

Whose Document Is It Anyway?

Best Practices for Avoiding Post-Production Chaos

By Michael Wyatt

Many consider production to be the final step in the electronic discovery process. However, once production is complete, lawyers are often left with large quantities of electronic data that have to be organized and reviewed. Lack of planning for those data once they have been produced can render your pre-production efforts worthless. The introduction of new federal discovery rules in recent years has shifted the focus to the gathering and production of electronic data at the expense of planning what you are going to do with the data once they have been produced. To get the most from your e-discovery dollars, which is now the largest non-lawyer litigation expense, it is essential that careful thought and planning go into what you want to do with the data post-production. How do you want to organize and manipulate the data? What level of data extraction should there be to enable you to get to the “hot” documents relevant to the case you want to build or the defense(s) you want to assert in an efficient manner? A strong understanding of how data are utilized on the ground is vital in delivering good results. Because of the increasing volume of data involved in litigation, the effort required to produce electronic data is an increasingly herculean one. Consequently, much of the planning and decision-making for the discovery process is being delegated to more junior members of corporate legal departments.

The act of producing data is only the beginning of the process and your obligation to your company’s interests in the litigation. What exactly has been produced? How are you going to get your arms around what you have turned over to the other side? Ask any young lawyer working on a piece of litigation and he or she will tell you a version of the same story; that is, being called into the general counsel’s office to be met with him or her waving a piece of paper

in the air and asking, “Has this been produced in the XYZ litigation and, if so, when and by whom?” How do you find out the answers to these questions if you don’t know off the top of your head? What tools are at your disposal to be able to figure it out quickly? This can be complicated if the data have not been handled and organized properly in advance.

Planning

Planning is a critical component of the electronic discovery process, and it is essential to be able to anticipate the importance of efficiently and accurately determining a document’s origin and status in the litigation. At the planning stage, it is vital to think beyond simply where the relevant and/or responsive data and documents are. Thinking about how you will organize and review the data is just as important as locating it. Think about categories, or “families,” of documents within the data so that they can be grouped with similar or related documents. You could break the data down by causes of action, requests for production, or simple subject matter. Of course, one document can be in more than one family. Assigning data to a family or families while they are being reviewed can dramatically reduce time and money spent searching for the document(s) you are looking for later on. If you have not anticipated these questions and, subsequently, have not planned for them, the consequences can be a disaster. For example, consider the actual case where some form of coding and subjective review of a massive amount of data had been completed. The litigation was a dispute over three separate construction projects on the same site. The review had been set up to group the documents by the types of construction defects, but it did not allow for the documents to be grouped by construction project. Therefore, every time a search was performed

for a specific defect, the lawyers had to manually filter the documents by project. For the attorneys to build their case adequately (and efficiently), counsel had to rely first on text searching alone and later had to pay to have additional review and coding carried-out, thus causing a significant delay in the litigation. Conducting a discovery diagnosis can help your organization identify and document current discovery practices, evaluate recommended approaches based upon industry best practices, and project quantifiable benefits from implementing discovery management principles. In short, you will be able to determine what needs to be collected, processed, reviewed, and produced, and can then determine the most time- and cost-efficient method to accomplish a quality production.

Production Format: Should You Image Your Data?

One example of how planning helps to avoid post-production problems is production format. How you store and search your data can be affected by the format in which you produce the documents. There are pros and cons to images versus native formats. Making the data you produce text-searchable is important. It can help to locate documents with common terms or phrases. Images can be processed to be text-searchable. This can be done by either making the images text-searchable or by producing the data in its native format. Producing data in its native format has advantages and disadvantages. The advantages are that native formats generally require minimal processing, meaning a considerable reduction in processing costs. In addition, you are able to view the metadata, including tracked changes, comments, and calculations. It is important to remember that native files need the original application, which can create licensing issues. Therefore, further support for the applications may be necessary. The alternative is

reviewing native files with a universal viewer. Native files cannot have Bates label or other markings added at the page level. It is possible to identify a whole file with something similar to Bates numbers, but it cannot be redacted or annotated.

There are also advantages to imaging your data. Images can easily be viewed with common viewing tools, such as Adobe. Also, the appearance of the document is identical to the original as printed. Images cannot be altered, but they can still be text-searchable. Images can be Bates-labeled and endorsed with any other language, such as “confidential.” Imaging, however, also has its disadvantages. Most notably are the high costs and extensive time associated with converting large quantities of native files to images. On average, image files are five to ten times larger than the electronic document equivalent, which can create storage space issues. Metadata and any other hidden data are also lost in the imaging process.

Review

There are other examples of how good planning can make life after production easier and less stressful. Carefully planning the format and substance of a review can avert problems or costly do-overs later on. There are many different types of review, and selecting the right type for your particular case is essential. Legal review of documents is one of the largest litigation expenses, and it is only increasing as the volume of corporate data grows. Think about how many emails are sent and received in your company every day. (Your friendly IT person can probably provide this information.) Ideally, you want each document to be reviewed only one time. Formulating the review in such a way as to glean every piece of relevant data from each document will ensure that the process will not have to be repeated, thereby saving significant time and money. What type of review you choose should depend on several factors, including the volume and type of data to be reviewed, whether there are potentially privileged documents that need to be identified (and a subsequent privilege log created),

whether there are specific discovery requests, including Rule 26(a) disclosures, and the number of issues or causes of action involved in the litigation.

Hosting

Having a powerful and versatile hosting tool for your electronic data is essential. The ability to review, categorize, and organize data can have a significant impact for litigants and the outcome of litigation. Once the obligation of producing the data has been met, the data has to be utilized to build your case and/or defenses, prepare witness files for deposing and examining witnesses, and assembling exhibits for motions and trials. Possessing and utilizing a tool that can navigate you to the key documents—both positive and negative for your case—is vital.

Imagine a case where over one million documents have been produced. What methods are there for directing you to the key documents? Provided that you have selected the best method for reviewing and coding the data, problems such as determining whether a document had been produced or not becomes less of an ordeal. Without a good search tool and the appropriate planning, the chances of having an efficient way of verifying the status of documents grows slimmer.

Imagine you are in the middle of a deposition where an attempt is made to utilize a document as an exhibit and you need to know whether the document had been produced. The document has no Bates number associated with it. Because you have instant access to the repository via the Internet and powerful search capabilities, you are able to determine the origin and status of that document in seconds. Therefore, an appropriate objection to its use can be made in a timely fashion. Having the tools in place to be able to conduct such a search was a result of anticipating this scenario several months previously in the planning phase of the discovery process. Thinking in advance about how you will want to utilize electronic data post-production can make a significant difference in the time and money you spend managing and organizing it. Having a centralized hosting tool that can accommodate

electronic data across multiple matters will also dramatically decrease your litigation spending on electronic discovery management.

Cost Strategy and Settlement

Getting an early grasp on the expense involved in collection, processing, reviewing, and producing your electronic data is crucial. This is true not only for the purposes of preparing a budget, but also for making a determination whether it is financially prudent to continue with the litigation at all. If, for example, you have determined that you are going to incur \$100,000 in processing costs for

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your production (and even more costs to review it) in a matter that the total claims by the plaintiff amount to just \$25,000, that fact will have a significant impact on how and if you proceed with the case or attempt to resolve the dispute before the total costs are incurred. Further, having your and the opposing party’s production hosted in a powerful search and organization tool will allow you to get to the most relevant documents in a more efficient way, thereby reducing your costs and leading you to a more informed and firmer footing when it comes to strategy and negotiating a settlement.

What Can Go Wrong? Examples from 2008

A review of some 2008 cases and opinions concerning electronic discovery provide good examples of some of the pitfalls that can be made by failing to plan adequately for production of electronic data as well as failing to get an early grasp of what data you have.

(Continued on page 16)

WHOSE DOCUMENT IS IT ANYWAY?

(Continued from page 5)

Failure to address the format of production adequately and the issue of metadata were common stumbling blocks for parties to litigation. In *Goodbys Creek v. Arch Ins. Co.*,¹ the defendants were ordered to reproduce all of their production in native format. The defendants had provided only images of their electronic data. The cost to reproduce an entire production would have been significant. Similarly, in *White v. Graceland Coll.*,² the court found that the production of electronically stored data in paper format did not comply with the rules and ordered the reproduction of certain electronic data in native format. It is crucial when producing data in any other format than native format that the metadata be preserved or saved. If that data is lost in converting the data to images, for example, the consequences down the road can be severe. Sanctions, adverse instructions to the jury, and even dismissal of the case in its entirety have all been remedies the courts have used for discovery penalties. The issue of spoliation has been raised frequently in opinions handed down in the last year. In one such case, a magistrate judge recommended a default judgment in favor of the plaintiffs and for defendants to pay “all reasonable costs” related to a spoliation discovery dispute.³ There are many other cases regarding spoliation as well, which emphasizes the profound importance of preserving any electronic data that could potentially be relevant, and therefore, discoverable.⁴ Failing to preserve electronic data can lead to severe adverse consequences for litigants.⁵

Another area where courts have been increasingly intervening in the discovery

process is the area of search terms. The search terms utilized to gather all potentially relevant electronic data are becoming increasingly important in avoiding problems post-production. Courts are ordering parties to litigation to come up with an agreed upon set of words and terms for the purpose of mining their data for relevant data. Depending on the size of the data set, processing electronic data can be an expensive and a time-consuming process. It is vital that your search terms strike the right balance of being comprehensive enough to hit every potential piece of relevant data, but also not so broad that a large amount of irrelevant data is captured. Remember, everything that is gathered and produced will have to be reviewed. Simply dumping large chunks of data on the adverse party is sure to raise the ire of a judge or discovery master. There are cases where parties have been ordered to conduct multiple searches across their whole data set to strike the right balance.⁶ Complaints by litigants of the excessive cost of searching large quantities of data often fall on deaf ears. In *Mikron v. Hurd Windows*⁷ the court found that the defendants failed to live up to their meet-and-confer obligation and that they had also failed to demonstrate that plaintiff’s discovery requests were unduly burdensome and/or cumulative, or that the requested electronic data was “not necessarily accessible because of undue burden or cost.” Striking the right balance in the search terms and coming to a mutual agreement on what the terms should be makes the process more defensible to a challenge at a later date, which can lead to delay and additional cost.

In summary, the benefits of planning for the management of your electronic data include the significant savings in overall costs; making the processes you utilize more defensible in a discovery dispute; allowing you to efficiently leverage the best possible outcome for those you represent; eliminating redundant data collection and processing efforts; and perhaps most importantly, giving you more control over the process. Looking beyond the effort required to gather and produce electronic data to how you can effectively manage and utilize it post-production will go a long way to avoiding the many post-production problems that litigants continue to experience. ■

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Endnotes

1. 2008 WL 4279693 (M.D. Fla. Sept. 15, 2008).
2. 2008 WL 3271924 (D. Kan. Aug. 7, 2008).
3. See Gutman v. Klein, 2008 WL 4682208 (E.D.N.Y. Oct 15, 2008).
4. Almarri v. Gates, 2008 WL 4449858 (D.S.C. Oct. 2, 2008); Arteria v. Universal, 2008 WL 4513696 (D.N.J. Oct. 1, 2008); Atlantic Recording v. Howell, WL 4080008 (D. Ariz. Aug. 2009, 2008); and Gippetti v. UPS, 2008 WL 3264483 (N.D. Cal. Aug 6, 2008).
5. Keithly v. Homestore.com, 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008).
6. Ross v. Abercrombie & Fitch, 2008 WL 4758678 (S.D. Ohio Oct. 27, 2008).
7. 2008 WL 1805727 (W.D. Wash. Apr. 21, 2008).