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## COMPLEX LITIGATION

### Don't Give Up Yet

You can significantly reduce e-discovery costs despite an explosion of information

By Scott A. Carlson

Setting aside the Chicken Little cries that the e-discovery Sky is falling, there are certain fundamental truths about e-discovery:

1. The volume of electronically stored information created by organizations is growing at an explosive pace;
2. Organizations have largely abandoned or found ineffective their attempts to slow the growth of data;
3. As the volume of data increases, so does the cost of eDiscovery in terms of preservation, collection and review;
4. Attorney review costs can be staggering and are directly related to the volume of data.

There are technologies available right now and new ones constantly being created, however, that can substantially reduce e-discovery costs.

#### Paper: Gone But Not Forgotten

In the good old days of paper discovery, when the volume of information

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became too great, an organization fell back on the “warehouse and sticky note” solution. The discussion with opposing counsel went like this, “We have a warehouse that is filled with documents. We’ll have a paralegal there with a big box of sticky notes. You can spend the remainder of this year going through them. Put a sticky note on anything of interest and we’ll have it Bates numbered and sent to you. Be sure to wear boots and jeans because the roof leaks.”

Unfortunately in the electronic age, the warehouse is bigger but your opponent does not need sticky notes anymore — she is more than happy to have a copy of everything. First, for about \$500 dollars she can buy a 500-gigabyte hard drive that, depending on the type of files, can hold about 50 million pages. While hosting 500 gigabytes of data is not without costs, they pale in comparison to copying 50 million pages (at 20 cents per copy) for \$10 million dollars, thus eliminating the copy everything approach. Second, with simple search tools, your opponent does not have to review all 500 gigabytes but instead can perform selected key word searching and obtain key documents. You will have no “sticky note” advantage, however, because you will not have seen the searches they employed or the documents they found — at least not before the depositions.

#### Reducing the Volume

With no warehouse where opposing

counsel can do the review for you, you must do it yourself. Accordingly, reducing the volume of data to be reviewed becomes a fruitful area for seeking reduction in e-discovery costs.

If one intends to control costs, one must move away from copying entire 40-gigabyte hard drives, for example, and move towards collecting only the user files — perhaps 2 to 4 gigabytes of the entire 40-gigabyte hard drive. Better yet, one would ideally only collect those documents and individual e-mails that meet certain search criteria (key word search terms, date restrictions, file type limitations, author or other search criteria or combination of criteria). *Zubulake V* suggests precisely this type of capability on the preservation side when noting that it may be possible to conduct system-wide key word searches for larger organizations.

To date, this author is aware of only one product that offers the capability to conduct detailed searches across an entire organization’s IT system and to return individual user files that respond to the search criteria. That product is Guidance Software’s EnCase Enterprise Edition with the eDiscovery Suite. While the cost of the product is not insubstantial, large and small organizations alike can usually plan for and afford the software due to scaled pricing based upon the size of the deployment. In many instances, the cost savings on one significant piece of litigation can pay for the entire EnCase license.

The costs savings can be enormous. First, one can severely reduce, and sometimes completely eliminate, the need for manual collection of data. Second, one can reduce vendor costs (often based on a per gigabyte price) for

processing the data “collected” down to a more reasonable amount of information selected for “review.”

The processing techniques of de-duplication, elimination of non-user files, date restrictions, application of key words and other methodologies have proven very effective and were a great first step in reducing review costs — perhaps taking 200 gigabytes collected down to 20 gigabytes for review. However, it still carried with it a significant cost for processing as one generally pays for the processing of the entire 200 gigabytes when only 20 gigabytes were presumptively relevant. Even at a per gigabyte rate of say \$2,000 (and prices may be higher or lower than this), that would be a \$400,000 cost to process the collected data down to the review set.

Instead of paying for it at the processing stage, one can use EnCase to apply some of the same criteria that processing applied (e.g., key words, elimination of system files, date restrictions, etc.) but do it at the collection stage. Most of that \$400,000 in the example above can be applied to the purchase of the EnCase license instead of processing. At the end of the case, the organization still has EnCase (and its capabilities beyond e-discovery). Eventually, the organization will have paid for the product through savings in processing costs and manual collection of data — for some after several cases and others after one large case.

### **Reducing Costs of Review**

Of course, key word collection may be subject to criticism if you choose the wrong key words. It may make more sense to do the system-wide search for key words and other criteria, but collect all e-mail and documents from key players. This may be a reasonable approach to fulfilling discovery obligations and would collect additional relevant documents that key words might have

missed. For this example, say that we added another 5 gigabytes to the 20 gigabytes we collected above, which may represent 2.5 million pages of documents and staggering attorney review costs. But, one still has options.

One option takes us back to the warehouse. One could consider taking the 25 gigabytes, searching for privilege, enter into a claw back agreement and turn the rest over without review. Most would consider that risk too great, but it may be an option in some small number of cases.

Another option (and one commonly employed) is to review every document. This option carries with it an enormous price tag in attorney review costs. With a market rate of \$50 per hour for contract attorneys and an expected rate of review at about 700 documents per 8 hour day — one pays \$600,000 for every 1 million documents reviewed. At those rates, one must ensure they utilize professional project managers who can achieve optimal results in large-scale reviews.

A third option is the one that this author believes is viable now, and will become necessary in the future as data volumes continue to explode. In turning to new technologies one can attempt to review only the most relevant documents. What to do with the remainder of the documents may be a matter of personal choice — not produce them, produce them all with the belief you found the most relevant ones, or some hybrid.

Figuring out which documents to review first is accomplished through platforms that offer artificial intelligence capabilities. While there are a number of players in the market, this author is most familiar with DolphinSearch’s concept search platform. Dolphin provides the basic key word searching that is available from nearly all vendors. More importantly, however, Dolphin offers its concept search tool that seeks to understand relationships among the data, find-

ing additional documents that might not have been in the key word hits (looking at the “extra” 5 gigabytes from the key players in our example above) ranked by relevance and sorted by specific issues.

When reviewing the documents, a reviewer can go through each “issue” in order of potential relevance. At some point the reviewer may well decide that the “issue” search no longer contains responsive documents. Depending on the issue, one may stop 25 percent of the way through or 75 percent of the way through the issue — it will depend on the search and depend on the data set. The result in nearly all instances, however, will be stopping well short of reviewing every document.

Besides the benefits of relevancy ranked and issue based review, another capability that leads to more efficient reviews is an explode feature that takes the reviewer right to the part of the document that contains the key word or concept hits. This is arguably the most relevant part of the document, so it makes sense for the reviewer to start there. Of course, DolphinSearch also comes equipped with various other tools, such as project management tools, redaction, privilege tags, hot docs tags, etc., that one comes to expect from all review tools.

### **Time to Look Again**

In sum, there are tools available right now that can substantially reduce the escalating costs associated with eDiscovery. If you did your due diligence six months ago and decided that there was nothing that impressed you — it’s time to look again. And you best look again six months from now. The technologies keep getting better. If one cannot stem the increase in the volume of data, one better be prepared to manage the costs on the collection and review side. ■