Managing Document Production in Complex Commercial Cases

By Scott T. Seabolt

Introduction

Managing complex commercial litigation can be one of the most challenging tasks facing in-house counsel. The resources devoted to these cases, both inside and outside of the company's legal department, can be significant. The most expensive, and often the most frustrating, aspect of this task involves the discovery work. Within the discovery process, the assembly and production of documents can present significant and expensive challenges.

In-house counsel should play a key role in managing the production of documents in a complex commercial case. The purpose of this article is to outline the steps that should be taken, including issuing the litigation hold notice, gathering responsive documents, and the critical step of reviewing and producing those documents. To the extent in-house counsel can be involved in each step of this process, significant savings in outside counsel fees can be realized. Additionally, efficiencies can be achieved that will also result in meaningful savings.

Issuing and Implementing an Effective Litigation Hold

The timely issuance of an effective litigation hold is a critical part of any document production process. Recognizing the importance of timely litigation holds, the 2006 amendments to the Federal Rules of Civil Procedure (FRCP) added "preserving discoverable information" to the list of topics to be covered during the initial conference of the parties under FRCP 26(f). This is not to say that litigants should wait until the initial conference before issuing a litigation hold notice. Rather, the notice should be issued as soon as the obligation to preserve relevant documents attaches.

The obligation to preserve relevant documents attaches when litigation is reasonably anticipated.[1] Litigation can be and frequently is reasonably anticipated before a lawsuit is filed. This is particularly true in the context of complex commercial litigation that often is preceded by a demand letter, a formal dispute resolution process, or less formal discussions and negotiations. The obligation to preserve relevant documents applies equally to plaintiffs and defendants, which means that when a party is considering initiating litigation, it also should be considering and taking steps to meet its preservation obligations.

There are many factors that should be considered in crafting and implementing an effective litigation hold notice. Some of the more important factors are summarized below. Time is of the essence in issuing a litigation hold notice, so these steps must be completed immediately once litigation is reasonably anticipated.

Identify the Issues in Dispute

A party is under a duty "to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[2] Thus, in order to implement an effective litigation hold, it is critical to identify and develop a list of the legal and factual issues at the outset of the case. Complex commercial litigation tends to be fluid with new legal and factual issues arising throughout the proceedings. Accordingly, the list of legal and factual issues should be reviewed and updated throughout the case.

For Each Issue, Identify the Categories of Documents That May Contain Potentially Relevant Data or Information

Different legal and factual issues may involve different categories of relevant documents. For example, questions of contract formation and interpretation may involve certain categories of documents, while questions of trade secret misappropriation may involve entirely different categories of documents. If the issues are contract formation and interpretation, potentially relevant categories of documents may include contract drafts, previous agreements, correspondence between the commercial functions, documents showing the parties' course of performance, etc. If

the issue is misappropriation of trade secrets, potentially relevant categories of documents may include product specifications, R&D documents, correspondence between engineers, etc. Just as most complex commercial matters tend to involve myriad legal and factual issues, most complex commercial matters also involve numerous categories of documents from numerous custodians in multiple functional areas within an organization. Identifying the various categories of documents relevant to each issue and the functional areas in which those documents reside is critical to implementing an effective litigation hold.

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For Each Category of Documents, Determine Where the Documents are Located and Develop a List of Custodians

No two companies have the exact same information system or document management process. And truly "paperless" companies are not very common (at least not yet). Thus, most complex commercial cases generally involve vast amounts of electronically stored information and some amount of hard copy documents. In determining where specific categories of documents are located, it often is helpful to involve a member of the IT staff, as well as members of the functional areas affected by the litigation hold. These individuals can help to explain where and in what form certain categories of documents are located, e.g., servers, network drives, shared drives, local drives, portable media, legacy systems, hard copy files, microfilm/microfiche, off-site storage, etc. These individuals also can help to identify the custodians for each category of documents. The list of custodians generally should include individuals directly involved in the underlying dispute, as well as individuals who may not have been directly involved in the underlying dispute, but who are responsible for maintaining certain categories of relevant documents, whether electronic or hard copy.

Prepare and Issue the Litigation Hold

The litigation hold notice itself should be treated as a document protected by the attorney client privilege and the attorney work product doctrine and, therefore, should be issued by a person falling within the ambit of the privilege. The contents of the notice will vary from case to case and organization to organization based, in part, on what was learned in steps 1-3 above. In general, the notice should provide an overview of the underlying dispute, list the categories of documents covered by the notice, explain that the notice covers both hard copy documents and electronically stored information, and instruct custodians not to discard, delete, destroy, or alter documents falling within the scope of the notice. The notice should further explain that the "hold" instruction will remain in force until further written notice from the organization's counsel is received.

In preparing a litigation hold notice, consideration should be given to where and for how long electronic information is stored. For example, a company may have an information system in which e-mails are retained in users' in-boxes for a limited period of time and then automatically deleted. If the company has such a system in place, consideration should be given to additional steps that may be taken to ensure that relevant e-mails are not deleted from users' in-boxes. With some information systems, the automatic delete operation can be suspended or modified for specific users affected by a litigation hold. If this is not practicable, users affected by the litigation hold can be instructed to place relevant e-mails in a folder that is not subject to an automatic delete operation or to take other appropriate steps to ensure that relevant e-mails are not lost.

The 2006 amendments to the Federal Rules include a safe harbor provision in FRCP 37(f) which states, "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." The practical boundaries of this Rule are yet to be determined, and relying on FRCP 37(f), which operates retrospectively, as a guide to issuing litigation hold notices may be a dubious practice. Moreover, the other 2006 amendments to the Federal Rules, particularly FRCP 26(f), were designed at least in part to avoid disputes under the safe harbor provision by forcing parties to reach an understanding early in litigation as to what has been done and what should be done to preserve relevant documents.

Obtain Written Confirmation and Keep a List

In complex commercial cases, the litigation hold notice may be issued to dozens of custodians. Moreover, as cases evolve and new

issues arise and new categories of documents are identified, amended or supplemental notices may be necessary. Consequently, it is critical to keep track of who received what notices and when. To this end, it also can be helpful to have each custodian certify in writing that she/he read, understood, and complied with the contents of the notice.

Gathering Responsive Documents

The first step in gathering responsive documents is to determine the scope of what is being gathered. Are documents being gathered pursuant to some initial disclosure obligation,[3] or as part of general case development, or in response to specific document requests from an opposing party? What is the scope of the documents being requested? Does the litigation hold notice need to be amended or supplemented in light of what is being requested? Were the documents currently requested already gathered as part of an earlier document sweep? This last question is particularly important and requires careful consideration. Attorneys and clients sometimes assume too hastily that documents responsive to a particular request were covered by an earlier request or were included in initial disclosures. Assumptions like this are dangerous and can prove to be costly if they turn out to be incorrect.

For most employees (particularly those who do not happen to be lawyers), litigation is an unwanted distraction from one's day job. Nowhere is this more apparent than in the document gathering process. For the most part, the proliferation of electronically stored information has made the process of gathering documents more arduous, not less. Gone are the days when an employee's file consisted of a few folders tucked neatly in a filing cabinet. In addition to searching hard copy files, gathering relevant documents today can involve scouring e-mails, hard drives, and shared drives, searching Word, Excel, PowerPoint, and other electronic files, sorting databases used by purchasing, engineering, quality, accounting, or other functions, etc. To most employees, the prospect of spending several hours scouring electronically stored information and sifting through hard copy files, all the while reliving a dispute they would rather forget, simply is not appealing.

For litigators, however, performing a thorough document sweep is critical to an effective representation. Recognizing the significance of electronic discovery in litigation today, the 2006 amendments to the Federal Rules specifically added the "disclosure or discovery of electronically stored information" to the list of topics to be covered during the initial conference of the parties under FRCP 26(f). Pulling folders from a filing cabinet simply is not sufficient today. And it is important to get it right the first time. Filling gaps in an incomplete document sweep can be as time-consuming and as expensive as the original document sweep.

There is no panacea for the tedium of gathering documents. It is a pain, and it probably always will be. To mitigate the pain, litigants sometimes try to leverage their technology to gather responsive documents. For example, rather than asking individual users to gather responsive e-mails, it may be possible to search, isolate, and harvest relevant e-mails directly from a server. It may be possible to search, isolate, and harvest other electronic files from hard drives or shared drives without imposing on individual users. In appropriate circumstances, leveraging technology to gather electronically stored information can be less disruptive to an organization, though it also can be expensive.

Before employing one of these methods, it is advisable to retain a third-party consultant specializing in electronic discovery. Working with the company's IT staff and other functions, the third-party consultant can help to identify the best method for searching, isolating, and harvesting electronically stored information. Before conducting the search, it also is a good idea to consult with opposing counsel and agree on the search terms to be used and the form of production. For example, will reports be provided showing the searches performed and the results? Will electronic documents be produced in native format or in searchable TIFF or PDF formats? Will metadata be produced for electronic documents? Answers to these questions can affect how the search is conducted and how electronic documents are harvested and prepared for review.

In gathering documents, consideration should be given to sources of electronically stored information that are not "reasonably accessible." The 2006 amendments to the Federal Rules added a provision to FRCP 26(b)(2)(B) that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue

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burden or cost." The objecting party bears the burden of demonstrating that the information is not reasonably accessible. The objection can be overcome on a showing of good cause by the requesting party, but the court may specify conditions for the discovery, such as cost sharing or shifting.

Whatever the method employed for gathering documents, it is important to maintain a meticulous list of what sources were searched, how they were searched, and when. It also is helpful to have each custodian certify in writing that he or she has conducted a reasonably diligent search of the identified records, both hard copy and electronic, and has produced all responsive documents located through the search. As documents are gathered, it is important to keep track of when documents were received and from what sources. This information may be helpful in filling gaps in the production, responding to subsequent requests, diffusing discovery battles, identifying witnesses, and preparing witnesses for depositions.

Even with the benefit of technology, reviewing documents remains an expensive and time-consuming proposition.

Reviewing and Producing Documents

Reviewing large volumes of documents for responsiveness, privilege, and confidentiality is a time-consuming and expensive proposition. Litigants often try to leverage technology to reduce this expense. Large document productions generally are handled using document review programs. Using these programs, documents can be uploaded to an electronic database and then searched and reviewed for responsiveness, privilege, and confidentiality. Fields can be added to facilitate searching, such as authors, recipients, dates, document type, etc. Documents also can be coded based on issues or subject matter. Employing useful coding conventions requires careful consideration of the issues in the case, but it can make the development of the case much more efficient in the long run.

In some instances, a party may choose to conduct an automated privilege review using fields or search terms, rather than conducting a manual review. This can save time and money, but it introduces an element of risk because the search functions on most document review programs are not 100 percent accurate. FRCP 26(b)(5)(B), introduced in December 2006, adds a claw back provision for the inadvertent disclosure of privileged documents. However, FRCP 26(b)(5)(B) does not address the question of whether an inadvertent disclosure nevertheless may constitute a waiver of the privilege. Consequently, whether conducting a privilege review manually or through automated search functions, parties should consider including a provision in their protective order that the inadvertent disclosure of privileged documents does not constitute a waiver of privilege.

In reviewing documents, it also is important to consider questions of confidentiality. If there is sensitive information included in the documents, as there usually is in complex matters, the parties should enter into a protective order detailing how confidential documents will be treated during and after the litigation. Ideally, this should be done before the documents are reviewed so the documents can be designated appropriately as they are reviewed. There are numerous considerations that go into negotiating a protective order. The sensitivities vary from case-to-case. Some of the more common considerations are: a) whether there should be a single "confidential" designation or other designations for "restricted confidential" or "Attorney Eyes Only" documents; b) whether there are any limits on what a party can designate as "confidential" or "restricted confidential"; c) who are the persons with whom designated documents can be shared; d) whether designated documents should be filed under seal with the court or made part of the public record; e) what is the mechanism for challenging a party's designations; f) if a designation is challenged, who will have the burden of proof, the moving party or the designating party; and g) what will be done with the documents after the litigation is concluded.

Documents should be produced with bates-stamps, bar coding or some other document numbering convention. Most document review programs have automated numbering functions. The producing party should keep a careful record of what was produced and when. This can help to avoid or diffuse subsequent discovery battles.

Even with the benefit of technology, reviewing documents remains an expensive and time-consuming proposition. The greatest benefits of document review programs generally are experienced later in the case, such as in creating timelines, preparing witness files, identifying exhibits for depositions, preparing subject-matter files, and performing other tasks that require isolating specific documents quickly. In complex cases involv-

ing hundreds-of-thousands or even millions of pages of documents, utilizing document review software is perhaps the only practical solution. But the effectiveness of this solution necessarily depends on investing the time and money on the front end to have the documents loaded, reviewed, and coded properly.

Repeat the Process

A mistake some lawyers and clients make is assuming that document production ends after the first major production is complete. This is an incorrect assumption. Document production is an ongoing process. Whenever a new document request is served, the process needs to be repeated at least to the point of determining whether or not the newly requested documents were gathered and produced previously. Even if there is only one set of document requests served in a case, steps need to be taken periodically throughout the case to ensure that it was done properly the first time and that nothing was missed. This can be accomplished through follow-up notices, witness interviews, deposition preparation, etc.

Some attorneys may have experienced a situation where a witness, in the middle of a deposition, suddenly remembers a new set of documents that he or she forgot to turn over. For the attorney defending the deposition, this is an uncomfortable situation. In preparing witnesses for deposition, it generally is a good idea to ensure that the witness received and complied with the document sweep notices. Even if it is learned during the preparation session that the witness forgot to turn over some relevant material, it generally is better to discover this before the deposition when you may have an opportunity to rectify the situation without potentially dire consequences. In any event, attorneys and clients should remain vigilant about document production throughout the case.

NOTES

1. *Zubulake v UBS Warburg LLC*, 220 FRD 212, 217 (SDNY 2003).

2. *Id.*

3. To eliminate any doubt, the 2006 amendments to the Federal Rules of Civil Procedure specifically added "electronically stored information" to the categories of information covered by the initial disclosure obligations under FRCP 26(a)(1)(a)(ii).

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