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Controlling the Costs of Discovery By Leveraging The Left Side Of the EDRM

By Brian E. Schrader

While the cost of document discovery has always been one of the most significant expenses of litigation, those costs have spiraled ever higher in the past decade with the increasing volume of information in the digital age. However, by leveraging the left side of the EDRM (www.edrm.net) with early planning, the proper identification of people and resources, and the use of well-scoped tools and methods, costs can be controlled and the potential for sanctions can be avoided.

Strategic Planning Is Essential to Controlling Costs

The adage, "Garbage In; Garbage Out (GIGO)," has never been more true than in the discovery process. Simply put, if you do not start the entire process on the right footing, you will incur unnecessary costs and increase the potential for sanctions.

Proper planning is the key to any successful discovery process, and this is especially true with electronically stored information ("ESI") collections. The process *must* begin with a meeting of key players and strategic planning. The key players include counsel, essential client management personnel, IT resources and the outside vendor, if applicable.

continued on page 7

Explaining e-Discovery

A Look at Some Common Misconceptions

By David Stanton and Jeff Fehrman

Due to the broad scope of legal relevance, virtually every bit and byte within a company's IT infrastructure could be subject to an enforceable discovery request in civil litigation. Evidentiary demands have evolved, along with the tools we use to measure and record our activities. The process of identifying and producing electronically stored information ("ESI") — e-discovery — has grown so expansive and specialized that its costs have begun outpacing traditional attorney's fees in large corporate disputes.

The e-discovery process takes place at an intersection between increasingly complex information technology and rapidly maturing information law. Doing this well — achieving cost-effective, defensible and useful results — requires coordination between IT professionals and lawyers. Poor communication by the participants turns e-discovery into crisis management — driving up costs and causing unpleasant surprises. To help avoid such pitfalls, this article dispels some common e-discovery misconceptions.

'Save Everything'

A good IT department maintains the integrity and availability of corporate data. Yet, most business units lack a routine for categorizing or disposing of their electronic files. In addition, the IT department has little visibility into the contents of company records, thus lacking the wherewithal and authority to dispose of electronic data on its own. Storage is also cheap, with the price of a gigabyte dropping from $9.00 to $0.08 over the past 10 years. Therefore, most IT departments have responded to rising data volumes by expanding and buying huge amounts of additional capacity.

Kathy Hogy, the vice president of legal discovery at a Fortune 500 company, explains that saving everything seems fine, until litigation or regulatory action requires the retrieval of specific, relevant information. Most organizations do not take into account the cost and effort of producing information under tight deadlines, and as a result, face potentially steep consequences for failed or late productions.

continued on page 2

In This Issue

e-Discovery

continued from page 1

Storage and hard drive cloning may seem inexpensive at first, but retrieving and processing information from these media for litigation purposes can be very difficult and expensive.

Moreover, many believe they should save everything due to some nebulous legal requirement to do so — this is inaccurate. Except in the most heavily regulated industries, there are relatively few categories of documents that cannot be freely discarded, and the decision to do so is usually a practical one, not a bright-line legal obligation. The U.S. Supreme Court expressly acknowledged this when it overturned a document-shredding conviction and found, in *Arthur Andersen v. United States*, that it was entirely appropriate to have a document retention policy "created in part to keep certain information from getting into the hands of others, including the government." 544 U.S. 696, 704 (2005).

'There's an 'Easy' Button'

There is no one-size-fits-all, automated e-discovery software or solution. Organizations seeking to standardize the process must anticipate great variability from case-to-case. The same procedures and tools will not necessarily work in every scenario, due to changes in the types and locations of data, the identity of custodians, the legal process involved, and the risks, costs and consequences of legal losses. e-Discovery is not an application; it is a process. It combines technical skill with human judgment and requires active oversight by qualified counsel and the careful use of technology by appropriately skilled individuals.

Corporate information systems are heterogeneous, and litigation often involves data from systems that are not designed to support legal discovery. Once these disparate data types are collected for a case, they must be loaded into separate platforms for further analysis; these in turn must be operated by people with the requisite expertise. Many e-discovery providers claim their products span the entire EDRM (Electronic Discovery Reference Model), but no vendor has produced an automated black box that distills relevant data from the IT infrastructure without the expertise of a team.

As organizations develop e-discovery capabilities in-house, they should carefully consider who would operate the tools they acquire, how their programs will be made sustainable over time, and recognize that despite the capabilities of various tools, none of these will ever conduct e-discovery at the push of a button.

'IT Provides Litigation Support'

Claudia Morgan, an attorney at Hogan Lovells, says that there is a very popular misconception that the IT department should serve as the company's litigation support group. Just because IT keeps the data does not mean IT is qualified to handle data in litigation, or that it is desirable to have IT testify about the collection effort.

An IT department usually does not perform document search and discovery functions, and assuming that IT is technically qualified to do this competently, it still invites considerable risk. This is a common misunderstanding among infrequent litigants who fail to appreciate the downstream costs of a slipshod collection. Information must be extracted and handled in a *defensible* manner in litigation, without corruption and with an unbroken chain-of-custody. This is not

continued on page 5

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Product Review

Is There Really Such A Thing As Social Practice Management?

By Donna Seyle

In the cloud-based law practice management ("LPM") arena, there is no shortage of new and innovative platforms to choose from. Time and billing, matter management, CRM: these features have become standard, meat-and-potatoes stuff in LPM technology. Developers are now moving far beyond them, to incorporate some pretty exciting functionality, streamlining not just your matters' documents and information, but also the organizational, communication and workflow components of your practice: Your law firm, and everything that happens in it, wrapped up in a single application. What more could you ask for in seeking the most efficient way to run your practice? Law practice management, meet legal productivity, or, as the San Diego developers have dubbed it: social practice management. Welcome to MyCase (www.mycaseinc.com).

Overview

Social practice management is a clever catch phrase for a product that performs practice management functions in a social networking environment, thereby streamlining the process and maintaining an overview of the matters in your office at all times. Each matter is entered into the system with the standard features. MyCase adds the ability to create a group, comprised of attorneys, clients, necessary staff and any others involved in the case (*i.e.*, expert witnesses), for the matter.

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The platform enables anyone in the group to communicate each and every action quickly in the case to other applicable group members. This information is also automatically displayed in a recent activity screen that sits on your home page in a Twitter-like format, keeping everyone continuously current, tracking the matter's progress and streamlining workflow. Put another way, the design facilitates law to be practiced in a social networking environment optimized for interaction, collaboration and simplicity.

Since there is unlimited data storage, every e-mail, scanned letter, document and legal form related to that matter can be easily uploaded into the system. MyCase accepts every document extension, and makes the data searchable (or not, if you so choose).

With every twist and turn of navigating around this application, there are shortcuts to accomplish any task. Send a note, upload a document or add a contact; all without needing to leave the current page. This is only one of the many ways MyCase makes the daily routine efficient.

In fact, MyCase exhibits the first glimmer of a marriage between practice and project management platforms. In comparing MyCase with Onit, a fully developed legal project management application, MyCase is missing only two of Onit's main functions: Project Planning and Budget Estimating. MyCase can be easily adapted to perform these functions and track them in its existing communication framework. By creating this social environment in which every action in a case is being digitally managed, MyCase developers have added to productivity in ways I'm not sure even they envisioned.

The Design

Opening a new case is done in four steps:

1. First screen: Basic case information. Name, type of matter and short description.
2. Second screen: Staff link. Create groups and designate members' permissions.
3. Third screen: Contact information. Creates the client link, which populates all other necessary fields.
4. Fourth screen: Billing information. Includes hourly, contingency or fixed-fee billing options as well as payment options.

One of the first results of your input, besides automatically populating the necessary fields, is that everyone whom you've linked into the case will receive notice in their recent activity stream, as well as a little red comment bubble on the case tab. (And yes, it looks just like the notification bubble on Facebook.) In this scenario, all communications among the group regarding the case will occur within the secure environment. Once your case input is complete, you can filter information on the case anywhere you are in the system by using the case name.

To ensure all bases are covered, an e-mail is also sent to advise anyone working outside the platform that the case has been added. In order to preserve the security procedures put in place by MyCase, the public e-mail simply notifies you to log into MyCase to receive an update. This occurs not just when the case is input, but whenever anyone is alerted to an event within the system. The notification system can also be adjusted manually when you want to choose who receives the communication.

This design underlies all the functions performed in MyCase. Whether uploading a document, setting a deposition, requesting someone's presence at a court appearance, or creating a discussion around certain topics or events in the case's progress, it is accomplished through these processes. The efficiency of this model seems self-evident. Like a project management format, MyCase simplifies the task of documenting ideas and events, and communicating them to all the necessary collaborators. And like social networking, everyone is invited to comment, respond or engage in an immediate, real-time environment.

Document Storage

The good news is that document storage is unlimited and can be uploaded using any file extension, so you can store photos, video and audio content. There are two potential

continued on page 4

MyCase

continued from page 3

upload categories: case documents (anything linked to a case) and firm documents (anything that can be used globally throughout the firm, such as templates). All documents can be tagged for search. The notification processes alert you to any document that may be uploaded by a client or witness so it can be properly tagged and filed. The system has versioning capability and retains an audit trail, enabling you to search back through a document's evolution.

Time and Billing

This function is almost a standalone module, yet in an equally collaborative design. As mentioned above, there are three billing models you can choose for each matter: hourly, contingency or flat fee. If you choose hourly billing, a question will appear regarding the use of a trust account. If you are billing as a flat fee, you can input what the total price is, and how much the client has on deposit. This information is incorporated into the invoicing function.

Billing entries include expenses as well as time, and allow you to customize your activities. You can view the billing status by matters that have open balances, have been invoiced, or both. These screens give you a quick overview of the firm's billing status, as well as the client's. Invoicing allows you to set up payment plans. You can create an invoice and notify the client or save, print and mail.

There are also several payment options. The client can:

- Auto-pay via his merchant account that is linked in MyCase;
- Pay through a merchant service account created in the system; or
- Pay upon receipt by cash, check or credit card.

Future Upgrades

Like every product launch, MyCase has not integrated all of the envisioned functionality. Two upgrades that are front and center are:

1. Bi-directional calendar syncing. Currently you can only sync from MyCase to your public calendaring system; soon, you will be able to go either way; and
2. Adding a task widget on the home screen sidebar. This will appear in line with the important alerts and upcoming events on the right side of the home screen.

There are more, but they are not being made public yet.

What I Expected to Find, But Didn't

A developer has to pick and choose among design priorities, but MyCase misses some biggies that I hope will be considered for later versions. They are:

- Conflicts checking system;
- Web site portal integration; and
- Separate billing discussion tab.

Because the system is designed for solos and small firms, its conflict checking system relies on the ability to search within the system. However, a more robust system is called for as cases and their associated personnel begin to build. Given the ABA's Ethics 20/20 Commission's investigation into the use of cloud systems, I suspect there will be a recommendation or demand for this sometime in the future.

The Web site portal (a bridge that enables a client to access the system through a link on your Web site) is one of the key components of a virtual law practice, or e-lawyering, as defined by the ABA-LPM's eLawyering Task Force. Examples are VLOTech (currently in private beta through TotalAttorneys.com), DirectLaw.com and Wizilegal.com. Although MyCase is not configured in this way, the developers will work with you to design a link for your Web site to their system branded for your firm.

The system enables you to bill on a fixed-fee basis, but does not provide a place to separately store discussions, notes, drafts, change orders, or anything related to the process of arriving at a negotiated fixed or customized billing agreement. This would be helpful in tracking costs and reviewing the steps taken when attempting to formulate a similar billing arrangement in the future.

Security

Lawyers using cloud-based products for their practice management solution know they must perform due diligence before retaining a cloud vendor to be certain their data is protected using best practices and specific security standards. The legal profession has a higher duty of care to protect its clients' data in order to retain the attorney-client privilege and duty of confidentiality. It has the additional burden to insure against prohibitive jurisdictional regulations where the data resides, as well as the ability to authenticate documents as evidence if necessary. As a result, the terms of the Service Level Agreement ("SLA") must include more than the standard provisions of a click-wrap agreement.

If the vendor does not own or control the servers on which your data will reside, law firms must extend that due diligence to include information about the server host. The terms of the SLA between the host and the vendor must mirror the important terms of the agreement between the firm and the vendor.

MyCase is built on Amazon's EC2 platform and is backed-up using Amazon's S3 storage. Using global hosting for data storage has not been well received by the legal technology community, primarily because clients have little leverage to negotiate any special terms in their SLA. A global host's servers are generally located internationally, and your data can be dispersed to various locations. That being said, MyCase and Amazon provide a greater-than-usual degree of transparency with respect to the security practices they employ, and they are impressive. Additionally, Amazon's policy is to locate your data in the same country in which you do business.

Conclusion

MyCase represents another step in the progression of law practice cloud solutions. The product is a powerful tool: a uniquely seamless way to run your practice that enables you to document and communicate every event involved in each legal matter. It is that seamlessness that creates the efficiency and level of productivity you need to provide cost-effective and quality services to your clients. It is your ability to provide cost-effective *and* quality services to your clients that make your practice successful.

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Use Twitter to Cut the Clutter

By Adrian Dayton

The other day, my son was sitting next to me while I did some work on the computer. He started pushing icons on my screen with his finger. My computer doesn't have a touch screen like my iPad, so nothing happened, but it demonstrated an expectation with which my son is growing up: He expects to get the media he wants, when he wants it, at a touch of a button. When I was a kid (not very long ago), the only options for watching cartoons were right after school and Saturday morning. My son will likely never have to deal with this constraint. I had to search through libraries to find content as a child; for my kid, finding content will be as simple as a Google search.

This search capability presents a problem, referred to by many as information overload. "I don't have time to answer my e-mails every day — how will I find time to use social media?" complained one attorney. "I just can't handle sifting through any more information," complained another. What these lawyers don't realize is that as this technology progresses, so does its ability to organize information.

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Use Twitter to Organize

Twitter is a great tool for organizing information. Think of every Twitter profile as a TV channel. Pick only the channels that are interesting to you. Interested in links to articles on employment law? Follow @danielschwartz. Interested in tech and antitrust? Follow Glen Manishin (@glennm). Want to hear the latest on alternative fee arrangements? Patrick Lamb (@valoremlamb) is your guy. See, it isn't about consuming *more* content, it's about consuming *more relevant* content.

If you don't have time to search for multiple Twitter accounts to follow, there is a shortcut called Twitter lists. Many of the power users of social media have spent hours and hours organizing lists of people to follow that share about certain topics. You have the option of simply following an entire list, or selecting users on it.

Twitter is very different from e-mail, because whereas in e-mail your Inbox fills up with messages as they arrive, Twitter functions much more like a river with information flowing by. There is new information coming in every moment. If you miss it, it's gone. If something is very important however, it will likely be repeated or "re-tweeted" over and over, making it far less likely you miss it.

Another great tool for organizing all this information is Tweetdeck. It's a free download that allows you to set up multiple columns with searches, lists and even allows integration of LinkedIn and Facebook streams. Many IT departments aren't big fans of Tweetdeck because it is a desktop application and requires you to download software to your computer. If your IT department won't allow it, there is a similar Web-based tool called Hootsuite that is very similar — and also very free.

Once you have started to organize your stream and set up tools like Tweetdeck to manage all of this new highly relevant information, it is time to turn off e-mail alerts. Go into the settings for Twitter, LinkedIn and Facebook and limit e-mails being sent to you from these applications. If our objective is to prevent information overload, it is essential to turn off most e-mail alerts. You may still want to receive message from LinkedIn, because these allow you to respond directly to the sender of the message via e-mail, but I recommend turning all other alerts off.

Manage Your Time

Check-in at least once per day. One busy attorney I spoke with told me: "That shouldn't be a problem — I check Facebook at least once per hour." I wouldn't recommend checking quite so often; follow the advice of Tim Ferriss in *The Four Hour Work Week* and schedule the times you will be checking in with social media. If you turn off all the alerts and never log in, than you aren't any better off than before. Keep in mind this is a new process, and it takes time and effort to develop any new process, so be patient with yourself.

My grandparents aren't big fans of satellite TV. The prospect of choosing among 300 channels is just too much for them. They prefer the manageable three channels they grew up with. If you just want three channels, that's fine — just make sure you use social media and technology to guarantee those three channels are the right channels for you.

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e-Discovery

continued from page 2

something an IT department necessarily understands, and if a document is obtained incorrectly (*i.e.*, spoliated), then it may not be admissible at trial. Furthermore, errors in the collection effort can result in significant sanctions and could impeach the organization's overall credibility with the court.

Thus, companies and their counsel should consult with experienced electronic document technicians who have specific litigation expertise. The cost of hiring qualified personnel in this capacity is a small fraction of the overall costs of the e-discovery process, and will be much less than the cost of defending or redoing an inadequate collection when its sufficiency is challenged by the other side.

'Litigation and e-Discovery Is the GC's Problem'

Some executives believe e-discovery is a legal issue and just a concern for the lawyers. This is a dangerous way of thinking. e-Discovery exposes an entire organization to a broad array of risks, which are best addressed through information governance. Keep in mind that it takes just one judge in one lawsuit to expose a C-suite to the world.

Senior management should recognize the risks of e-discovery in order to set an appropriate "tone at the top." CEOs can protect the organization by

continued on page 6

e-Discovery

continued from page 5

requiring information governance measures and enforcing usage policies. CFOs who recognize e-discovery as a cost of doing business can commit appropriate resources, develop realistic metrics and controls, and achieve a favorable return-on-investment for preparatory efforts.

Every level of an organization should be generally informed about the litigation process and the likelihood that data could someday be produced. This is particularly important with a younger generation entering the workforce, who are accustomed to constant informal online communications and must be sensitized to the risk that their text messages, e-mails, Facebook postings and other generated content could pose to the organization.

'Just Run Search Terms'

Greg Kaufman, a partner at Sutherland Asbill & Brennan, disputes the misconception that e-discovery is as easy as entering a few search terms: "You can't Google your enterprise data."

There is a large difference between running an Internet search and retrieving relevant electronic evidence from an IT system. Whereas Google's servers continually crawl the Web to find and index new Web page content, corporate data is largely uncentralized and unindexed, and it exists across a broad array of devices, applications and formats, with each requiring individual search efforts to find what is relevant to a particular case.

Due to the huge, disorganized volumes of unstructured information maintained by large organizations, it can be quite difficult to target only that which is relevant to a particular case. A combination of legal and technical acumen is required to exclude non-relevant data, and a great deal of skill can go into the development of accurate search terms, which must then be correctly applied (*i.e.*, to the proper databases and archives, with the right analytic tool, etc.). The search and retrieval process can be much more complex than it seems.

'Early Case Assessment Is An Application or Device'

Information retrieval has been around at least as long as libraries have been in existence, and it consists of much more than running a few search terms or looking at an index. Likewise, what has come to be called *early case assessment* ("ECA") is an information retrieval process, not merely an application or device.

In a sense, ECA is just old-fashioned investigatory work. It refers to an initial effort to query select data resources and use the results to make initial determinations about a dispute. If performed correctly, ECA can help reduce litigation expenses dramatically and yield a very high ROI. For example, document review is the most expensive part of e-discovery, but by carefully evaluating the facts and data in advance of the review, organizations can focus on what is most relevant first, and then leverage this information to develop a robust training program, which can minimize errors and repetition and speed up the pace of the review. ECA can also help an organization establish a realistic litigation budget, allowing it to make well-informed settlement decisions at the onset of the case.

e-Discovery can be elaborate and very complicated; it can take several months and millions of dollars to complete. As with any large-scale project, appropriate planning is paramount and the effort placed to scope the project and establish clear parameters for its execution generally translate into greater efficiency as the process unfolds. Kaufman, for instance, often tells his clients that they can complete a document review quicker by starting later, and that spending extra time on analytics and culling will reduce the overall time and expense of the process.

ECA, therefore, requires several kinds of input — from custodians, lawyers, IT personnel, consultants and others. There is simply no software solution that can do this on its own.

'Backup Tapes Are 100% Reliable'

Hogy suggests that while backup tapes are inexpensive and can store a lot of data, they are far from reliable and can present several problems in the discovery process. Magnetic backup tapes physically degrade over time and they are more likely to contain errors the more often they have been used. To recover specific content for litigation purposes, the data must be restored from the tape media and converted to an active digital format. In some instances it may be possible to index and search tapes prior to restoration, yet backup tapes are intended for disaster recovery, and can be unsuitable for other uses. They generally should not be used for compliance archiving when other alternatives exist.

'e-Discovery Must Be Performed By Trial Counsel'

Companies tend to hire subject matter experts to litigate their cases, and assign *de facto* control over the e-discovery process to the litigators. This can be very inefficient for repeat litigants, and it is more practical to engage e-discovery counsel to help the organization manage the process overall. Moreover, although e-discovery must be supervised by an attorney, it is neither necessary nor practical for lawyers to do all of the work.

The technical complexity associated with retrieving and processing information means many aspects of the e-discovery process are best performed by preferred forensics specialists who are familiar with the company's systems. Likewise, the high volume and routine nature of document review makes it more efficient and economically attractive to use process-oriented service providers overseen by e-discovery counsel, rather than costly trial attorneys who are unfamiliar with company IT.

By leveraging trusted, experienced service providers and e-discovery counsel, corporate legal departments can let their trial attorneys focus on case strategy, rather than having them immersed in the process details of identifying and extracting ESI, and sorting out what is relevant from what is not.

Conclusion

In today's legal and regulatory environment, organizations are finding that e-discovery is a business process that cannot be avoided. The better companies understand the process and are able to get beyond the misconceptions, the more likely they are to achieve efficiencies and obtain favorable outcomes.

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EDRM

continued from page 1

Together, that team will have the resources needed to identify the relevant sources (people *and* systems), and the best methods for collecting those sources. Jumping into the process without such planning will surely decrease efficiencies, lead to duplicate efforts, and increase costs and the risk of sanctions.

Identify People and Resources Early

Once gathered, those key players must first work together to identify all potentially relevant sources of paper documents and ESI and develop a comprehensive strategy to collect that material from each of those sources. Without a complete understanding and strategic plan from the outset, unexpected issues will certainly arise, which will only increase the costs.

The process must start with the identification of the people (*both within and outside of the organization*) who are most likely to be the custodians of potentially responsive or relevant information. From there, a full picture of the potential sources of documents and ESI can be identified. Only with that complete picture can a strategic and comprehensive plan be created and the legal team truly be prepared for meeting the obligations under FRCP Rule 26(f) and similar state rules.

Custodian Participation Will Reduce Costs

Courts have clearly stated that document discovery must include a balanced approach, including meaningful guidance by counsel and the engagement of those with the most knowledge regarding an organization's information — the custodians. Counsel has an understanding of the legal obligations and issues; management and custodians have the best understanding of what responsive information exists; IT staff can assist in identifying how that information is stored, backed-up and retained, and using the right tools, will be able to ensure that such information is defensibly collected and properly handled throughout the process.

Yet, even though courts have required custodian participation, this is not the only reason to adopt that practice. When leveraged correctly, using the right methods in conjunction with custodian participation to identify, preserve and collect ESI can greatly assist in reducing the costs throughout the litigation lifecycle.

Initial legal hold notices should be designed to help the custodian understand the litigation at hand and the preservation obligations that exist, helping to define the process and avoid potential sanctions. A well-crafted, technology enabled custodian questionnaire will help identify key custodians and collect key statistics regarding the sources and quantities of potentially relevant information. An ESI collection technology that *unobtrusively* engages custodians and provides them with the opportunity to help identify potential sources of ESI as an integrated part of the process will help identify key resources, target collections and reduce time spent by the legal team and custodians. All of this will reduce overall costs.

Targeted ESI Collections Reduce Costs

When it comes to collecting ESI, a properly defined, planned and executed approach will not only establish defensibility, but will reduce costs. Organizations often default to forensically imaging ESI sources, which is usually unnecessary and will increase costs. True, in cases where criminal conduct, a suspicion of improper ESI deletion or other such concerns exist, traditional hard drive imaging may be warranted. The legal team, together with e-discovery advisers, should be able to help evaluate the concerns of a given project and determine whether a more intrusive hard drive imaging is appropriate.

However, just as when collecting paper documents you need not copy the contents of every filing cabinet and rummage through garbage cans and document shredders, the same is true for most standard ESI collections. A targeted, surgical and *defensible* collection of potentially relevant ESI will significantly reduce the overall costs of any discovery process. It's axiomatic that reasonably and defensibly controlling the ESI collections from the outset will help reduce the volume of clearly irrelevant information, and thereby reduce the costs of each subsequent step in the process.

Avoiding Unnecessary Business Interruption Costs

Most organizations are loath to disrupt their employees with litigation needs even once, let alone multiple times. One recent discussion with an individual revealed that he had been disrupted nine times in a single year for ESI collection efforts. Such practices significantly increase costs, disrupt business and cause unnecessary distress and distraction. They are disruptive at every level and can be avoided with proper planning and tools.

An essential element of this process is evaluating the technology resources available within an organization. One common request of counsel is whether the ESI collection efforts can be context-sensitive. In other words, can an agreed-upon list of search terms be used to filter ESI collections from the outset? While possible, it is not recommended, unless the organization has the technology already in place that is *proven* to be functional, accurate and defensible.

The concern is one of unnecessary disruptions to the lifeblood of an organization, its people and the negative impact that business interruptions will have if a company needs to repeatedly go back and interrupt employees each time a date range or keyword is changed. If an ESI collection is guided solely by contextual searches, each time those searches change (which often is the case), the collection has to be supplemented. If an organization has the technology in place to enable such repeated

continued on page 8

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EDRM

continued from page 7

collections in a defensible and efficient manner without continually interrupting the employees, then that option may be considered. Unfortunately, most organizations do not have such comprehensive enterprise systems in place because of high costs and lengthy processes to implement them.

Moreover, it is better to cast a slightly wider net than absolutely necessary, as the incremental costs of being slightly over-inclusive are clearly less than the potential sanctions that can result from failing to identify and preserve responsive and/or relevant ESI. Thus, there must be a balance in the ESI collection process — one that ensures a wide enough scope to capture all potentially responsive and/or relevant information, but not so wide as to capture files (be that system files, specific data or other data with identifiable characteristics) that will forever be clearly irrelevant to the litigation at hand. The strategic planning and custodian participation outlined here allows for the creation of a collection protocol that balances those needs, and the tools chosen must be able to accommodate the scope of the project.

With such a methodology underlying your collection efforts, you will be able to apply more specific filters *post*-collection. If your parameters change, you need only re-filter the already collected data and need not interrupt the business and employees after the initial collection event. This gives you more flexibility, helping control the costs of the entire ESI collection process and ensuring compliance with data preservation obligations that form the foundation of a defensible discovery process.

Defensible Collection Practices Prevent Unnecessary Costs

A defensible collection process will ensure that obligations are met, and help avoid costs and penalties that can result from deficient document collection practices. A defensible collection not only includes the planning and identification outlined above, but also must include the use of protocols and technology sufficient to track the source of documents, preserve information regarding how those documents are maintained, and capture essential information about the documents themselves. This is just as true for paper documents as it is for ESI.

For example, one of the most important aspects is establishing a chain of custody. Who maintained the information, be that paper or electronic, is crucial to any defensible collection, and is required by nearly every regulatory body, court or dispute resolution venue. Equally important is the physical or electronic source of the documents, be that the file folder for paper documents or the computer source, folder path and filename for ESI.

Many regulatory agencies now require such information, without which they reserve the right to consider the entire production nonresponsive. If such information is not captured and retained from the outset, the expense of recreating it, if even technically feasible, will exponentially increase the overall discovery costs.

Another example is the retention of metadata, and ESI metadata is especially fragile. If the ESI collection process does not follow sound principles in the capture and preservation of metadata at each step along the way, it is easy to unintentionally alter metadata. From inappropriate collection methods like copying files by using a "drag and drop" method, to using methods that simply do not capture the external elements of a file (such as the computer source and the folder path) or maintain the proper file dates at each step, examples of insufficient and non-defensible ESI collection efforts abound.

When collecting ESI, it is also highly advised that the collection method establish the hash value of each file *at the time of and from the point of collection*. A hash value is a digital fingerprint of a file that is generated by defensible ESI collection tools. It is created by using an algorithm that generates a unique alphanumeric value for the file based on its content. If even a single space character is added to the content of a file, its hash value will change. Thus, "hashing" is a very useful method for establishing at any later point in time whether the file has been altered or whether the file in question is exactly identical to the file originally collected and preserved.

Another best practice in collecting paper documents and ESI is to always maintain a pristine original set. After the original collection, the data should be defensibly duplicated (making sure the resulting copies are exact identical copies of the originals), and that all subsequent work (*e.g.*, analysis and review) is performed using the duplicates. That way, even if something later in the process unintentionally alters or impacts the files themselves or the metadata, you always have a pristine original version to which you can refer.

Conclusion

Defensible data collections are the primary key in avoiding the sanctions that have been leveled against litigants with ever-increasing frequency. If properly applied, a defensible data collection methodology creates a rock solid foundation upon which a defensible discovery process can be built. Moreover, best practices in the identification, collection and preservation of *both* paper documents and ESI enable you to more effectively meet your obligations and control costs throughout the rest of the process. If a document collection process does not follow such guidelines, the volume of information collected will be significantly increased, you may face potential sanctions for not following best practices, and you may find yourself repeating the process from the outset, significantly increasing the costs at every step.

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