**Decreasing Costs and Increasing Value: Creative Approaches to Solve Cost Intensive E-Discovery Problems**

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Three years ago, this author published the first law review article that detailed the cost of e-discovery.[2] Admittedly, the cost proposition for e-discovery has since changed with the advent of new technology, the establishment of best practices manuals, and the increase in educational seminars; however, e-discovery is still expensive and, in many cases, cost prohibitive. With cost considerations in mind, counsel must establish practices and procedures to navigate its clients through the treacherous e-discovery waters. This, however, requires counsel to be creative and prevent the costs of experts, vendors, and attorneys from spiraling to a place where "angels fear to tread."[3]

This article identifies three overlooked tactics that counsel may employ to limit its e-discovery exposure. Of course, some e-discovery solutions are oft-cited, and this article makes mention of those only briefly here: 1) maintain a document retention program, 2) cooperate with opposing counsel, 3) sample documents, 4) argue for proportionality, 5) outsource the review to another country, 6) hire a special master, and 7) use predictive coding where appropriate. Other techniques are consistently overlooked, and these approaches have the potential to help counsel reduce attorneys' fees, increase productivity, and maximize the clients' e-discovery dollar. This article explores three such overlooked techniques:

1. Disclose Before You Search. In Arizona, counsel must exchange an Arizona Rule of Civil Procedure 26.1 disclosure statement that includes: 1) the factual basis for the claim, 2) the legal basis, 3) the witnesses, and 4) the proposed damages, among other things, within 40 days after filing a responsive pleading to the Complaint.[4] Counsel should require the mutual exchange of such before starting any e-discovery event, because counsel must have a target to hit before it may take aim and start searching for relevant documents. By having your opponent's preliminary facts, legal arguments, and witnesses placed center stage, counsel may target a specific set of documents, outline a specific strategy to find those documents, and obtain the precise documents that counsel needs to produce for litigation.

2. Use online surveys to track and monitor your client's preservation efforts:[5] Monitoring an e-discovery event is a tireless task. This task requires counsel to identify key individuals, issue a litigation hold to each key player, send each custodian an acknowledgement form, ensure that every custodian has returned and complied with the contents of the litigation hold letter, interview custodians about where and how they store their data, monitor the client's employees to ensure compliance, sample the custodians compliance efforts, and so on. But there is an

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[2] Degnan, *Accounting for the Costs of Electronic Discovery*, MINNESOTA JOURNAL OF LAW, SCIENCE AND TECHNOLOGY, 12 Minn L. Tech. & Sci 151 (2011).

[3] *Cf.* United States v. O'Keefe v. 537 F. Supp. 2d 14 (D.D.C. 2008)

[4] Ariz. R. Civ. P. 26.1(b).

[5] The author is thankful to Joshua Carden for this idea.

easier way. Instead, counsel could easily send a mandatory online survey to all relevant custodians—perhaps through a company such as Survey Monkey®—that requires the recipient to acknowledge that he or she: 1) received the litigation hold notice; 2) read the litigation hold notice; 3) identified what steps the employee took to comply with the notice and 4) provided any hot documents outlined in the Rule 26.1 disclosure (see above) that the litigation team should look at before proceeding; and so on. By reviewing the reports generated from the survey, counsel can view real-time charts and graphs to see who is complying with the litigation hold, and more importantly, who is not.

3. Systemize and Standardize E-Discovery: E-discovery is very document intensive, but counsel must engage in certain aspects of legal project management to ensure that its team is complying with the rigorous e-discovery rules and with its own ethical obligations. Legal project management requires that the defendant make efficient use of its resources; systemize and create forms for many motions, notices, and letters; and rigorously plan the e-discovery case to ensure that the case stays on time and on budget. For example, counsel can use software that will help track the deliverables to ensure that the case is moving forward. In such software, counsel can establish forms, craft surveys that can be used on multiple e-discovery cases, and so on. By understanding and implementing legal project management techniques and tools into the e-discovery case, counsel can reduce the uncertainly that invariably goes into the e-discovery event.

While by no means an exhaustive list, counsel can greatly reduce the cost and uncertainty that goes with an e-discovery event by using detailed disclosures, surveys to track compliance, and legal project management techniques. By initiating these procedures, counsel may develop a road-map for his clients to navigate the treacherous waters and go where most trial counsel fear to tread. In so doing, e-discovery counsel may focus the litigation on the merits, rather than expend unnecessary money and time on discovery.