Civil Justice Reform – Law Firms

An Inconvenient Forum – Reining In E-Discovery In The United States

Robert C. Manlowe and Andrija Samardzich

WILLIAMS KASTNER

The costs of litigation, particularly for large companies, has continued to skyrocket as electronic discovery moves from the fringe of litigation to center stage. Long, protracted e-discovery disputes have become more common, and occur in an environment where pitfalls are questionably defined and liability can be daunting. In fact, a recent survey of attorneys conducted by the ABA demonstrated that a substantial majority of the interviewed attorneys agreed that e-discovery is not only overly burdensome, but has also disproportionately increased the cost of litigation. Cases are settled because of anticipated cost rather than on the merits of the action, and many lawsuits are simply not brought from fear of the cost of litigation. To preserve the function of the civil justice system, something must be changed.

Cooperation is the cornerstone to discovery, and e-discovery is no exception. However, in many cases the parties cannot agree on all aspects of e-discovery, and courts have been forced to intervene. The results are not always consistent, and litigants may find themselves in trouble, despite their best efforts to meet their obligations. Worse still, litigants may find themselves targeted by unscrupulous e-discovery practices by an opponent that are designed solely to drive up costs or convince the court to issue sanctions.

Changes to the e-discovery practice in the U.S. are needed to discourage abuse of the discovery system, to keep the costs and liabilities of e-discovery reasonable, and to provide surer footing to parties as they navigate e-discovery in any given case. The source of ambiguity and uncertainty for litigants originates from the duty to preserve, though, more specifically, when that duty arises and what scope of preservation the duty requires. Litigants are often required to make these determinations when little is known about the nature of the actual claims that have not yet been filed. Add to this the threat of sanctions for failure to appropriately interpret one's duties, and litigants find themselves in uncertain and perilous terrain. Even the grounds on which a court will issue game-changing sanctions vary in different jurisdictions, creating more uncertainty.

The field of e-discovery could be notably improved by providing clear and uniform guidance on the events that trigger a party's duty to preserve documents as well as limiting and delineating the appropriate scope of that duty, and by explicitly proscribing the type and limits of sanctions that are available for specific types of conduct relating to e-discovery. Each of these subjects is addressed separately, below.

***Robert C. Manlowe** is a Member in Williams Kastner's Seattle office. His practice involves Complex Litigation Management, ESI/e-discovery Consultation Services, Crisis Management and Media Relations. **Andrija Samardzich** is an Associate in the Portland office of Williams Kastner and a member of the Business Litigation and Products Liability and Mass Torts Practice Groups. Please visit our website at www.metrocorpcounsel.com for complete article with footnotes.*

Triggering The Duty To Preserve

Scores of recent articles have been published to address issues relating to when a defendant's duty arises to preserve documents for litigation. The sheer volume of literature that addresses the issue attests to the fact that the duty is neither clear nor intuitive. Business defendants can neither function nor thrive in such ambiguity; these entities can generate incredible volumes of electronically stored information ("ESI") each day, and need specific guidance regarding what of this mass of information must be preserved, when that duty arises, and for how long the data must be kept. Currently, no bright-line rule exists that provides litigants clear guidance as to when their duty to preserve first arises.

Federal courts have generally agreed that the duty to preserve is triggered when litigation is initiated, is reasonably anticipated, or is reasonably foreseeable.[1] Although there seems to be common acceptance of phrases such as "reasonable anticipation of litigation" or "reasonably foreseeable litigation," litigants would find a clear, bright-line standard more useful – for example, triggering the duty when litigation is "reasonably certain," or a similar phrase that provides litigants with a simpler cue for initiating their duty to preserve and issue litigation holds. Reducing the guesswork that is required by litigants in discerning the start of this duty would also reduce the frequency of lost documents and resulting sanctions. Generally, discovery would run smoother, and litigation could achieve the goals it was created to achieve.

When litigants are forced to interpret vague notions like "reasonably anticipated" litigation, they may well end up issuing holds far earlier than is necessary, or, as a complete waste, issuing them for a situation where litigation does not result. Conversely, months or years after issuing a hold, a court may determine that the hold was issued too late and issue sanctions for information that was not preserved. The shift to reasonable certainty provides a clearer articulation of the triggering of the duty to preserve and ensures that fewer complications will arise later, and discovery will proceed more smoothly.

Limiting The Scope Of E-Discovery

Even if a litigant has a clear understanding of *when* the duty to preserve is triggered, knowing what to include in a hold can be far more daunting and challenging. It is unlikely that the original drafters of the rules relating to discovery scope ever imagined the unparalleled volume of electronic documents that can be generated by a company. With only phrases like "reasonably related" and "likely to lead to discoverable information" as guidance to what should be preserved, litigants are left to issue these sweeping holds when they know very little about the "reasonably anticipated" lawsuit they are facing, particularly in jurisdictions that require only notice pleading. Include too much in a hold, and you must pay the potentially hefty price of reviewing and culling the additional irrelevant material; include too little or fail to include a single computer or custodian of records in your search, and sanctions may well follow. In fact, some litigants issue overly broad demands for preservation for the express purpose of later pursuing ancillary litigation against the preserving party for any perceived failures, regardless of how slender the relevance of the unpreserved information might be.

The scope of a litigation hold will vary in each case and is dependent on the specific claims raised in the case. However, baseline rules detailing a general framework of the minimum, reasonably expected scope of preservation would give initial guidance to parties and allow them to demonstrate their good-faith efforts to comply. This would allow the preserving party to meet its obligations in the early and unclear stages of litigation (or anticipation thereof) without fear of sanctions arising later. Furthermore, a minimum preservation standard would provide parties with a starting point from which to cooperatively build the scope of preservation for a specific case, and would place the onus of seeking a broader scope of preservation on the requesting party.

However, when attempting to negotiate an expansion of the minimum scope of preservation, litigants should not feel free to demand the stars and sky. Proportionality is key to efficient and effective discovery practice.[2] As counsel for large corporations will attest, even a modest increase in the scope of preservation can cost hundreds of thousands of dollars, and the impact of requesting an expansive scope of preservation is not felt by the requesting party. The cost of e-discovery can quickly surpass the highest possible value of a judgment in a given case. The Seventh Circuit's Electronic Discovery Pilot Program[3] acknowledges this problem in Principle 1.03 of its general principles, noting that "The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable."

Proportionality, however, is often difficult to ascertain in a given lawsuit. Therefore, the most reasonable way to provide a clear and uniform approach to the problem of proportionality would be to set a cost-threshold at which point the burden of paying for additional collection and preservation of ESI shifts to the requesting party. If a party meets the preservation guidelines described above, but the opposing party requests the preservation of more information, at some point, that party should be required to pay for the additional cost of searching for and preserving that information. A threshold of, for example, $15,000 before shifting the cost-burden would encourage parties to request preservation and production in a focused and calculated way, then determine whether the value of additional information would be worth the additional request. This would reduce the cost and burden to parties generally, while increasing the accuracy and use of strategy in discovery, without limiting a party's access to justice. Proportional and well-defined discovery scope will go a long way to improving the current e-discovery problems in civil litigation.

Providing Clear Guidance On Sanctions In E-Discovery

In light of the ambiguity and uncertainty that currently pervades the e-discovery field, it is no surprise that sanctions related to e-discovery are on the rise. Sometimes years after a litigant issued its holds on shaky "anticipated litigation" and has preserved what it thought appropriate, a court will be asked to review the process employed by the litigant in preserving its documents. And, courts have not been consistent when deciding what types of conduct merit sanctions. When so little guidance exists on how to conduct e-discovery, adding additional threats of undefined sanctions for unspecified behavior can expose a party to liability they never imagined.

Typically, severe sanctions such as adverse inference instructions, default judgment, or striking pleadings are reserved for bad faith conduct. However, a recent federal opinion from the Southern District of New York sanctioned several parties for "gross negligence" stemming from their perceived failures to issue timely holds and preserve documents by issuing an adverse inference instruction regarding "missing" documents to the jury.[4] In contrast, other courts have noted that negligence is simply not grounds for issuing such severe sanctions in most jurisdictions.[5] Before issuing severe sanctions, courts should be required to find intent to prevent the use of ESI in litigation, rather than focusing on every possible inadvertent shortcoming in a party's preservation efforts.[6]

Furthermore, courts must shift their focus away from the minutia of every step taken by a litigant to preserve data, and instead analyze the proportionality and sufficiency of the data that was preserved and produced, as well as the litigant's overall good-faith effort to preserve. Otherwise, courts lose sight of what is truly at issue in the litigation. The court that sanctioned parties for "gross negligence" gave little regard to the fact that much of the "lost" data was duplicated in the documents produced by other parties, and penned only four paragraphs in an opinion that exceeds 40 pages to discuss the actual relevance of the allegedly lost documents.[7] There was no suggestion that parties were unable to prepare their cases resulting from these shortcomings.

By ignoring the sufficiency of the preserved data and the overall good-faith efforts to preserve, courts seem to lose sight of the forest by focusing on the individual trees. The most important question should be whether a party has cooperated in a good-faith manner and made reasonable efforts to preserve and produce the material the opposing party requires to formulate and prepare their case, not whether every single quantum of data was preserved. Until courts shift their focus accordingly, the U.S. civil justice system will continue to creep closer to a Kafkaesque bureaucracy in which substance and utility are overshadowed by procedure.

Regulating electronic discovery on the issues surrounding preservation will provide certainty and predictability to litigants and ensure that good-faith efforts continue to be the key to functional discovery. A clear guide to the origin of the duty to preserve, the reasonable scope of preservation, and the repercussions for intentional failures is necessary to modernize the discovery process and encourage litigants to cooperate and focus their efforts to most efficiently resolve the disputes at issue.

Please email the authors at bmanlowe@williamskastner.com or asamardzich@williamskastner.com with questions about this article.