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PERSPECTIVE

Reevaluating the Rules for e-Discovery

By Daniel M. Kolkey and Chuck Ragan

In his annual message to Congress in 1862, Lincoln famously observed, "The dogmas of the quiet past are inadequate to the stormy present." So, too, the discovery dogmas of litigation past are inadequate to the storm unleashed by e-discovery. Yes, in 2006 and 2009, changes were made to the federal and California discovery rules in order to adapt them to some of the unique issues arising out of e-discovery, such as the preservation of electronically stored information (ESI) and the form of production of ESI. But these changes failed to fully appreciate the deeper changes that ESI has wrought to the nature of discovery. Consider the following:

A third-party — the e-discovery technology vendor — must now come between attorney and client in the search for, and the production of, ESI, while the legal responsibilities for discovery remain with attorney and client.

The many moving parts of the modern information technology infrastructure make it remarkably easy to find some fault or error in most e-discovery cases, increasing the opportunities for satellite litigation and its attendant costs to clients and courts alike.

Courts have reacted to the increasing risk of error owing to technology's opacity by placing new obligations on counsel to navigate a client's technological architecture, with the objective of ensuring the production of relevant evidence, but with the consequence of duplicating and multiplying the costs already incurred by the e-discovery consultants.

As ESI also exponentially expands the material subject to discovery (adding volumes of daily conversations in the form of text messages, e-mails, and voicemails to the traditionally available documentary evidence), the costs of e-discovery have become disproportionate to the value of the controversy at issue, undermining litigation as an efficient means of dispute resolution.

And judges complain about having to spend hundreds of hours dealing with subjects that they occasionally concede are beyond their experience and training. The fact of the matter is that complex and constantly evolving technologies make it difficult for lawyers — who are not trained as engineers — to determine the myriad sources of ESI, evaluate the burden of extracting it, and identify the search terms that will capture the relevant electronic documents. The reality is that the technology infrastructure of the large commercial enterprise today is not as simple as the workstations that lawyers and judges use in their daily personal and professional lives. In the commercial world, it is not unusual for an international firm to have upwards of 2,000 applications, each with varying functionality bearing on the preservation, collection, analysis, review, and production of ESI. It is not reasonable to assume that any one lawyer, or even a small group of lawyers, will master those complexities. Indeed, in the modern corporate IT world, there is no single "person most knowledgeable" about an organization's systems and applications. Rather, answering a seemingly simple interrogatory, such as "Identify your databases, document management systems, and messaging storage systems," may require consulting with literally dozens of internal subject matter experts.

With so many moving parts in the modern IT infrastructure — which includes not only e-mail but also dynamic databases, Web-based applications, SharePoint and other collaborative applications, social media (like Facebook and MySpace in the corporate setting), telephony, and myriad portable devices — it should come as no surprise that it can be remarkably easy to find some fault or error in virtually every electronic discovery case. Notwithstanding the retention of an e-discovery consultant, some courts have ruled that "counsel's obligation is not confined to a request for documents; the duty is to search for sources of information." And to do so, courts are saying that counsel must also become familiar with the client's "data retention architecture." The recent Qualcomm v. Broadcom decision, vacating sanctions against individual outside lawyers, nonetheless criticized outside counsel for "not obtain[ing] sufficient information from any source to understand how Qualcomm's computer system is organized,...how often and to what location laptops and personal computers are backed up, whether, when and under what circumstances data from laptops are copied into repositories, what type of information is contained within the various databases and repositories...etc." With the additional attorney fees imposed to accomplish this on top of the fees for e-discovery consultants to do the same, and on top of the client's own time for e-document collection, the clients become the victims, and the costs become merely statistics.

But as Lincoln noted in that same annual message in 1862, "As our case is new so we must think anew, and act anew." We suggest the following, modest first steps toward addressing the transformative nature of e-discovery:

First, courts should require attorneys to draft tailored document requests and objections. California Code of Civil Procedure Section 2031.030(c)(1) and Rule 34(b(1) of the Federal Rules of Civil Procedure already require that a party designate documents or ESI by describing each category or item with "reasonable particularity." But the reality of document requests is quite different. Overbroad document requests, unencumbered by any knowledge regarding the types of documents sought, are the rule. And courts are often inclined to require the parties to negotiate in good faith even over the most poorly drafted request. The result is little incentive exists to properly tailor a document request, which translates into exorbitant discovery costs.

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Courts should more rigorously enforce these existing rules and require reasonably particularized requests and tailored responses. In most cases, a failure to prepare a reasonably particularized request should be sufficient to uphold the responding party's objection; the obligation to properly produce should be conditioned upon the obligation to properly request.

Likewise, boilerplate objections that apply to every document request (even when they actually do not apply) should not be sufficient to preserve the objection. In *Mancia v. Mayflower Textile Services Co.*, Magistrate Judge Paul Grimm invoked Federal Rule 26(g) — a provision that has been on the books since 1983, but infrequently invoked — to suggest that boilerplate objections waived the objections.

Second, proportionality principles should be clarified and rigorously enforced. The rules of discovery already include proportionality principles (e.g. Federal Rule 26(b)(2)(C)), but they are written in such broad terms that they provide little guidance in finding the right balance between discovery's burden and benefit. And with notable exceptions — see *Rimkus Consulting Group v. Cammarta,* 2010 WL 645253 at 6 (S.D. Tex 2010) — they have been underutilized for ESI issues. Proportionality (like relevance) must become a gateway consideration for any ESI dispute, and not avoided by the mere incantation of "liberal discovery," if there is to be any hope of aspiring to the Federal Rules' goal of "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding." (Federal Rule of Civil Procedure 1)

Third, new approaches for resolving discovery disputes should be found. Courts should consider new approaches to resolving discovery disputes, such as "baseball arbitration," which would encourage greater reasonableness in drafting discovery requests. In such a baseball arbitration, each side would submit, as its final position, a proposal that it believes is the most reasonable under the circumstances, and the court would be limited to choosing the best proposal based on principles of reasonableness and proportionality. This type of arrangement should induce the parties to narrow their disagreements and resolve many of them without a judicial decision.

Finally, the discovery rules should be amended to specify a new allocation of responsibilities between the parties and their attorneys with respect to e-discovery. This allocation would specify the respective responsibilities among client, attorney, and the third-party IT vendor, guided by an appreciation of the cost, fairness, and efficiency of any given allocation. An attorney's certification of a discovery response would reflect this new and more realistic allocation of responsibilities.

In short, while the tools to constrain the e-discovery monster exist, the discovery dogmas of the past must be reconsidered to ensure that e-discovery is not an end, but a means of achieving the just, speedy, and proportionately priced resolution of disputes. With some creativity and sensitivity regarding the costs that e-discovery imposes on the entire system, we can do it.