TACKLING E-DISCOVERY ON A BUDGET

BY SHAWN RAYMOND

MANY COMMERCIAL CASES ARE LARGE ENOUGH to justify hiring an outside vendor to take charge of the entire data collection and production process, including hosting an on-line platform for document review. But going this route is not cheap. Indeed, for many clients, particularly individuals and small businesses, it is prohibitively expensive.

Having recently completed several moderately sized electronic document productions in plaintiff-side commercial contingency fee cases for clients who are paying expenses, I am happy to share my still evolving approach to carrying out "do-it-yourself" electronic discovery for cost-conscious clients.

Reach Early Agreement on How to Produce E-Discovery
At the outset of each case, I work to get all parties to agree on the format for how all electronic production, particularly emails, will take place. At Susman Godfrey, we propose the following standard agreement:

> Electronic documents will be produced, to extent possible, in PDF format. If necessary, the parties will exchange application data electronically in the native format kept by the producing party. We will produce a bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged that do not contain electronic documents produced in the PDF format. If such application data is used at trial or in deposition, the party introducing the data will indicate in the footer on the hard-copy version (or on a separate cover sheet) (a) the CD or DVD from whence it came, (b) the directory or subdirectory where the file was located on the CD or DVD, and (c) the name of the file itself including the file extension.

I find that producing electronic documents in PDF format is almost always sufficient and cheaper. The alternative, producing electronic documents in native format, is usually an unnecessarily expensive, cumbersome approach unless special circumstances dictate. The biggest exception that comes to mind involves the production of Excel spreadsheets that contain more than one page of columns – they can be extremely difficult to read as individual PDF print outs and may be meaningless without the ability to see the formulas that create the numbers in the Excel spreadsheets.

Even if it turns out that some amount of native-format production needs to take place, I nonetheless press opposing counsel for an agreement to initially produce all electronic documents in PDF format and then give each side the opportunity to request a supplemental native-format production for particular documents (*e.g.*, documents difficult to read as PDFs, or documents in which the parties want to review the metadata).

If you go the "production as a PDF" route, make sure to specify whether or not the parties will produce responsive electronic documents as searchable PDFs. I prefer producing documents in searchable PDF format because it is easy to upload the them to any number of standard document review tools (*e.g.*, Summation Blaze, CaseMap, Concordance) that do not require you or your client to pay an outside vendor to host the documents on an expensive external platform.

Keep an Eye Out for Certain Types of E-Discovery
Until recently, I viewed the term "E-Discovery" as limited to email and electronic Word or Excel documents. But with ever-expanding forms of electronic communication, I now make it a point in my document requests to ask for two specific types of electronic media that many people overlook: instant messages and electronic recordings of voice mail.

In a number of industries, particularly ones involving oil and gas brokers and traders, instant messaging serves as an important method for internal and external communication. And because people write them in real time, instant messages ("IMs") can be an evidentiary goldmine. People type IMs back and forth so quickly – each IM includes the date, hour, minute, and even second of the communication – reading them makes me feel as if I am reviewing a transcript from a government wire tap. Given the real-time nature of IM conversations, people have a tendency to be careless (some may say more "honest") with what they write. And when witnesses write IMs that touch upon key matters at issue in a case, I am always on the lookout for ways to use them to my advantage on cross examination.

You also may be surprised to find out how far back companies keep archived IMs. Many businesses utilize IMs as a way to record particular trades or transactions. It is therefore not unusual for some of them to store IMs along with back-up email or document server tapes. Because IMs are commonly

used today by individuals and corporations, you should consider specifically referencing them as part of your document requests.

Voicemail is another commonly used communication tool. Because of that, I find out whether the parties have access to electronic recordings of voice mail. In recent years, new voice mail features have become available that automatically convert a voice message to a .WAV file and then send the voice message to the phone recipient's email address as an attachment. If users save these .WAV files, your requesting this type of data could lead to a treasure trove of good (or bad) evidence for your case.

Other new voicemail-related products now offered, including GoogleVoice and Phonetag, either use an automated system to transcribe voice messages and send them to the user as an email text, or automatically route voicemails to transcribers who listen to the voice messages, convert them to text, and email the typed message to the recipient. That makes them discoverable.

As these types of voice mail services become more prevalent, I think they can become increasingly important evidentiary tools. You should give some thought to having your document requests specifically cover these types of communications.

Do-It-Yourself Email Review

Rather than hiring an outside vendor to host a website so you can review a manageable number of emails – a single gigabyte equals about 100,000 pages of emails without attachments, so my rule of thumb is to try to perform an "in-house" review if my client's email production is less than four gigabytes. I have borrowed the following email review technique that my partner, Trey Peacock, introduced me to some time ago.

I do not pretend to have the technical expertise necessary to search for and capture emails off a client's server, but most small companies have an IT department or an available third-party consultant capable of running word searches or finding emails from particular users without having to consult with (and pay for) an outside litigation vendor. In such cases, I rely on these IT personnel to gather potentially responsive emails.

When it comes to conducting word searches for possible responsive documents, I make every effort to reach an agreed-upon list of search terms with opposing counsel. This puts all parties on notice of what is being searched, and it decreases the likelihood of having to perform subsequent searches, which can be a budget-busting time killer.

Focusing exclusively on word searches is not, in my view, the end of the story in terms of what I eventually produce. I still think it is crucial to review these emails for relevance, privilege, and confidential or trade secret information.

To accomplish this without having to pay for an external platform to host the emails, I have the search results saved as a .PST file on a CD or thumb drive – ".PST," I have come to learn, stands for Personal Storage Table. I then download the .PST to my desktop. As shown in the screen shot below, I next open Outlook, click on "File," then click on "Open," and then click on "Outlook Data File."
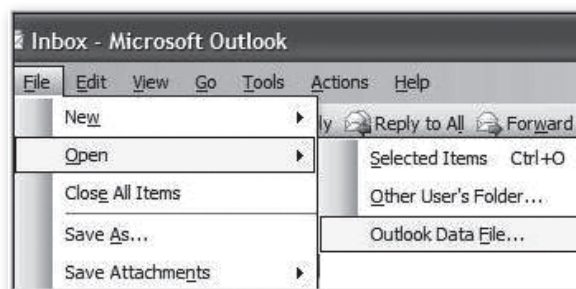
I locate the .PST file containing the emails I want to review and then click on that file name to have the emails contained in the .PST opened in my Outlook under "Personal Folders." Once I have completed this loading process, I have to remind myself to remove the CD or thumb drive and store it in a safe place in case I need to refer to the original assembly of emails.

With the .PST files now loaded onto my Outlook, I then create eight new file folders as shown in the screenshot below: (1) Dupes, (2) Highly Confidential, (3) Non-Responsive, (4) Privileged, (5) Redact, (6) Responsive, (7) To Discuss, and (8) To Review.
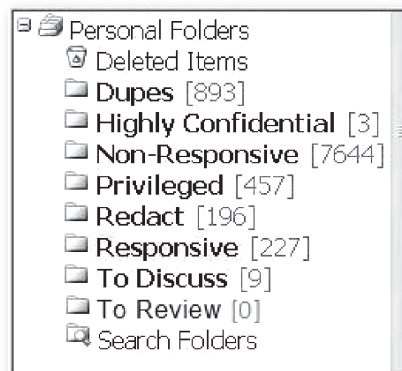
Regardless of how the .PST files are organized (they may be assembled in different file folders based on individual users or search term results), my next step is to merge all of the as-yet-unreviewed emails into the "To Review" folder.

Once I have placed all the emails in the "To Review" folder, I work some magic trying to reduce the overall number of emails I need to review by removing any duplicative emails. The program I use, MAPILab Duplicate Email Remover, costs about $25.00 to download as a permanent feature on Outlook. CNET, Topalt, and other companies offer similar types of de-duping software. Whatever software you choose can be downloaded onto your email inbox in no time. The programs are simple to use, enabling the do-it-yourself email reviewer to send all duplicate emails into the "Dupes Folder." This can greatly reduce the number of emails you have to review.

Having "de-duped" the data set, I am now ready to begin the actual review. Well, almost. To eliminate unnecessary keystrokes and to make the review go as quickly as possible (which are important goals if you are reviewing thousands of emails), I click "View," "Reading Pane," and then "Right." That way, as shown in the fictitious email exchange below, I can read the email on the screen without having to use the mouse to open the text of each email being reviewed.

To begin my review, I oftentimes arrange the emails by "Sender" so I can identify emails sent to/from counsel or other persons when a privilege may likely exist. This step allows me to more quickly identify privileged emails for placement into the "Privilege" file folder. This also is a useful way to ferret out spam and other irrelevant emails and move them to the "Not Responsive" folder. I also will sometimes sort the emails by "Subject Matter" to group email chains together. This makes it easier to be consistent and to treat one email in a chain the same way as all others in that chain.

With these housekeeping matters out of the way, I turn to actually reviewing the emails. Once I determine whether the email is responsive, non-responsive, privileged, highly confidential, or needs redaction or further review, I use the mouse to click on the email (or blocks of emails) and drag it into the appropriate file folders I have created.

I use the file folder titled "to Discuss" for emails that I am not sure are responsive or privileged. And I make it a point to review each of these emails with my client to find out in which folder I need to put them.

When the review is complete, the "To Review" file folder is empty, as all the emails in that folder are now in the responsive, non-responsive, privileged, highly confidential, highly confidential, or needs redaction or further review folders.

After I have put all of the emails in the appropriate buckets, I save the now reviewed .PST file to a CD or thumb drive with instructions for my firm's or the client's IT department (or an outside vendor) to produce the appropriate files with the proper confidentiality or redaction stamps ("Produce," "Highly Confidential," and "Redact") as bates-labeled PDF files or in
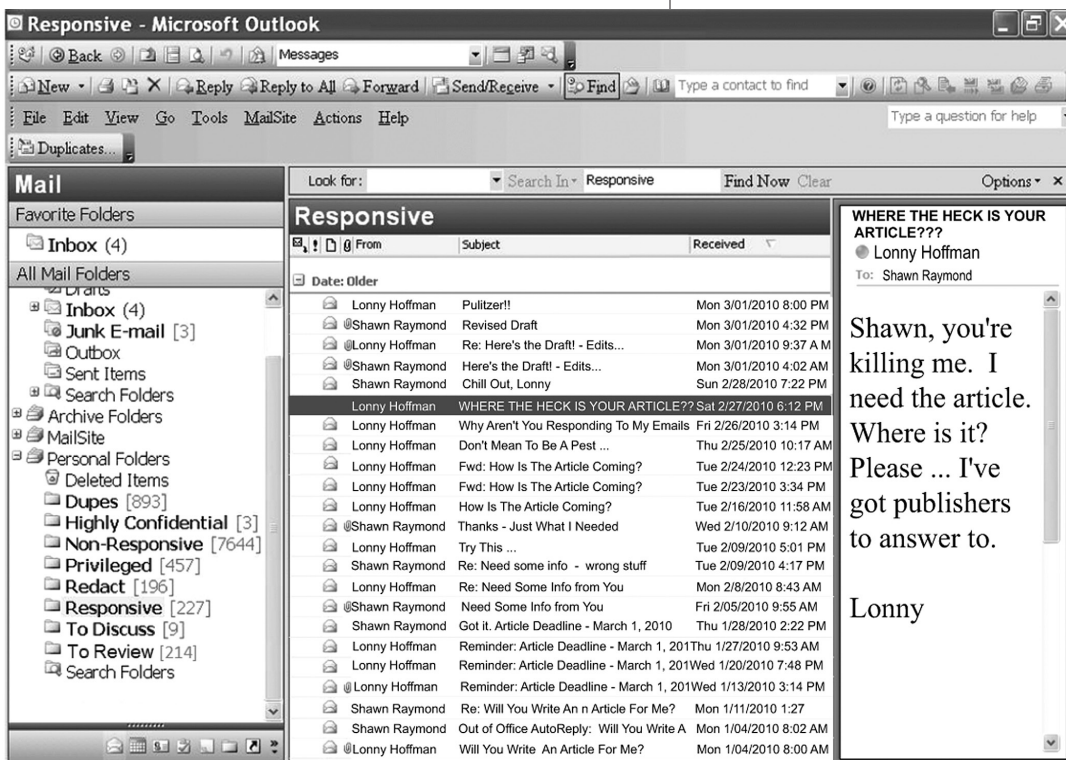
native format, depending on what agreement I have reached with the other side. I also have the emails located in the "Privileged" folder bates-labeled and printed out for me to create a privilege log.

I find this approach to be an effective, manageable way to tackle email review in cases that do not involve that much data. And if questions arise after the email production has taken place, I always can refer back to the .PST files, which will allow me to find, sort, and retrieve the emails.

Takeaway Thoughts

E-Discovery can be hugely expensive for your client or for you if your firm is advancing expenses in a plaintiff case. But many smaller commercial cases do not require a high-priced vendor to run the entire collection and review process. Coordinating with your client's or your firm's IT department, you can create a fast, efficient format for completing email review. It can save you time and your client (or you) expenses.

I am happy to share in greater detail the process I use to negotiate E-Discovery agreements with opposing counsel and to perform a "do-it-yourself" email document review. Shoot me an email (sorry, no IMs), or give me a call.

Shawn Raymond is a partner at Susman Godfrey in Houston, and he's serious about his offer to visit with you about E-Discovery strategies. Feel free to contact him at sraymond@susmangodfrey. com. ★