

Litigation Data Analysis Strategies For Legal Teams

Let the Numbers — and the Consultants — Do the Talking

By Christy Burke

The need for lawyers to leverage technical knowledge to prepare a case for the courtroom is escalating rapidly.

Here's compelling evidence: Legal sector studies show that about 90% of evidence used in civil litigations falls into the classification of electronically stored information ("ESI").

Indeed, the amended Federal Rules of Civil Procedure ("FRCP"), in effect since Dec. 1, clearly state that ESI is discoverable and mandates that litigants preserve ESI and consider carefully how it is handled.

But attorneys should take note that e-discovery requiring knowledge of ESI and access to experts to help litigation teams isn't confined to the Fortune 500.

"e-Discovery has gotten a tremendous amount of press due to high-profile cases involving the likes of Martha Stewart, Enron and Arthur Anderson," Olivera Medenica, of Wahab & Medenica LLC in New York City, says. "But the fact ... is that e-discovery is not limited to large companies. It can affect smaller companies that may not have the sophistication to deal with onerous electronic discovery (requirements)."

Medenica, whose practice includes a focus on e-commerce and information technology, says that *ESI* has become an established term in the legal lexicon, but that the term is evolving.

"e-Mails can be replete with information not otherwise available in more formal correspondences and these are all discoverable," she says. "e-Discovery will expand to include voice-mail messages as attachment to e-mails and instant messaging logs. This can prove to be a tremendous burden, in time and money, for the small business owner dealing with a disgruntled former employee."

STRATEGY STEP-BY-STEP

In *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. 2004), the court stated that counsel must become fully familiar with the client's document-retention policies, as well as with the client's technology infrastructure. Gathering this information invariably entails speaking with the client's information-technology personnel who can explain system-wide backup procedures and the *actual*, not *hypothetical*, implementation of the firm's ESI-management policy.

From e-mails to documents, backup tapes to voice mails, legal teams must know:

- Where their clients' data resides;
- Who is responsible for maintaining that data; and
- How to protect and preserve it in case litigation commences.

Even though e-discovery has been presenting itself for several years as a growing concern, many lawyers are still at a considerable disadvantage when confronted with proceedings involving e-discovery because they lack adequate technical background to fully grasp their clients' IT architecture.

Peter Toren, of Kaskowitz, Benson, Torres & Friedman in New York City, says that shouldn't prevent attorneys from tackling e-discovery projects.

"Most lawyers don't have need for technical experience as long as they are willing to work with IT teams and outside consultants," Toren explains. "If it's a massive production, we often need the help of outside vendors, both in the litigation-support and computer-forensics areas."

Without proper technical knowledge, how will the attorney properly and fully interview the IT personnel, and understand the client's electronic infrastructure? How, too, will the legal team know the right questions to ask, and how can the team be confident that it has synthesized that information to create a true representation of the client's technology setup?

And, not least: Who will be able to serve as the 30(b)(6) witness? This is the one "omniscient" person who is supposedly so knowledgeable about the IT infrastructure and corresponding operation that he or she can answer virtually any technical question in the courtroom without once saying the forbidden words — "I don't know."

Common wisdom would dictate that the company's CIO is the obvious choice to be this witness. But while the CIO formulates the strategic vision, focuses on the intimate details of budgeting and has a 30,000-foot view of the IT operation, he

or she isn't always familiar enough with day-to-day details to be the 30(b)(6) witness. Other IT staffers generally have tight specialties in their area of expertise (e.g., managing the e-mail server, ensuring that the enterprise is backed up regularly, managing the many databases within the organization or administering a vast PC network). That means that they often don't have the breadth of knowledge needed to serve as the witness, either. From the onset of litigation, attorneys also know that they must solve the vexing problem of who their 30(b)(6) witness will be.

"Yes, that's an issue arising more and more," Toren says. "Parties want to take a 30(b)(6) deposition about steps the company may or may not have taken. It can be difficult to find the right person or people for this. It depends on how centralized the data storage is and how the staff is organized. You can either brief one person to be the sole witness or you can submit multiple depositions in which they're broken into several subtopics and there are two or three witnesses, each with a different realm of expertise. A number of factors go into making the decision about which ... options to choose."

Many lawyers readily admit that they don't have the technical background to map all the possible electronic-data sources at the client company. They know that they must hire experts who can do a quick and defensible analysis of a company's IT infrastructure.

"The proliferation of data in various media and the amendments to the FRCP are forcing an unprecedented fluency in the language of e-discovery," Ari Kaplan, a New York City-based attorney, legal-tech journalist and a member of our Board of Editors, says.

Legal teams are increasingly looking to specialized electronic-discovery consultants who can go into their clients' company and create a

detailed accounting of the clients' technology landscape, and who can also be the 30(b)(6) witness.

One such consulting group providing help to litigation teams is UHY Advisors' Forensic Litigation and Valuation Services ("FLVS") practice, which includes the electronic-discovery division of accounting giant UHY Advisors Inc. UHY's services are generally retained at the early phase of the case — sometimes prior to filing or in anticipation of a potential suit, or at its preliminary stages, so that experts can begin assisting the attorneys immediately.

DATA LANDSCAPE MODELING

When the legal team first hires a litigation valuation consultant, a comprehensive assessment tool called Data Landscape Modeling ("DLM") is executed. DLM is a quick and inexpensive process during which consultants correspond directly with the client's IT department to create a clear, thorough report of the company's technology infrastructure.

FLVS Managing Director Douglas Herman offers some insight to this process.

"Our goal in a Data Landscape Modeling analysis is to thoroughly research the infrastructure by speaking to the corporate IT people," Herman explains. "We then translate and digest that information, boiling it down to create a complete, annotated report of where all the potentially responsive data stores exist within the target organization. Then, we provide the DLM report to the attorneys to reference throughout the case."

Herman adds that his team assesses what information is important to examine, *i.e.*, what's potentially relevant to the case at hand. They also help determine which information is outside the demands of the case and may not be pertinent. Consultants work in these matters side by side with the legal team and client's IT department to identify and document the computing framework used to store and transmit electronic data. UHY experts, for instance, regularly correspond with the client's technology staff to identify key people who should be interviewed about the company's IT setup. The consulting

team then interviews all IT staff members who have knowledge relevant to electronic-data sources.

DLM results are summarized into a report that helps inform the attorneys as they develop the case. This document provides a detailed, comprehensive guide to the client's potential digital-information sources that might be discoverable in the case. This summary "deliverable" indicates the specific physical location of all electronic data sources and the time span of the organization's relevant data. The DLM also separates the data that is readily available on "live" production servers, differentiating it from data that might exist on potentially inaccessible backup media.

Throughout the DLM generation process, experts thoroughly learn the client's IT infrastructure. By interviewing several IT department employees, consultants acquire a deep understanding of the company's data landscape. If the legal team then deems it appropriate, the consultant working on the matter can serve as the 30(b)(6) witness in the case. For example, Herman has been called many times to testify via deposition in cases for which he created a DLM.

This practice follows lawyers' guidance. Toren's advice, for instance: "Develop a good relationship with the client's IT staff so they'll want to take time to educate you on their technical structure. Clients must be fully cooperative for the best result. If they're not fully cooperative, there could be severe sanctions if they don't produce. Make sure the client understands its obligations. Take the time to do the search, and follow up and make sure it's all produced. Attorneys should do whatever they can to facilitate this process."

Once the consultant has completed the DLM analysis, the legal team has a much better idea of the scope of potentially discoverable data, including backup tapes, e-mail and documents. Armed with this complete map of the client's data, the lawyers can begin to build an e-discovery strategy on a client's behalf.

For example, say that a corporation is being sued and the DLM report shows the attorneys that the client has kept a full year's worth of daily backup tapes. Technically, barring any type

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of claim of undue burden, all these backups are potentially discoverable, except for the small amount designated for disaster-recovery purposes. The legal team needs to figure out how to deal with this problem, because having a third party sort through and process all 365 tapes could cost the client well over \$1 million.

“A few years ago, the legal team could walk into a courtroom and make an argument to the judge about the financial burden of restoring and reviewing the data contained on hundreds of tapes — and it would sometimes work,” Herman says. “Now, as judges become more and more savvy about backup media and e-discovery as a whole, they tend to be less sympathetic to e-discovery costs, chalking it up to a *cost of doing business*.”

Understandably, clients and their lawyers are looking for relief from such stringent and expensive requirements.

DATA SAMPLING AND DIFFERENTIAL ANALYSIS

To address such concerns, Herman went the way of entrepreneurial ingenuity and developed a strategy called Data Sampling and Differential Analysis (“DSDA”). DSDA is a technique most often used when a company has kept a huge number of backup tapes containing terabytes upon terabytes of data.

“Out of the 365 backup tapes in a given year, a high percentage of the data will be duplicative from one day to the next,” he says. “In a DSDA study, we compare the data sets to each other and determine to what extent the information is duplicative of previous tapes. By doing this statistical analysis, we can help the legal teams to negotiate with the judge and opposing counsel to possibly lessen their e-discovery burden.”

Here’s how it works. In the DSDA process, UHY takes Day 1 and compares it to Days 2, 7, 15 and 30 of the same month. The data found in Days 1 and 2 will likely be highly duplicative — as much as 98% may be the same data. This close similarity of data between two days can open the door to other comparisons that lead

to persuasive arguments. By providing numbers and statistics, UHY might be able to make the judge more receptive to negotiation.

How much negotiation lawyers and consultants can do with the judge “depends on the litigation,” Toren notes.

“If the advantage or disadvantage is pretty equal on both sides, then you don’t want to demand from the other side what you don’t want to do yourself,” he says. “No one wants to produce millions of documents that are not relevant to the litigation. It’s more difficult when the sides have unequal numbers of documents. For example, when an individual is suing a large corporation, if the individual plaintiff demands a large burden of discovery production from the corporation, a cost-shifting argument may take place to require the individual to help pay for the production costs.”

Once Herman submits his statistical analysis to the legal team, the lawyers can go into the judge and suggest: “What if we were to restore backup data from every other day instead of every day? We would still get 93% of the potentially responsive data. Or if we restore one tape per week, we’ll still get 80% of the data. These numbers are just an average based on past cases where this tactic has been used, but it certainly does show how a simple argument, substantiated by a statistical analysis, can work.”

Herman says that judges like to have multiple options presented to them rather than just a single option, which could come across as an ultimatum.

“By entering into this negotiation phase with the judge,” Herman notes, “UHY and the legal team may be able to convince the judge to allow for partial discovery of the backup tapes. This can potentially save the client millions of dollars.”

Herman says the success rate of using DSDA to compel discovery negotiation is about 80% (talk about using statistics to drive a point home). In the other 20% of cases (where DSDA was unsuccessful in garnering discovery-requirement relief), the backup-tape volume was

not sufficient to prove undue financial burden to the client.

Opposing counsel might immediately object to the DSDA process because it amounts to a legal team asking the judge to relieve their client’s discovery burden by permitting partial discovery, but with the recently amended FRCP, a DSDA-based cost-shifting argument can be made. When opposing counsel objects to the judge reducing the discovery requirement on the backup tapes, the judge might reply: “Well, if you want to insist on the opposing counsel going through every day’s backup tapes, then your client will have to help pay for it.” When opposing counsel realizes that its client will have to share the backup-tape discovery costs, counsel will be likely to agree to a lower-burden option presented by UHY on the client’s behalf.

DSDA’s benefits are straightforward and persuasive. With this strategy, a highly defensible process of reducing the client’s discovery burden can be presented that is successful in four of five cases. DSDA allows the attorneys to look good to their clients, and ultimately, save their clients money. Herman realizes that, in reducing the case’s discovery requirements, some revenue might be sacrificed, but says that regardless of how profitable the gigantic discovery jobs are to electronic-discovery vendors, he feels that by keeping the attorneys and clients contented, he’s serving their best interests and is reinforcing the client-attorney-consultant relationship.

“We are not just a wholesale data-processing warehouse,” he says. “We ask, ‘Where did this data come from and why are we processing it?’



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