REPORTING ON STRATEGY BY THE PLAINTIFFS' BAR

Approximately 2/3 of my consulting practice revolves around issues with ESI production. Much of that work involves asymmetrical cases where one side, typically corporate defendants, has the vast majority of discovery. And since my experience is not untypical, the result is a heavy focus in the eDiscovery world on defense strategy, both in actual practice and educational conferences.

But what about strategy for the Plaintiff's bar? Do they have different dramatically different needs simply because they have less ESI? In discussing this article, I was asked the following questions which we will consider below:

- Do symmetrical cases (both parties producing comparable discovery) differ from asymmetrical cases (one side has the vast majority of discovery) that much in terms of strategy?
- Are plaintiffs more interested in expanding the scope of production (to get more potential evidence) or avoiding the old "document dump" because they don't have the resources? Or does it depend on the type of plaintiff?
- Are plaintiffs more motivated to request native files than defendants because they are more invested in using the metadata?
- Does the EDRM model seem more like a defense model than a plaintiff model, given that it is more focused on producing then presenting? Should there be a model for requesting parties?

THE QUESTIONS

To research this issue, I decided to begin by asking several top plaintiff attorneys the following question, What would you say are your top 3 pain points in plaintiffs' eDiscovery work?

My query went to the following attorneys

- Craig Ball, well-known eDiscovery expert
- Bob Eisenberg, also a well-known legal educator, currently Of Counsel at Bern LLP
- Drew Ashby of Ashby Thelen & Lowry
- Jean Martin of Morgan & Morgan

I thought that the most common answer or problem would be exchange protocols and/or load files but the winner was actually cooperation with three responses. Protocols as an issue was tied with two others, lack of tools and competence, at two responses. After that, each of the people responding had an answer somewhat unique to themselves.

Craig Ball	short-sightedness, competence, no tools/training
Bob E	cavalier attitude, knowledge of IG, lack of tools
Drew	cooperation, protocols, motion practice
Jean	producing party, protocol issues, search terms

Before I look at each of the responses, I should note that Craig Ball had a very insightful overview of the general differences between plaintiff and defense firms in eDiscovery.

> "The challenges faced by plaintiffs' lawyers confronted by e-discovery flow from structural differences in practice. Plaintiffs' lawyers operate as small firms and solos who finance their cases and are compensated on contingency. So, plaintiffs' lawyers tend toward frugality (as they are spending their own money) and shy away from capital expenditures that cannot be reliably expensed against the matter. Plaintiffs' lawyers tend not to possess (or need)

> the costly in-house IT operations of large defense firms and, crucially, plaintiffs' lawyers don't have large support staffs for IT and litigation support because the cost of same can't be spread across hundreds or thousands of lawyers."
>
> "Without in-house e-discovery teams at the ready, plaintiffs' lawyers are more apt to "wing it" or seek expertise only when obliged to do so on an *ad hoc* basis."

THE ANSWERS

So, what of the individual responses? The most popular answer was cooperation. Bob Eisenberg actually had an answer here that bordered on a protocol answer, saying that,

> "... there is, it seems, frequently, an almost cavalier attitude to understanding eDiscovery technical aspects and a lack of necessary skills in connection with the subject of forms of production, for instance. This sometimes extends to eDiscovery jurisprudence, as well and leads to inefficiencies and lack of defensibility in the production of ESI."

Drew had a similar response in saying that the lack of cooperation was often manifested in the hard-line attitude he mentioned above or in wrangling over the minutiae of details such as metadata or load file separators.

Craig had an interesting response that bordered on cooperation so I counted it there when he said that,

> "As well, plaintiffs' lawyers do an abysmal job of drafting requests with the specificity and precision needed to forestall successful proportionality objections. "

Finally, both Craig and Drew had an answer that addressed motion practice, Craig with a reference to the ongoing use of outdated boilerplate pleadings by both sides and Drew mentioning lack of specificity.

The second response tied for most common, and the one that surprised me most, was lack of competence. This point was reflected in several different ways. Craig Ball stated it most directly when he called it "the big one" and noted the failings in the Plaintiffs bar,

> "Plaintiffs' lawyers have been slow to integrate e-discovery into their practices, so few plaintiffs' lawyers are conversant in the argot and processes of e-discovery. This isn't a slam. Defense lawyers can call on resources unavailable to plaintiffs' lawyers. A defense firm will have an e-discovery specialist or practice group to guide them and may be able to draw on resources supplied by an insurance carrier or the client's IT staff and the client's in-house e-discovery workflows, tools and teams. How many plaintiffs' lawyers can responsibly delegate e-discovery to their clients? How many have e-discovery specialists as full-time staffers?"

But clearly he felt the Plaintiffs bar wasn't picking up the slack in those shortcomings by becoming ESI proficient themselves. As he put it, "The answers are out there; but they're not going to find the lawyers. The lawyers have to look for them."

Bob Eisenberg felt it was an often-overlooked problem with the defense side, calling it a "... lack of eDiscovery expertise and interest, ..."

The last answer tied for most common and clearly closely tied to competence was lack of tools and/or training. Bob tied it to his answer on competence, saying that the lack of competence

> "... results, in many instances, in a failure to deploy, on an in house basis (as opposed to transactionally), necessary eDiscovery technical tools and over-reliance on outside expertise which can result in unnecessarily costly services when eDiscovery is required and problems arising from little or no in house expertise to oversee and assure both the validity and cost-efficiency of eDiscovery."

Craig was quite specific as to the reason this was an issue when he termed it this way

> "Virtually no one offers e-discovery training geared to the scale, needs and resources of plaintiffs' lawyers. The Willie Sutton Rule applies. Service providers, CLE providers, software developers, all tend to go where they think the money is, being the big firms and big corporations. Providers shy away from plaintiffs lawyers out of fear of being blackballed by corporate clients and, understandably, because plaintiffs' lawyers need more handholding and support. Too, the collection, processing and review tools on the market are frequently priced out-of-reach to the solo and small firm practitioner and geared to the needs of producing parties. Without tools and foundational training to explore ESI, plaintiffs' lawyers can't get closer to competence."

Finally, protocols also had two mentions. Protocols, or issue with them was specifically mentioned by Jean and Drew. Jean felt that too often protocols were misused, often being conflated with confidentiality or protective orders. Drew went even further and said that agreeing on an exchange protocol was too often "...like birthing a baby..", with a common approach by defense temas that their proposed was "...industry preferred standard" with no room for negotiation, an approach bled into the second most popular answer, cooperation.

The other answers were more diverse. Jean mentioned repeated insistence on the use of search terms in the blind by Defense teams. Bob referred to a lack of understanding of their own internal IG systems by many

defense counsel. And Craig addressed what he called “short-sightedness” by Plaintiffs, which he described as their strong belief that “... if only they can get to the defendants' "documents," they can make their case and prevail.” But as he goes on to say, “It's not documents so much anymore; it's data”, an observation clearly related to the competence issue.

So, plaintiffs' lawyers tend to rashly agree to almost anything to get something. They accede to bad protocols, shoddy searches, and dumbed-down forms of production by being in too big a hurry to get their hands on production and start taking depositions.

Too, they don't consider the forms of the information they seek and how it's stored on the defendants' systems. When discussing data, plaintiffs need to know what vocabulary is used in-house to store the data.

CONCLUSION

Finally, I asked several of our stalwarts to address the question we posed at the onset of our discussion above.

With regards to symmetry, Craig said

> “Plaintiffs mistakenly assume they don't have anything to preserve, process and search. They often have much more than counsel appreciate yet lack the wherewithal to

> deal with it. Plaintiffs' lawyers who fail to bring the same diligence and skill they demand from the defense to their own client's data are easy targets for costly do-overs and serious sanctions. Defense counsel often harbor the same mistaken assumptions about asymmetry and fail to exploit this pressure point. That luck won't last, so plaintiffs' lawyers better get on the stick when it comes to defensible legal holds, collection, processing, and review.

With regards to the issue of native files, all our experts agree that plaintiffs want native files more than defendants because they want the original metadata while defendants are far more likely to already have invested substantial sums in database technology into which they have loaded their data and can use that to screen their productions.

Finally, with regards to the EDRM model, our experts felt it leaned towards a defense model not because it was more focused on producing than presenting but because the people who first originated it and later promoted it were defense-oriented so that was their natural inclination.

A larger problem for plaintiffs' attorneys beyond the EDRM focus is changing their paradigm from documents to data. As Craig Ball noted.

> "Plaintiffs' lawyers are hamstrung by paper presumptions unsuited to a digital universe. Lacking insight into modern information systems, they don't know how to fight back like coders instead of cavemen. So, they flail and whine that the production "just feels like it should be more" without being able to articulate why and how or produce evidence to support their motions-- crucially lacking the ability to educate the bench and secure relief. Plaintiffs get run over roughshod trying to argue what they need to prove."