BUSINESS & CAREERS

Drowning in data

The number of needles a lawyer has to find during discovery has not changed over the years. But thanks to information technology, document haystacks have ballooned out of all proportion. Now judges, litigators and clients want to bring proportionality back to the process.

"The increase in data is huge," says Kelly Friedman, a partner with Davis LLP. "Ten years ago, you might get 50 boxes of documents in a big case. Today you get thousands of times that."

"When e-discovery first started making headlines, the story was all about the millions of pages of information that were being collected, processed and reviewed," says e-discovery consultant Peg Duncan, "the vast majority of which was duplicative and irrelevant, and yielding alarming insights into people's predilection for porn."

Compounding the problem, certain factors can make data unnecessarily costly and time-consuming to produce. For instance, a computer forensics expert may be the only person who can recover things like corrupted or encrypted information, deleted data that could be fragmented all over a disc.

Other types of expertise might be called for to get data out of older, unsupported platforms or proprietary formats. "The situation is worse if information is on the Internet, like in Gmail, Hotmail or Yahoo accounts," says Duncan.

These swelling volumes of largely irrelevant data that businesses keep (often because they're told to "save everything") has increased the cost and time needed to produce information to the extent that parties settle cases to avoid discovery costs rather than reach a settlement or try cases on their merits.

An emerging consensus states that proportionality, used along with other Sedona principles, will help solve the discovery cost conundrum. The Sedona Canada Principles Addressing Electronic Discovery affirm that electronically stored information is discoverable and propose a framework for dealing with its production. The Ontario Bar agrees, and (as have other provinces) recently issued new rules of civil procedure in 2010 to promote the use of proportionality.

HI-TECH

LUIGI BENETTON

Reducing costs and improving efficiency during the e-discovery process happens largely thanks to rules 29.1 (parties must develop a written "discovery plan"), 29.2 (parties must consider proportionality concerns in conducting e-discovery) and 30 (parties must limit the scope of discovery to "relevant" documents), according to Cindy Ringer, client relationship manager for legal technology software and services vendor Kroll Ontrack. "The practical intention here is to increase cooperation and planning from the outset of litigation," she says.

"Proportionality should apply throughout the discovery cycle," Friedman concurs, "in the preservation of potentially relevant documents, the identification and collection stages, eliminating duplicates, review and production."

A narrowed test for relevance might not sit well with litigators who "grew up in a world where they had access to everything," says Susan Nickle, a lawyer with e-discovery law firm Wortzman Nickle Professional Corporation. "Now people are asking what they really need to try a case."

To answer that question, litigators increasingly need to speak the language of their clients' document management system administrators and other information technology personnel. Litigators must understand how clients store data in order to use factors like time, expense, prejudice, and availability of alternative sources for information, to defend preservation decisions.

But the first two defences — time and expense — might not hold water for much longer. "'Undue burden' arguments, the U.S. analogue to proportionality exclusions, have increasingly fallen out of favour as awareness of e-discovery obligations and technological improvements have made production

See **E-discovery** Page 22

Sedona's view on e-discovery

ON OCTOBER 27, 2010 the Sedona Conference released a public comment draft called "The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery." You can download a copy for personal by visiting www.thesedonaconference.org.

The commentary:

- defines the concept of proportionality in Canada
- provides practical guidance and solutions to discovery disputes
- includes tables which outline current civil procedure rules across Canada dealing with proportionality
- lists factors to be considered when applying proportionality principles in Canada at each stage of discovery.

The Sedona Conference seeks peer review from the bench, bar, and others involved in electronic discovery in Canada. Use the public comment form at www.thesedonaconference.org/content/miscFiles/wgspubcommentform.pdf

M&A 2011 top trends

Torys LLP has released its annual mergers and acquisitions (M&A) trends for the year. Torys' top trends in M&A for 2011 are:

1. When foreign investors target Canada, politics may matter
2. Alternative transaction structures will continue to be popular for sovereign wealth funds and other investors from emerging markets
3. Let the shareholders decide
4. Target boards will consider more aggressive defensive tactics when facing a hostile bid
5. The spotlight will shine more brightly on shareholder voting processes in M&A

BUSINESS & CAREERS

'Monumental' change to billings in 2010

Billings
Continued From Page 20

pricing would have been "a blip on the screen, as opposed to the reset button being pushed.

"What this survey shows is that the reset button has been pushed, and that legal departments are beginning to get a little more confident about some of the data they've been collecting about what different types of work are worth."

Between September and October last year, the ACC and *The American Lawyer* conducted an online poll of 453 corporate chief legal officers and general counsel (GC) — 128 of them worked for multinational companies with annual revenues of US$1 billion or more (and some with a Canadian presence). In that group of 128, 62 per cent of GCs said they used flat fees for an entire matter in 2010, a slight increase from the 60 per cent reported the previous year. Only 13 per cent of large-company GCs did not use any kind of alternative-fee arrangement last year.


LEONID YASTREMSKIY / DREAMSTIME.COM

But following such a model actually serves as an incentive for law firms to improve their own performance and operate more like "an entrepreneurial business," according to Hackett.

"If a firm charges $100 an hour and estimates that it will take eight hours to do the work and will get paid $800, it can make more money if it does the work more efficiently in less than eight hours," she explains.

"Meanwhile for the corporate counsel, it means not just cost containment but cost predictability — and shares the burden of the risk between the firm and the client, as opposed to leaving the risk entirely with the client."

Overall, 51 per cent of GC respondents said their value-based or alternative-fee arrangements were initiated primarily by their corporate law departments, not by law firms.

Yet another survey *The American Lawyer* conducted during the same period of time in 2010 tells a different story.

In its annual Law Firm Leaders survey, the magazine polled the heads of the AM Law 200 — the 200 top-grossing firms in the United States (many of whom conduct significant business in Canada) — and discovered that 90 per cent of them indicated that their firm used a flat fee for entire matters in 2010, compared to 82 per cent in 2009. As well, 90 per cent of these respondents said their firm had used incentive or success fees last year — a 15-per-cent jump from the previous year.

According to Hackett, that represents a significant attitudinal change within large law firms.

"If you start to see big firms, who've always said, 'we don't talk about value. We're quality and reputation, and you don't mess with us,' establishing value practices and out there saying, 'how can we serve you differently than we did last year?' you know that change has hit the marketplace. Those are the folks that in some cases really don't have to because they print their own money — they are the go-to people for a lot of larger corporate projects."

She says that external counsel has begun to recognize the "new normal" as it pertains to fees. "If they don't start moving to alternative billing practices, they're going to be out of the market soon and will have a harder time generating business than they have in the past. It won't be only about a firm's reputation and you pay whatever they bill you."

Nevertheless, the results of both surveys (93 per cent of law firms willing to discuss alternative fees compared to 61 per cent of GCs at $1-billion-plus companies willing to do so) reveal a "disconnect" between law firms and corporate law departments, "and how they are looking for or hearing messages differently outside their comfort zone, because they both believe they are leaders and that the other side is whatever impediment there is to change," observes Hackett, who worked as a transactional attorney at the Washington, D.C. multiservice firm, Patton Boggs LLP, before joining the ACC in 1989.

"The law firm folks are saying, 'We're proposing stuff like crazy and not all clients are taking us up on it.' And corporate clients are saying 'We have to demand this of our firms and they're reticent to try to pick it up and run with it.

"The truth is they're all responsible."

However, she adds that attitudes won't change overnight. Nearly three-quarters of the in-house legal market is still on an hourly-fee arrangement.

But that's okay too.

"The point of the Value Challenge was never to kill the billable hour," explains Hackett. "It was to start lawyers moving to a place where alternative-fee structures were available, and where the fee structure they chose — including hourly billing — is best adapted to the work being done."

Still, she expects an increase in the use of alternative billing this year.

"My big worry in 2010 was that lawyers would all revert back to their comfort zone after they put a Band-Aid on the wound caused by the recession. But they've drunk the Kool-Aid." ■

Document destruction could cut down on clutter

E-discovery
Continued From Page 21

difficulties increasingly obsolete," Ringer says.

Indeed, today's enterprise-worthy document management systems and policies tie in to litigation readiness to the extent that the right document management systems and policies could be considered "preemptive" proportionality. "It's difficult to engage opposing counsel if you don't have your own house in order," Nickle says.

Judges can also reject simplistic "production costs too much" proportionality arguments that litigators do not back up with evidence, partly because today's e-discovery tools can generate reports that corroborate said arguments. Those reports contain best estimates of time and cost required to produce specific documents, along with other valuable information.

Duncan, Nickle and Friedman, who all share connections to Sedona, agree that changes in procedure are slow in coming (partly due to a paucity of motions to date arguing proportionality). That said, judges and masters are speeding things up by requiring discovery negotiations, forcing parties to do "meet-and-confers" to make them cut down the resulting production.

A subtle linguistic barrier prevents what may be the most valuable proportionality aid: the elimination of non-business data like emails about summer camp registrations and golf trips (and any evidence of porn consumption on the job).

"Rather than creating policies on 'document retention,'" says Duncan, "businesses need policies on 'document destruction' and they must enforce them — and not just for email."

Eliminating duplicates from systems to further reduce document volumes prompts some companies to move information from tape archives to archiving systems that suppress duplicates while making information easier to search.

"One powerful approach I'd like to see adopted more widely is tagging of documents, so that users can identify documents in a managed repository the way they want, while the records managers can keep control overall," Duncan says.

Nickle figures the current focus on proportionality in big commercial cases will give way to the needs of smaller, less complex cases. "Every case has electronic records in it," she says. "Proportionality has a greater impact on smaller cases, where cost is more of a factor." ■

Proportionality in a nutshell

IN SIMPLIFIED terms, proportionality analysis calls for litigators to meet defined objectives while cutting burdens, costs or delays they don't need to incur to meet those objectives.

Four factors enter into proportionality testing:

- nature of the litigation
- relevance of available electronically stored information
- whether this information matters to the court
- what it costs to produce it

For more information, check out www.thesedonaconference.org