Explaining e-Discovery

A Look at Some Common Misconceptions

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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.

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 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 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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