them more prominent, encouraging parties and courts alike to remember them and take them into account in pursuing discovery and deciding discovery disputes. … [I]t is time to prompt wide-spread respect and implementation."[25]

The current Rule 26(b)(1) allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," and "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action" even if the material may be inadmissible at trial so long as the "discovery appears reasonably calculated to lead to the discovery of admissible evidence."[26] An amended rule would limit this scope to discovery that is relevant, "and proportional to the needs of the case, considering … the amount in controversy … and whether the burden or expense of the proposed discovery outweighs its likely benefit."[27] Notably, the proposed amendment deletes the phrases "discovery of any matter relevant to the subject matter" and "discovery [that] appears reasonably calculated to lead to the discovery of admissible evidence."[28]

Proportionality: Case Law. The Sedona Conference explains that sampling and extrinsic information can help determine whether requested discovery warrants the potential burden or expense of its production.[29] When evidence is required in considering proportionality, courts have approved limited discovery, including the use of keywords to identify and review a percentage of potentially relevant files,[30] and use of sampling "[i]f feasible and cost efficient" to assess the relevance of archived ESI.[31] Courts also consider extrinsic evidence, including the parties' opinions regarding the importance of the requested information, whether the information was created by "'key players,'" whether the prior discovery indicates that the information is important, whether the information was created contemporaneously with the key facts in the case, and whether the information is unique.[32]

At least one court has found clawback orders to be relevant in assessing burden: "A clawback order can protect [the producing party] against a claim of waiver, such that [the producing party] need no longer bear the cost of reviewing the ESI for responsiveness and privilege."[33] However, as explained by Judge Andrew J. Peck of the Southern District of New York, a clawback order does not necessarily eliminate the need for document review:

> Rule 502(d) [of the Federal Rules of Evidence] allows what I call the insurance policy or get-out-of-jail-free card. … If you are a good lawyer, you are not going to be saying, "I have a 502(d) order so I do not have to review [and I can] let the most important privileged document out and then claw it back later." … [T]he other side is going to know about it if you produce it and you cannot prevent them from using that information to the extent they can.[34]

Peck instead suggests that streamlined or limited review may be appropriate if certain categories of information are unlikely to be privileged.

The current Rule 26(b)(2)(C)(i) directs courts to impose limitations where "the discovery sought is unreasonably cumulative or duplicative,"[35] and the proposed amendment to Rule 26(b)(1) underscores this limitation. Courts have limited discovery, for instance, when the requesting party failed to "point to any specific, noncumulative evidence they expect to find" and instead selected new custodians by merely examining organizational charts and using metadata to identify individuals who were communicating with existing custodians.[36] Courts have explained that "just

because a proposed custodian exchanged a large number of emails with a current custodian does not mean that the proposed custodians will have a significant number of important, non-cumulative information."[37]

Cases in the Commercial Division have declined to order cumulative discovery even where the sought after information can be relevant. In *MBIA v. Credit Suisse Securities*, the requesting party moved to compel, contending that it "lack[ed] the full universe of responsive ESI documents that it need[ed] to prove its case" and the requested information "demonstrate[d] some of the most egregious examples of the fraud … allege[d]."[38] The court denied the motion, finding that based on ESI produced to date, "'the parties have received all of the documents necessary, and more, to litigate the merits of their claims and defenses at trial and to ensure that any jury verdict is based on a reliable factual record.'"[39] While noting that the information sought consisted of evidence unfavorable to the producing party, the court reasoned that "[n]onetheless, [the requesting party] (or any other plaintiff in complex litigation) cannot reasonably expect to uncover every single instance" of relevant evidence.[40]

Proportionality: Local Rules and Guidelines Governing Proportionality. Courts in numerous jurisdictions have adopted rules and guidelines to address proportionality. The Commercial Division has actively implemented measures to limit the scope and reduce the cost of discovery. Rule 11-a limits the number of interrogatories to 25 and the scope of inquiry by subject matter.[41] A proposed rule limiting depositions to 10, seven-hour depositions for each side is currently pending.[42] Under Rule 9 governing accelerated adjudications, parties may agree to limit discovery.[43] Judge Paul W. Grimm of the U.S. District Court of Maryland has promulgated an order phasing discovery to focus first on the facts that are most important to resolving the case: "Phase 1 Discovery is intended to be narrower than the general scope of discovery stated in Rule 26(b)(1)," and while the court may permit additional discovery for good cause, the requesting party must show why it should not pay for it.[44]

Proportionality: Cost-Allocation. Cost-allocation can help prevent the use of e-discovery as a weapon. The proposed amendment to Rule 26(c)(1) adds "the allocation of expenses" as a term that may be included in a protective order. As the Duke Subcommittee noted, "Rule 26(c)(1) now authorizes an order to protect against 'undue burden or expense'" and while "[s]ome courts are exercising that authority now," it would be "useful to make the authority explicit … to ensure that courts and the parties will consider this choice as an alternative to denying requested discovery or ordering it despite the risk of imposing undue burdens and expense."[45]

Grimm defines "free discovery" as "a 'base level' of discovery that [is] proportionate to the needs of the case, the burden and expense of which is borne by the producing party with the provision that any further discovery must be conditioned on a showing of good cause and an assessment of cost allocation."[46] He points out: "The key, however, is in figuring out how to define the amount of 'free discovery' so that it is sufficient to give the requesting party a fair shot at the discovery it needs, while simultaneously protecting the producing party from excessive cost and burden."[47]

The limits of "free discovery" have been tested in class actions, which by nature involve asymmetrical discovery:

> The Court is persuaded, it appearing that Defendant has borne all of the costs of complying with Plaintiffs' discovery to date, that the cost burdens must now shift to Plaintiffs, if Plaintiffs believe they need additional discovery… . The Court is firmly of the view that discovery burdens should not force either party to succumb to a settlement that is based on the cost of litigation rather than the merits of the case.[48]

Conclusion

The cost of discovery has become increasingly unmanageable and is hindering the resolution of cases on the merits. Jurisprudence on e-discovery is prolific, and the trend is to put an end to excessive preservation and production of ESI. Parties must cooperate to curtail discovery to what is proportional to the needs of the case, and the courts are more inclined to seek good cause before compelling discovery, and shift costs to the requesting party when appropriate. Future cases should further refine the scope of discovery and the boundaries of cooperation in the discovery process.

1. DISCOVERY SUBCOMM., ADVISORY COMM. ON CIVIL RULES, REPORT: RULE 37(e), at 3 (April 10-11, 2014) (Tab 3-A of MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES).
2. Judge Paul W. Grimm & David S. Yellin, "A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery," 64 S.C.L. REV. 495, 511 (2013) [hereinafter "Pragmatic Approach"].
3. Nicholas M. Pace & Laura Zakaras, RAND Inst. for Civil Justice, "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery," 16 n.39, 103 (2012) [hereinafter Rand Report].
4. LexisNexis Discovery Servs., "How Many Pages in a Gigabyte?," LEXISNEXIS, http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf.
5. Rand Report, supra note 3 at 17, 19.
6. Id. at 86.
7. Letter from William H.J. Hubbard, Assistant Professor, Univ. of Chi., to Comm. on Rules of Practice & Procedure 1 (Feb. 18, 2014).
8. Lawyers for Civil Justice, "Now Is the Time for Meaningful New Standards Governing Discovery, Preservation, and Cost Allocation," 13 n.52 (March 15, 2012).
9. Letter from David M. Howard, Corporate Vice President, Microsoft Corp., to Judge David G. Campbell, Chair, Advisory Comm. on Civil Rules, U.S. Dist. Court 5 (Aug. 31, 2011).
10. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 265 (Aug. 2013).
11. DUKE CONFERENCE SUBCOMM., ADVISORY COMM. ON CIVIL RULES, REPORT 3 (April 10-11, 2014) [hereinafter Duke Report] (Tab 2-A of MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES).
12. *Residential Funding v. DeGeorge Fin.*, 306 F.3d 99, 107 (2d Cir. 2002); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008).
13. *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 523 (D. Md. 2010).
14. Discovery Subcommittee Report, supra note 1, at 15.
15. Id. at 3.
16. Standing Order M10-468, No. 1:11-mc-00388-LAP, at 20-21 (S.D.N.Y. Nov. 1, 2011).
17. COMMERCIAL DIV. R. 8(b), N.Y. CT. RULES §202.70.
18. Thomas Y. Allman, "Local Rules, Standing Orders, and Model Protocols, Where the Rubber Meets the Discovery Road," 19 RICH. J.L. & TECH. 8, 31 (2013).
19. SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM—REPORT ON PHASE ONE (MAY 20, 2009 TO MAY 1, 2010), Principle 2.04.
20. See U.S. DIST. COURT FOR THE DIST. OF DEL., DEFAULT STANDARD FOR DISCOVERY, INCLUDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION (ESI) 2, 7 (Dec. 8, 2011).
21. U.S. DIST. COURT FOR THE N. DIST. OF CAL., MODEL STIPULATED ORDER RE: DISCOVERY OF ELECTRONICALLY STORED INFORMATION FOR STANDARD LITIGATION 2.
22. See *Kleen Prods. v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *18 (N.D. Ill. Sept. 28, 2012).
23. Id. at *8, *12.
24. Duke Report, supra note 11, at 4.
25. Id. at 6.
26. FED. R. CIV. P. 26(b)(1).
27. Duke Report, supra note 11, at 18-19 (emphasis added).
28. Id. at 19.
29. SEDONA CONFERENCE WORKING GRP. ON ELEC. DOCUMENT RETENTION & PRODUCTION, THE SEDONA CONFERENCE COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY, Principle 4, at 11-12 (January 2013) [hereinafter The Sedona Conference Proportionality Principle].
30. *McPherson v. Canon Bus. Solutions*, No. 12-7761, 2014 WL 654573, at *9 (D.N.J. Feb 20, 2014).
31. *Kleen Prods. v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *18 (N.D. Ill. Sept. 28, 2012).
32. The Sedona Conference Proportionality Principle 4, supra note 29, at 12 (citation omitted).
33. *In re Coventry Healthcare ERISA Litig.*, 290 F.R.D. 471, 476 (D. Md. 2013).
34. Steven Teppler, "E-Discovery: Where We've Been, Where We Are, Where We're Going," 12 AVE MARIA L. REV. 1, 32-33 (Winter 2014).
35. FED. R. CIV. P. 26(b)(2)(C)(i).
36. *Kleen*, 2012 WL 4498465, at *14.
37. Id.
38. *MBIA Ins. v. Credit Suisse Sec. (USA)*, Index No. 603751/2009, 2014 N.Y. Slip Op. 31871(U), at *2 (Sup. Ct. N.Y. County July 17, 2014).
39. Id. (citation omitted).
40. Id. at *3.
41. COMMERCIAL DIV. R. 11-a, N.Y. CT. RULES §202.70.
42. Memorandum from John W. McConnell, Counsel, State of N.Y., Unified Court Sys., to All Interested Persons (June 20, 2014).
43. COMMERCIAL DIV. R. 9, N.Y. CT. RULES §202.70.
44. Standing Discovery Order Issued by U.S. District Judge for the District of Maryland Paul W. Grimm at 1 (April 9, 2013).
45. Duke Report, supra note 11, at 9.
46. "Pragmatic Approach," supra note 2, at 523.
47. Id. at 524.
48. *Boeynaems v. LA Fitness Int'l*, 285 F.R.D. 331, 341-42 (E.D. Pa. 2012).

Reprinted with permission from the October 6, 2014 edition of the NEW YORK LAW JOURNAL © 2014 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-10-14-06