Beyond the "E"

Applying an Analog Approach to Discovery in a Digital World

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Since the writing of Section 15 of the Judiciary Act of 1789, discovery law has been a core precept of civil litigation – as integral to legal practice as the initial complaint. However, what was once easily understood and applied by even the most novice attorney, has become an area of frustration, confusion, and derision for even the most seasoned barristers. As data has moved from file cabinets to phones, the staggering amount of Electronically Stored Information ("ESI") has led to "paralysis by analysis" – lawyers can become overwhelmed with combing through what seems like unlimited data, missing opportunities to leverage discovery in their favor.

Step one in approaching e-discovery should always be, first and foremost, to "look beyond the 'e." Getting caught up in the technology of the data being targeted will distract from the bigger picture, leading to a failure by counsel to internalize the importance of the discovery process as it relates to their argument. When discovery is approached strategically and confidently at the outset, with clearly defined goals driving the outcome, what was once imposing can instead become an asset in court that may prove to be a difference-maker.

The Overwhelming Magnitude of "Big Data"

In the digital age, the term "potentially relevant" can be broad enough to conjure thoughts of millions of records that need to be collected, reviewed, and produced. Between laptops, desktops, personal devices, external drives, cloud accounts, etc., even a single custodian can generate enough ESI which, if printed to paper, would fill Cowboys Stadium. The key is in realizing that there is no obligation to even acknowledge a vast majority of that data. Before considering anything else, including an ESI Agreement, an attorney should start by asking two key questions:

What type of evidence do I need to win this case? By establishing not only the specific information needed to prove the argument but also the nature and format of that data, counsel can begin to set parameters from the outset and limit the type and location of data that needs to be considered.

How will my opponent try to prove their case? Before knowing the data sources that may need to be analyzed, an attorney should determine what opposing counsel's goal is, and what type and format of data will serve them best. Counsel can then design their e-discovery plan to spoil the best intentions of their opponent.

With a general strategy in place, it is time to determine the most likely locations of the relevant data, staying savvy enough to only consider those data stores that (a) meet the parameters set forth in the queries above, and (b) stay within the definitions of "relevant" and "proportional" as those words are defined by the Federal Rules. A good exercise is to imagine all potentially relevant data as an office building. It would be beyond reasonable for the court to expect someone to evaluate every single square inch of that building. Instead, an e-discovery plan should allow the attorney to pinpoint the specific file cabinets in the specific rooms where the most relevant data is likely to be stored.

Identifying the Relevant Data

Once the locus of potentially relevant data has been established, additional steps can be taken to further refine the scope of discovery, thus limiting both time and expense. Consider those "file cabinets" contemplated above as the top of a funnel. The e-discovery process is a journey down the funnel, where counsel needs a compelling purpose to move down the funnel, where each step of consolidation and refinement is predicated on a defensible reason.

Identifying the final data sources or custodians may seem like sufficient culling to begin the review process, but even then additional steps can be taken to reduce the discovery burden. Response to a vague request for the data associated with a specific custodian or data source may seem limited in scope, but it may still be broad. Imagine interviewing a witness to a crime. While seeking information related to that specific event at that specific time, it would be ridiculous to also ask that person for information about their dog's birthday party, their trip to Barcelona, and their favorite member of the Village People. Pouring through the entire data footprint of a custodian would be equally ridiculous and tedious.

An attorney should leverage all available resources to further limit their review. At the macro level, simple tasks like determining a device's use, how it is organized, and the habits and activity of the user. At the micro level, lawyers can use any number of tools, including but not limited to, process documentation, custodial interviews, technical specifications and capabilities of the data source, and data maps prepared by Information Governance experts such as those found at BlackStone.

Reality Bytes

Eventually, technology needs to be assessed and dealt with. Most often this occurs through engagement with an e-discovery vendor like BlackStone, who is equipped to collect and format data in a manner that will make it most reliable, reviewable, and useful. But with a discovery plan in place, the processing of that data becomes the easiest part of the plan. Equipped with specific targets and a well-thought-out workflow, the vendor need only execute the directive. Efficiency is maximized, and the cost is minimized. It is the initial focus on the discovery portion of the equation that will allow an attorney to successfully navigate difficult e-discovery collections in spite of the ever-present specter of the "e."

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