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BEST PRACTICES

BuckleySandler partner Caitlin M. Kasmar discusses specific eDiscovery strategies that can significantly impact the burden, cost and potentially the substantive outcome of a government investigation.

The Butterfly Effect: eDiscovery in Government Investigations and Why Small Tweaks May Have Great Impacts

BY CAITLIN M. KASMAR

In the context of civil litigation, the rules governing eDiscovery may not be crystal clear (especially in light of the recent amendments to the Federal Rules), but at least there is ample guidance available.

Counsel can perform simple research and identify troves of articles addressing how to leverage the Rules—and other actual *law*—to position themselves in the best way possible to either obtain all the information they seek or prevent the other side from imposing massive burdens on their clients.

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The world of government investigations is different.

In this world, clients are motivated by one primary concern: to avoid being sued. In this world, the rules are not always clear.

Ostensibly, the Federal Rules apply (see F.R.C.P. 81(a)(5)), but neither party wants to go to court over a pre-suit discovery issue.

And often in this world of government investigations you are still engaging in a bend-over-backward effort to cooperate with what may be very burdensome requests, while at the same time strategizing how to limit the scope of the investigation.

In government investigations, the need to understand the universe of relevant information is even more pressing and urgent than in civil litigation; you may quickly find yourself backed into a corner, making representations about systems you do not fully understand.

Fortunately, a few tweaks to the process of responding to a subpoena can smooth the road ahead.

Negotiate, Negotiate, Negotiate

When a subpoena or civil investigative demand is issued by a government agency, chances are the issuing attorney is expecting the scope of the requests to be negotiated by company counsel.

In fact, we hear regularly from government attorneys that the requests were ''drafted broadly'' with full knowledge that the two sides will come to a reasonable agreement as to what should actually be produced in the course of meet-and-confer discussions.

This may seem an obvious point, but too many times we've been brought into active investigations where counsel handling the matter took the requests at face

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value and simply set about the work of collecting documents without engaging in a deep and substantive negotiation with the other side.

It cannot be stressed enough—do not assume that you need to produce everything the subpoena requests on its face.

Think hard about what the government might be looking for. Question your client carefully about what types of documents and information exist and whether there is a sensible way to be responsive to the request without turning over the earth.

Do not assume that you need to produce everything the subpoena requests on its face.

At the same time, do not assume that the government attorneys on the other side of the table are out to make your life, or your client's life, completely miserable for the next year.

At this stage of the investigation your client and the government have a shared goal in some sense —to uncover information with a minimum amount of expense, burden and delay.

If you can make the government investigators understand you are working to help them—assuming your client is taking a cooperative stance—you have gone a long way to build the trust needed to get through the duration of the matter and the various bumps in the road that will inevitably emerge.

Building trust means being responsive, following up on specific requests that are made and thinking creatively about ways to provide information in a way that best meets the needs of both sides.

It also means listening carefully to the government attorneys' descriptions of what they are looking for and what they expect in terms of timing.

Unrealistic expectations need to be rebutted quickly and carefully, preferably with use of an outside expert (see below) depending on how serious the issue is and what technologies are involved.

Learn Your Client's Systems

The first step in formulating a reasonable counterproposal to the government's request is learning how your client stores, retains and exports data and documents that might be relevant.

This takes time. Outside counsel should make sure to budget for this time, otherwise this critical step may be rushed in light of looming deadlines.

Consider the amount of time it can take to fully investigate a large company's systems in a fairly standard government investigation:

- Discussion with in-house counsel to identify potential custodians: **One hour**
- Discussion with client IT to obtain overview of systems, databases and other repositories: **Two to four hours**
- Interviews with potential custodians to discuss where they store information and how accessible it is: **Five to 20 hours**
- Discussions with client's vendor to determine logistics of obtaining information housed offsite, on backup tapes, or in similarly inaccessible locations: **Two hours**
- Discussions with client IT to determine best method of exporting data/email: **Two to four hours**

Total = 12 to 32 hours

For smaller companies with less IT-related infrastructure, the inquiry can sometimes take even longer as the requested information may not be readily available.

At typical law firm billing rates, the fees add up quickly before document review has even begun, which is typically the biggest cost driver in eDiscovery matters.

Investing this time up front can save massive headaches (or worse) later; savvy in-house counsel will recognize that plunging neck-deep into discovery without fully investigating and assessing the systems housing the data and documents is a big mistake.

Understand That Volume Is Less Daunting Than It Used to Be

Not so long ago, company counsel could often win the day with arguments about burden.

Statements like these were standard fare:

- ''Your request is so broad it would require us to produce every email ever written by over 20 custodians going back 10 years. You can't possibly mean that!''
- ''The company retains five years' worth of call recordings and your subpoena requires production of every last one of them. At 20,000 calls per month, the total volume would be 1.2 million calls, which is unduly burdensome for us to collect and produce.''
- ''Your request as written would require us to produce [insert scary-sounding number of terabytes] worth of data. It would take literally years to produce and review.''

After hearing these arguments, the government attorney would usually agree to some limitation—most likely, at a minimum, the use of an agreed-upon set of search terms and perhaps some narrowing of date ranges and custodians.

We are increasingly seeing the government attorney handling the investigation bring technical experts to the initial meet-and-confer discussion.

Today, you may still end up using search terms, but more likely than not the government attorney on the other side is not going to be so worried about the umpteen terabytes' worth of data.

We are increasingly seeing the government attorney handling the investigation bring technical experts to the initial meet-and-confer discussion.

There, technical experts will dig into the client's systems and question any representations made about the speed (or lack thereof) with which certain types of data can be pulled and exported.

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Companies cannot hide behind large volume anymore. There are plenty of new technologies that allow companies—and the government—to harvest and understand exceedingly large amounts of data and information.

Government agencies are using these technologies and are increasingly skeptical when clients describe an export process as ''manual'' in any way.

Do not assume that ''the volume is too large'' argument will get you anywhere, other than a request to go back and ask more questions of your client.

Do not assume you can skate by with a minimal understanding of the systems or technologies at issue.

Utilize Experts

In this new world of growing amounts of data and new places to harvest responsive data (smart phones, IMs, etc.), make sure you are consulting with the right experts.

Larger companies may have the internal IT expertise to handle complex data-harvesting jobs; smaller companies (or less-technologically-advanced companies) may not.

In those cases, you may need to deploy your own internal experts or retain outside experts to consult and determine the best way to pull relevant material.

Most competent eDdiscovery vendors can offer support across a wide range of media and/or know the right firms to subcontract with for specific technologies that are less frequently relevant (e.g., analysis of call recordings or other audio files).

Do not assume you can skate by with a minimal understanding of the systems or technologies at issue—the government is likely consulting with experts and you should be too.

Conclusion

The strategies described here, which can and should be deployed at the outset of an investigation, can have an enormous impact on the amount of information provided and the burden and cost associated with data production.

An illustrative example follows:

A client receives a subpoena from a government agency. The subpoena calls for production of all data related to the company's marketing practices from 2010-present.

Negotiate: Through early discussions with government attorneys, counsel learns that the government is actually most interested in a subset of the marketing data—specifically, data related to a certain category of advertisement.

The government agrees to review that data first and hold the rest of the request in abeyance.

Learn the systems: Through discussions with client about relevant systems, counsel learns that the client only maintains certain responsive data from the last year, and the rest resides with a vendor and has significant integrity issues.

This fact informs the strategy taken with respect to the data request and counsel is able to avoid wasting a lot of time and energy on both sides by fully investigating the vendor issues up-front.

Don't fear volume: Although counsel has managed to significantly limit the scope of the requests through the first two steps, the remaining data sought is still voluminous.

Counsel is able to communicate this fact to the government and come to an agreement with respect to a rolling production, or a sample of data, so that the client can continue its normal business operations but still provide information in a timely manner.

Consult with experts: Upon learning about the issues with respect to the vendor, counsel is able to identify and consult with an expert in this particular technology. The expert confirms what the client and vendor are telling counsel.

Counsel is able to communicate this to the government attorneys, and can even present the expert if necessary.

If counsel had not diligently walked through each of the steps outlined above, the company could have found itself producing too much data or (worse), producing *bad* data to the government, likely on a time-line that would have ended up being unrealistic.

The difference can be many thousands—even sometimes, millions—of dollars, not to mention the worse consequences for the client if the relationship with the government agency is irreparably damaged.

In short, eDiscovery in government investigations can be incredibly burdensome, expensive and time-consuming—but by following the same simple steps each time a new subpoena comes in, counsel can render the process less painful and create better results for clients.