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Hal and me: Accepting technology's imperfections

Find practical ways to handle the problems that come from expanding volumes of data, smaller budgets and courts' increasing expectations.

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The quest to solve the problem of reducing ever-expanding amounts of electronically stored information (ESI) into manageable and relevant documents for use in litigation has left many casualties along the way — lawyers who underestimated the burden on litigation budgets; contract attorneys who improperly coded privileged documents after 40 straight days of staring at a computer screen; litigants who failed to properly preserve and produce; vendors that underestimated the competition; lawyers who misstated that all responsive documents had been produced.

The next predicted casualty is the search term, as better and smarter technology-assisted review methods stake their claim in the era of the predictively coded document. Thus far, however, no proposed solution is without flaws. The key is accepting imperfection and finding practical ways to handle the problems that come from expanding volumes of data, smaller budgets and courts' increasing expectations.

The problem is well documented: The amount of information subject to discovery in litigation continues to grow at almost unfathomable rates as individuals and corporations generate staggering amounts of ESI. In 2010, approximately 32 billion useful (i.e., not spam) e-mails were sent every day — as compared with the 171 billion pieces of mail delivered by the U.S. Postal Service during all of 2010. Lucian Parfeni, "107 Trillion Emails Sent in 2010," Softpedia, Jan. 13, 2011, http://news.softpedia.com /news/107-Trillion-Emails-Sent-in-2010-177968.shtml; Devin Leonard, "The U.S. Postal Service Nears Collapse," Bloomberg Businessweek, May 26, 2011. E-mails are not the only source of ESI, with burgeoning social media, "status updates" and tweets, not to mention ever-changing and wide-ranging data sources including pads, pods and clouds.

The time, burden and expense associated with identifying and producing a subset of relevant information from diverse data sources containing mountains of information is dwarfing traditional discovery budgets and holding litigants in an expensive dilemma. Further complicating matters, this problem is expected to be solved in the same amount of time it took to produce documents back in the paper days. In rocket dockets such as the U.S. District Court for the Eastern District of Virginia, the time allotted for discovery often is three to four months total.

IMPERFECT SOLUTIONS

The process of preserving, collecting, reviewing and producing documents is imperfect — and, to be honest, it always has been. Today, the omnipresence of electronic documents encourages a belief in discovery utopia: Theoretically, each and every responsive document can be found! But the increasing volume of ESI generated by even the smallest litigants continues to outpace our ability to efficiently and accurately distill this information into a manageable and relevant universe of documents. The reality of limited time and money demands that parties compromise and accept discovery imperfection.

Imperfect, expensive and risky — apt words to describe the options for identifying responsive and relevant documents. Many methods have arisen over the years, including custodian-directed or assisted collection; black-box filtering (search terms, Boolean, etc.); early case-assessment filtering; concept searching; predictive coding; manual linear review; and even "quick peek" or no review. Each of these methods has its own benefits and risks.

Unfortunately, courts have not identified a universally accepted method, and instead have been critical of almost all of these

methods. See, e.g., *Phillip M. Adams & Assoc. LLC v. Dell Inc.*, 621 F. Supp. 2d 1173, 1193-94 (D. Utah. 2009) (finding that a company's delegation of the responsibility for storing and identifying relevant ESI to its employees created a sufficient degree of culpability that the company could be sanctioned for the spoliation of evidence); *U.S. v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) ("For lawyers and judges to dare opine that a certain search term would be more likely to produce information is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman."); *Victor Stanley Inc. v. Creative Pipe Inc.*, 250 F.R.D. 251, 260 (D. Md. 2008) ("While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge.").

Thus, litigants face the unenviable position of having to choose among various imperfect, expensive and risky options with no clear guidance from the courts.

As there are no perfect solutions, imperfection is inevitable. So, what are the ethical implications of this imperfection? If one knows that a collection method or some search criterion is missing relevant documents, what then?

No matter how reasonable the efforts, how cooperative are opposing counsel or how advanced the technology-assisted review, litigants must understand that some documents will be withheld that are not in fact privileged, some privileged documents may get produced and some relevant — perhaps critical — documents may never see the light of day.

This is not a new problem. When paper files ruled the world, the challenge was finding critical documents that existed only in hard-copy form (and for which there might be one or more carbon copies) located among thousands of storage boxes in a dusty warehouse somewhere. Today, the problem is almost the reverse: The chance of any single document getting lost is very small, given the ease of creating and copying electronic documents, the relative undestroyability of electronic documents copies and the modern practice of copying and forwarding documents to many recipients. The resulting volume of ESI causes documents to get lost in plain sight — a few kilobytes in the multi-terabyte ocean that must be collected, processed and reviewed by human beings.

Recognizing that we cannot locate, collect and produce every responsive document, what should we do? Are our ethical obligations any different than they were during the days of paper discovery? And how do we weigh our ethical obligations against the practical problems of time and expense, especially with the ever-escalating costs of electronic discovery?

Skeptics argue that some litigants take advantage of the imperfect process by purposefully choosing custodians or search terms that will avoid the production of the smoking-gun document. Others complain that overly broad requests are being made solely to drive up costs and force settlement on a basis other than the merits.

GAMING THE SYSTEM

Some litigants may be gaming the system — but is this really a new problem? Distrust is the main reason why efforts to encourage cooperation are not always successful. See, e.g., The Sedona Conference Cooperation Proclamation (The Sedona Conference Working Group Series, July 2008 Version, pp. 1-3). ("In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes — in some cases precluding adjudication on the merits altogether — when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.")

Unfortunately, unethical conduct exists today in the much the same way it existed during the days of paper discovery. An imperfect system invites abuse. The best way to address these problems is to engage in transparent dialogue with opposing counsel and the courts regarding the imperfect process and agree to an acceptable imperfect solution that is reasonable for the specific matter — considering the amount in controversy, specific claims and specific parties involved. If agreement cannot be reached, document the basis for any unilateral, imperfect plan of action.

Unfortunately, such agreements (or unilateral plans) are intended to address uncertain future events and may not work as anticipated. What should be done if relevant and material documents fall outside of the agreed-upon parameters? What should opposing counsel be told and what duty is there to revise or expand the search parameters (at perhaps significant cost)? Again, these are just variations on discovery problems that have existed for ages — although the nature, volume and ubiquity of ESI suggest that these problems may arise more often today.

There are no checklists that lead to the perfect solution in this difficult area. The best way to manage these imperfections is to admit they exist, take reasonable steps to reduce them and protect clients against them by seeking agreements that protect against the inevitable errors that will occur when managing huge volumes of ESI for production in litigation. The more transparent this process is, the more likely the parties (and the courts) can reach reasonable solutions to these difficult problems. Maybe Hal 9000 will save us all from ourselves, but chances are the issues associated with filtering down impossibly large amounts of data to digestible, relevant nuggets will require humility, cooperation and patience.

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