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Expert Analysis

Drywall Litigation Requires Centralized Approach *Lessons Learned Help a Better Model Emerge*

*By Barry Willms, Esq.
Counsel On Call*

Asbestos. Pharmaceuticals. Tobacco.¹ These are just a few of the extensive, expensive and inefficient litigations that have borne countless stories of frustration. They involved long, drawn-out discovery and duplicative information produced in hundreds of cases and jurisdictions at both the state and federal levels. Now we have the drywall cases.

Will drywall be the next tidal wave of discovery? If so, what lessons have been learned from the recent past?

To save money and achieve even the most challenging objectives, a strategic, proactive approach is vital. Gone are the days of winging it with hundreds of different outside counsel procedures and plans. Gone are the days of wasting money and duplicating effort. Knocking at the door are the much sunnier days of protocol, efficiency, consistency, scalability and predictability. It comes in the form of the central discovery repository, a model that avoids budget-busting surprises and is focused on repeatable processes, core teams of client-dedicated attorneys, collaboration and uniform tools, and it ultimately drives cost savings.

THE TRADITIONAL APPROACH

We all know how the nightmare begins. Letters, faxes and electronic notifications of lawsuits popping up across the country and being funneled to a client's numerous law firms. The suits are dealt with as local silos, and each law firm initiates a unique process to handle these matters, just as it would any other matter. From the company perspective, however, it quickly becomes untenable.

A client's information technology department and its key custodians are overwhelmed by duplicative and confusing questions. Collecting and processing

electronically stored information is a fairly standard process, but everyone is asking for it in a different way, on different timetables, and with overlapping custodians and different key terms. Costs rise, interference with key personnel is disruptive, and processes that may or not be defensible or even understandable are being followed. What is a client to do?

Cost and defensibility are key. Can the traditional diversified and complex approach be cost-managed? How about the cost of training various teams of attorney reviewers for each matter? Can a client defend doing it one way on one case and then another way on another case simply because the processes of each firm are different? What about the disruption to the company's business functions?

Here are some tidbits gleaned from my experience on ways to handle such complex discovery and perhaps help answer or raise a question or two about the process along the way.

CENTRALIZED DISCOVERY

So what are the lessons learned from the other large discovery matters that can be used on multijurisdictional litigation like drywall? Above all else — whether related to collection, review, production, discovery responses, privilege logs or anything in between — it can all be handled in a centralized manner that functions both collaboratively with and independently of the numerous outside counsel involved with the case.

While it might not be a "12-step process," there are 12 important and connected areas a central discovery repository approach directly addresses. On the surface it might seem overwhelming, but much of this happens by simply committing to this approach and deploying an expert team. The end product — one source for all discovery issues, not dozens — eliminates duplicative efforts, saves millions of dollars, implements repeatable processes and is unquestionably the best manner to approach e-discovery in large litigation.

1. MASTER PLAN

When preparing for a Federal Rule of Civil Procedure 26(f) conference² to discuss, among other things, the identification, collection, searching and overall management of the electronically stored information needed for discovery, is there a master plan in mind? Or is each such conference dealt with as it comes up in each jurisdiction?

Identifying a national discovery counsel for all matters is a more sophisticated and sensible approach. One go-to person. One dedicated core team of attorneys. One technology to understand. One process. And one invoice. From the outset, think how this may play out over years of time. Most of these litigations are long, drawn-out battles, and parties need to be proactive on the front end to get all the efficiencies and consistencies required in the long run.

2. BUDGET WITH ACCURACY

How much is all of this going to cost? Only a few years ago, this was a very difficult question to answer, and the estimated costs were jaw-dropping. Today, budgets are king. In deploying a comprehensive, centralized discovery approach, the answers to forecasting questions are straightforward, accurate and much more palatable.

Costs have been driven considerably lower because of the rise of discovery-focused service providers who have brought project management, metrics tracking, production initiatives and quality-control protocols to the forefront. It is much easier to determine how much electronically stored information there is to review, how many attorneys it will take to review all the ESI, how many decisions per hour the attorneys will make on a particular review platform, and how long the entire process will take.

Budget predictability is important for most businesses. No one likes to start a project without having some idea of the cost, and most law departments now require it. With a centralized approach, in-house counsel can rest assured that they will have a reasoned approach to budgeting.

3. INTERVIEW, COLLECT AND PROCESS

For the client, one of the most disruptive portions of the discovery process is the identification of ESI needed for all the cases. Instead of multiple interviews by multiple law firms of the same employees (both in IT and among key custodians), one team can interview and determine where and how ESI is stored and what technology currently exists at the company that might be used to handle identification, collection and possibly some initial culling of the ESI.

4. CENTRALIZED/BEST TECHNOLOGY

There are countless robust technologies available, but it is important to understand and use the best available tools, including hardware (multiple monitors, etc.) and software (processing, hosting and review platforms) services. Decisions per hour, along with quality attorney

reviewers, are the engines of predictability, and technology plays a major role in the success of the team.

The worst thing that can happen is that “gotcha” moment when a client receives a totally unexpected and huge invoice that comes when the right tool isn’t utilized, a tool doesn’t function as it should, or there are hidden costs or myriad other miniature disasters. These surprises create distrust and tension, and there’s absolutely no reason this should ever happen when the right tools are selected from the beginning and used consistently from matter to matter. In fact, it should enhance the budgeting process and ease concerns about unexpected technology issues.

5. EARLY CASE ASSESSMENT

Early case assessment, or ECA, has been a hot topic for some time and is usually a centerpiece session at any industry event or CLE, and for good cause. The ability to cull data down to a reviewable size that is manageable and defensible is another key to cost containment and budget predictability. It is not uncommon for well-structured ECA to eliminate up to 90 percent of the ESI that needs attorney review.

It takes experience and understanding to get the most out of the ECA process. The time spent on the front end to implement an iterative process of choosing keywords (fuzzy, stem searching, etc.), date limiting, de-duplication and other steps of elimination means the ESI is culled to its smallest possible size and produces significant cost savings before the review and production stages.

Often it is wise to get agreement with the other side on these matters. Sometimes that is not possible, but the client must be able to defend its actions and why certain words were kept out and why other keywords were used instead. In the end, the ESI set produced will be dramatically smaller than its original size and much more manageable.

6. PROJECT MANAGEMENT AND PROTOCOL

Of vital importance in the central discovery repository model is the project manager, a relatively new job title in the legal profession. Among other responsibilities, the PM is the attorney who works closely with the client and law firm to design and implement the ECA, review and quality-control protocols; identifies the best software tools to use; liaises with the technology partners; builds the attorney team; and provides expert consultation throughout the case and manages all matters within.

The PM is dedicated to the best interests of the client and focused on costs, quality, process, metrics, effectiveness and identifying best practices. Project managers (should) design and implement protocols that have previously proved successful, and as anyone who has been involved in successful discovery assignments will tell you, excellent project management is invaluable.

7. CLIENT-DEDICATED REVIEW TEAMS/ PRODUCTION SETS

On multijurisdictional litigation, a client will use numerous law firms. However, that doesn’t mean the discovery process needs to be handled multiple times or with each law firm’s different process. Simply put, that is guaranteeing a duplicative, inconsistent work product.

A client needs a dedicated core team of e-discovery experts that doesn’t break the bank, a team that handles the discovery process from one location and shares its work with each law firm involved across the country.³ The central discovery repository model uses experienced lawyers who choose to practice on one client’s discovery matters, are skilled on the selected review platform, understand the review and quality-control protocols tailored for the client’s matters, and work for one-quarter of the cost of law firm associates. Consistency and efficiency issues are solved. Cost savings are achieved.

The central discovery repository eliminates duplicative efforts, saves millions, implements repeatable processes and is the best manner to approach e-discovery in large litigation.

Experience has shown that many of the same custodians and many of the same documents are going to be requested in each case and production. Instead of teams of attorneys reviewing the same documents over and over, the client-dedicated team reviews them once, catalogs and folders the documents, and makes them available for production.

For example, if there is a marketing piece that gets distributed on a monthly basis, instead of finding all of them for the past 10 years in all custodians’ e-mails, go to a central source, collect them, label them and prepare them for production in each matter that calls for them. The team can produce more quickly and avoid the panicked review

and production that typically accompanies these types of cases.

With a central discovery repository, all the company documents that might be relevant to the various matters will be found in one location, with Web access for every outside counsel that requires it. Documents can be segregated by folders, and the client has the ability to limit access to whatever folders are deemed necessary for that particular matter.

8. REPORTING/TRACK PRODUCTIVITY

This functionality is lacking even in many centralized approaches to discovery, but it's imperative to know where the team is in the process. How far along is it in the budget? How many tags are being used on the documents, and how is that impacting productivity? How are changes to the review protocol being implemented? Is the team the proper size? All of this and much more can be determined with the project management and technology involved in the central repository model.

More importantly, in litigation such as drywall where there are often multiple matters within a case, it is vital to learn from prior experiences. During and at the conclusion of each matter, the team must have the capability to provide its client with detailed reports, show how the budget and true expenses are related to each other, identify what worked and what didn't, and determine the best ways to move forward. This is another core factor in implementing consistent processes that continue to reduce costs.

9. DEFENSIBLE AND REPEATABLE

The motion to compel: It's almost inevitable in some of the cases in a multijurisdictional dispute. There will likely be a hearing to identify what a client's process was, how the collection and production were handled, and any problems that were encountered along the way. Most of these types of issues can be addressed with the other side through e-discovery liaisons that understand the technical language and the e-discovery process. Much of the unnecessary motion practice on discovery disputes could be handled in this manner. If, however, a client reaches the time for a hearing, it should be able to rest comfortably that its process is defensible, tried and true, and used in every such matter regardless of jurisdiction.

10. DISCOVERY RESPONSES

Once the discovery requests, interrogatories and requests for admission from a number of cases have been

reviewed, it becomes obvious that there is tremendous overlap from one jurisdiction to the next. In fact, there is often a conglomerate of law firms on the other side that are sharing their discovery requests with one another. So why then would the client have each of its law firms draft responses for each set of discovery? How many times should the client have to pay for an associate to gather information and draft responses to the same questions?

The centralized approach is much more sensible and cost-effective. One discovery counsel. One database. One question posed to the client, one time. Have a database of approved answers that require only tweaking from one matter to the next, and then focus on new areas of interest that pop up from time to time on the requests. Project management, or a single point of contact on these issues, will make everyone's job much easier to handle and will provide consistent information from one jurisdiction to the next.

11. CONSISTENT PRIVILEGE CALLS/LOGS

As has probably become obvious by this point, consistency is a key tenet of the centralized approach, and nothing is more important than creating defensible and consistent privilege logs from one jurisdiction to the next. No one wants disagreements on a privilege call from one case to the next or a privileged document being produced in one matter and withheld in the next.

12. DOCUMENT EXPERTS/DEPOSITION PREPARATION/TRIAL SUPPORT

It's important to remember that when undertaking deposition preparation, hearings and finally going to trial, the client will need to have expert document searchers who understand the technology and the documents that were produced. Why train a new team for each matter when there's already a dedicated core team in place that understands the technology and how best to use it efficiently and attorneys who probably know the company documents better than anyone at the company? Why pay for retraining when that knowledge already exists and can easily slide into this position as the needs arise in whatever jurisdiction?

There are real benefits to trial teams as well. It's all about teamwork. Collaboration among the various law firms, in-house counsel and the centralized discovery team will create efficiencies in time and money and allow the case experts to focus on the case at hand.

CONCLUSION

Experience. Ease of use. Expandability. Repeatability. Client-dedicated teams. Cost savings. Accurate forecasting. Reasonable and defensible processes. All of these are essential to handling the large and complex matters needing a central discovery repository and are the hallmark of a long-term relationship between the company and its discovery counsel.

NOTES

- ¹ In 1998 Mr. Willms was part of an intensive effort to put more than 7 million pages from the tobacco litigation online (www.tobacco-archives.com/) as part of the Master Settlement Agreement with attorneys general from all states.
- ² Federal Rule of Civil Procedure 26, Duty to Disclose; General Provisions Governing Discovery; (f) Conference of the Parties; Planning for Discovery (<http://www.law.cornell.edu/rules/frcp/Rule26.htm>).
- ³ Ashish Prasad, Kim Leffert & Shauna Fulbright-Paxton, Cutting to the 'Document Review' Chase, 18 *BUS. LAW TODAY* (November/December 2008), available at www.abanet.org/buslaw/blt/2008-11-12/prasad.shtml.



Barry Willms is Senior Attorney + Discovery Process Architect for **Counsel On Call's** E-Discovery Division. He regularly designs and implements effective, cost-conscious discovery processes and manages teams of attorneys for in-house departments and law firms.

During the last 15 years, Mr. Willms has worked extensively on multijurisdictional cases, including the tobacco and pharmaceutical litigation during his 10-year tenure with King & Spalding LLC. He has led teams of more than 50 attorneys and has designed and implemented seamless protocols for collection, early case assessment, written discovery responses, privilege logs, document review, production, motion to compel hearings, and more.

More information on Mr. Willms and Counsel On Call can be found on www.counseloncall.com. He is also an author of www.lawdable.com, the company's blog, where he writes about discovery process issues.

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