So You Want to Be a Producer

A Successful Production Starts with a Solid Cast and Great Script

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Every entertainer in Hollywood wants to be a producer. In fact, every Hollywood bartender, waiter, dentist and real estate agent wants to be a producer. Yet in this business we call "law," no one has ever aspired to that title. Most lawyers loathe the job and delegate as much production work as they can to junior attorneys and paralegals. There is no glitz or glamour—only paper cuts and an ongoing debate over whether to capitalize the "b" in "Bates."

But times are changing. The risks associated with document production failures can produce dramatic headlines. Even the most senior trial lawyers are scrambling to master the intricacies of how electronic data is preserved, collected, tracked, reviewed and ultimately produced. Seminars are popping up left and right. Commentators are writing furiously. It seems like every lawyer now wants to be a producer.

So how does one produce a critically acclaimed blockbuster? There are as many elements to this answer as there are aspirants. This article focuses on one of them: document collection—a risky and expensive endeavor for any litigant, especially a large corporation. It demonstrates that a successful and manageable document collection is possible so long as it is based on a great cast and a solid script. If you have both, kid, then you're half way there.

This article also suggests that a good producer will consult those members of the crew who were involved in productions long before being a producer was so darn hip. Most senior grips, gaffers, paralegals and litigation support personnel have understood phrases like "storage media" and "exchange server" long before Zubulake made them popular chatter at bar luncheons.

A good producer will utilize the crew's experience but will also stay involved in every detail of the process. After all, if you're going to be a successful producer, you must ensure that the production moves forward on time, on budget and on message. Otherwise, it won't play in Peoria.

Start With a Great Cast

The biggest challenge with electronic discovery is that the universe from which to gather documents is infinite. This is especially true for corporations that may possess endless amounts of electronic data. Unlike the old warehouse filled with thousands of boxes, servers filled with trillions of electronic documents can be searched, organized, located and hosted for review. How, then, does a producer comply with the obligation to produce responsive materials in a world where every single document request has the potential to bankrupt the studio? Is there a way to organize a production around a reasonable and finite amount of data?

This producer suggests defining a collection universe in terms of your cast of "custodians." Custodians are employees of the corporate party who possess information relevant to the lawsuit. Your custodians will include the witnesses whom you will likely disclose under Rule 26(a) as well as other employees who maintain discoverable materials. There may be central file rooms or file servers that you will need to research and understand when organizing a production, but even these files are likely to be connected to the particular employees, i.e., custodians, who maintain them.

Consider identifying the names of these custodians in your responses and objections to document requests. Describe them as the locations or individuals whose data your client has identified and will search. By setting forth these limited search parameters in your response, you are more able to certify confidently that you have completed production. You are also more likely to engage in constructive negotiations with opposing counsel to the extent that they disagree with your definition of the universe.

There are several advantages to defining a collection by custodian. First, each custodian is a finite source that you are certain to exhaust. It is possible to collect every responsive document that exists on a custodian's desktop computer, network directory, laptop, office and in the backseat of his car. This "vertical" approach is far more reasonable and controllable than "horizontal" searches of servers and common department files, which may be endless and less pointed toward the most relevant material.

Second, a custodian-based approach is a tangible way to describe the burden associated with a particular collection if opposing counsel challenges your list. If you collect from each key custodian, and the result was an average of 2 GB of data per custodian, costing $10,000 per custodian, then you can estimate that collecting from an additional 50 custodians will cost $500,000. You may then have an argument that the benefit of collecting from 50 individuals not directly involved with the allegations is not justified given that documents have already been collected from the key witnesses at the company.

Collecting by custodian also allows you to coordinate your fact development with document collection. Interviews of witnesses regarding the facts of the case can coincide with document collection and provide an understanding of what documents are relevant and useful to your case. You may also marry these good documents with witnesses for evidentiary purposes. There is nothing more frustrating than finding the perfect document but not being able to find the witness who can testify about it. Organizing a collection by custodian will increase the chances that each document in the production will be attributed to a particular witness. This is especially true today when most useful documents are attached to email.

Custodians are often key witnesses who will be deposed. Your exhaustive collection of these custodians' materials during document production will ensure that your deponents can testify that they have attempted to comply with the opposing party's document requests. After all, it's the stars who will sell this picture, kid.

With luck, by the time you are ready to define your custodians and collect documents, your preservation efforts will have made you familiar enough with the company's IT structure that you can assure yourself your list of custodians is sufficient and defensible. Paralegals and litigation support can provide useful assistance with this initial research. They may have worked on other cases for the company and be familiar with its IT structure. Or, they may have worked with other companies whose structures are similar. The term "electronic discovery" is in its infancy, but many senior paralegals and litigation support staff have been collecting documents from computers since long before you arrived in this town.

Utilize your crew as much as possible, but realize that you are ultimately responsible for understanding the company's document structure and choosing your custodians. Remember: you are the producer.

Find a Solid Script

"What we've got here is a failure to communicate." *Zubulake v. UBS Warburg LLC* (IV), 2004 U.S. Dis. LEXIS 13574, *4 (June 20, 2004)(citation omitted). Judge Scheindlin uses this line from *Cool Hand Luke* to illustrate the need for counsel to "communicat[e] with the 'key players' in the litigation, in order to understand how they stored information." Id at *33. These communications can be very complicated and technical. Most lawyers do not know the right questions to ask custodians and IT personnel regarding .pst files, shared files, databases and other possible locations of responsive material. Similarly, custodians and IT personnel rarely understand the counter-intuitive scope of document collection and are therefore unlikely to know to bring sources of responsive documents to a lawyer's attention. Custodians are surprised to learn that even the documents on their old laptop, which is now used by their son to play video games, may need to be collected.

To avoid a failure to communicate, create a specific collection plan and follow it carefully. Devise collection rules for every type of material you collect. Apply the rules consistently for each custodian. A good script also includes interview checklists to be used with each custodian. These checklists will identify every possible source of responsive material—hard copy and electronic—and will ensure that the interviewer will ask the same set of questions of each custodian. Consider drafting a similar checklist for IT personnel charged with the responsibility for collecting data. You may even consider having the custodian and IT person fill out and sign the checklist to impress upon them the seriousness of the process.

Paralegals and staff can assist you with devising your strategy and ensuring that it is correctly followed. For example, they may create a database of the checklist responses and a running diary of the collection efforts. Keeping these records will be important in case you some day need to pass on that power lunch to prepare a declaration.

Also consider who is best equipped to testify as a 30(b)(6) witness on document retention and collection issues and consider how (or whether) to involve them in the collection process. You may also decide to involve an electronic discovery service provider in the collection process. The advantage to involving an electronic discovery provider is that, if your collection process is challenged, you have a credible witness who is able to testify that your collection process was consistent with industry standards.

A legally sufficient document collection requires a well-executed plan that involves the client, in-house and outside counsel. A good producer ensures that the plan is reduced to a solid script that will appeal to the right demographic.

You're Well On Your Way, Kid

Document collection and production is no longer a walk-on task. It now requires counsel to understand the details of a corporate client's workflow and electronic storage to ensure that a legally sufficient plan is executed. All members of the legal team should participate and consider document collection an integral part of their overall case strategy. Defining a collection based on your cast of custodians, and writing a detailed collection script, will put you on the right track. Heck, if you do it right, you may even be able to quit your day job.

Jeffrey Fowler is a Counsel in the Los Angeles office of O'Melveny & Myers LLP and is the leader of the firm's task force on document production issues. Mr. Fowler's practice has included a wide variety of commercial litigation where he has managed several large electronic document productions. He also drafts and implements electronic discovery protocols and document retention policies for corporate clients.

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