

The Role Of Cross-Border E-Discovery In The BP Crisis

Law360, New York (July 13, 2010) -- As millions of barrels of oil pour into the Gulf of Mexico, global law firms across a range of geographies are dealing with the inevitable messiness of a crisis that is spilling over into a mass entanglement of civil and criminal litigation — which, as of this writing, currently stands at more than 100 cases.

For a multinational company headquartered in Europe, many potentially relevant documents will be located in both the United States and the United Kingdom, complicating an already unwieldy discovery effort with cross-border privacy issues. Conflicts will arise, and given the highly political nature of this problem, there are certain to be many cross-border difficulties.

While the Gulf incident is highly public, data challenges will only escalate as long as global business expands without a global legal framework to support it.

As difficult as it has been to stem the oil leaks, lawyers involved in this case and its myriad complexities will similarly find it demanding to address the intricate discovery requirements connected to a core group of companies that include BP PLC, Transocean Ltd. (its Deepwater Horizon rig at the center of the situation) and contractor Halliburton. The life of these high-profile cases will live on in the courts for decades, and their respective law firms and attorneys can expect to face long-term challenges alongside the spill's expansion.

Document Review Best Practices

The critical lessons learned in these and similar cases is basic to best practices in discovery management — that the discovery strategy and early case assessment structure put in place at the onset of this type of event, one designed to organize and manage the disparate elements of the discovery process, will affect the management and its outcomes in subsequent court cases years down the road.

The creation of a well-designed organizational plan, and the steps taken to organize a defensible, responsive e-discovery process, ultimately addresses the needs of the courts who are looking for responsiveness from all parties involved. And, potentially, it can also save massive court costs for all parties involved with the proceedings, not to mention lessen confusion as a range of cases work their way through various courts.

Judges are adamant that attorneys meet mandated deadlines and work with a review process that is clear and defensible. And in terms of technologies that may be aligned to a case, the judges require that attorneys stay abreast of and utilize current technology options. In addition, courts are increasingly mindful of well-structured efforts to control the spiraling costs that can be associated with large discovery cases and proportionality discussions are fortunately becoming more common on the discovery front today.

Right-sizing discovery demands and production to that which is truly necessary for the parties to reach merits discussions is the key to keeping control in these cases. Producing counsel cannot blindly object to all requests and must be able to clearly articulate the burdens associated with responding to discovery.

As the in-house counsel leads the teams which collect massive amounts of data, it is certain that much of the relevant information that is culled may go back for years and be available in numerous paper and electronic forms. It is the “perfect storm” of collection activity, spanning decades and found in numerous kinds of media.

BP’s task force, and others close to the case, will face the following key challenges immediately as well as in the months ahead.

The first challenge, locating historical and relevant documents related to the construction and erection of the platform and subsequent communications around the platform, will cross borders and involve multiple decades and locations. The searches will involve multiple parties, including Transocean, Halliburton and a myriad of custodians across numerous countries.

The next challenge will involve the development of a document review strategy and a plan to cull, filter and review tremendous volumes of operational and electronic data in a manner that will prove scalable and responsive in the years ahead. As the quintessential multiparty, multipurpose discovery matter, finding a way to efficiently review documents once — and repurpose as necessary for production to the various plaintiff parties — will be key to cost containment.

Similarly, using current technology to order review and production to merit competing priorities will be essential to avoid missing deadlines and developing facts for defense counsel.

A third challenge, one that could perhaps be the most daunting of all, is that a plan must be created that assists in coordinating production to multiple parties for multiple, different purposes — and that establishes a ground zero for data issues and requests going forward, tracing history in a real-time basis.

When dealing with these three key areas — identification and research, document review planning, and multiparty production —discovery will be similar in this particular crisis to most large-scale litigation. It is akin to any mass tort/environmental discovery in terms of volume and complexity.

In matters like the BP scenario, the public and media scrutiny — combined with an accelerated timetable — necessitate finding ways to grapple with the immensity of this type of situation, both from a data and emotional point of view, as many are watching every move play out in major media outlets around the world.

As the recent Goldman Sachs case shows, it seems that document review is something that more and more reporters are interested in tracking as critical breaking news and any perception of stonewalling can quickly make headlines.

Can Technology Help?

Fortunately, compared to many crisis situations of years past, technologies have addressed the complexity of discovery and have added intelligent review mechanisms that speed the process and now make the efforts far less cumbersome. Volume-reducing technologies will help in cases like the BP oil spill or other large multiparty, multiproduction cases — and, in fact, culling through large volumes of data cost efficiently and quickly is expected to become standard procedure.

Whether it's prioritization technology or social network mapping, tackling this large data set in an organized manner will allow counsel to respond to the myriad of requests they face. The goal is to get to the facts first — certain enabling technologies now make this possible.

Additionally, increased sophistication in other areas, such as the creation of joint or multiparty repositories, also adds a potential element to discovery crisis planning that may have been impractical in the past.

Downstream, it could be very cost-efficient for BP to create a production repository that all plaintiff parties (civil, government, etc.) could access (e.g., such as in notable tobacco industry litigation), to contain costs.

A joint repository approach is usually considered when the following criteria and objectives are met: the matter involves multiple parties; the matter will involve voluminous and/or complex discovery (e.g., multidistrict litigation and class actions); the parties involved in the matter are scattered in different geographical locations; and, last, to increase efficiencies in the exchange of information. Provided the chosen platform has multiple views and is multiparty-security enabled, simultaneous delivery to multiple parties becomes possible.

However, this will only be feasible if all parties involved agree, and if the information sought by all of them is nearly identical. To the extent that the cases fracture and take different angles with different production requests, a joint production repository would not help. Some version of this scenario may, however, be doable.

What key functions does a repository serve? With the vast amount of old and new data involved in the BP case, a joint repository could potentially organize and enable the retrieval of various types of records relevant to a matter, which would include scanned documents (paper converted to electronic form); electronic documents (e-mail, office documents, PDF files); and databases and other content converted to a compatible format, as well as pleadings and court papers.

A joint repository allows the producing party to review and produce in the same platform, eliminating the transitions that so often result in errors in the process. To manage all this, specialized expertise is required to adequately support the effort, including the ability to accommodate the preferences and requirements of each party.

Technology doesn't get in the way here, so much as the ability to create separate project teams to satisfy each party's confidentiality requirements and the ability to agree on a cost-sharing scheme, multiple contractual relationships, and apportioning services on multiple invoices.

Conclusion

So whether the lawyers involved with the BP scenario adapt new prioritization and document review technologies, elect or do not elect to adopt a joint repository approach, a key takeaway is that a structured and defensible process for global document review be installed and be appropriately managed early on. Such a sustainable approach could practically assist the courts to address discovery requirements much more effectively.

As business is global, the problems are global. Cross-border conflicts and privacy requirements are the norm in today's multinational corporation's litigation docket. Addressing these issues early with an organized and defensible plan will serve BP and all the litigants well.

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