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E-discovery goes mainstream, business gets smarter

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An electronic discovery request can be daunting, especially for a small business that may not have all of its electronic information organized.

But there are ways companies can prepare themselves for what is already a common occurrence in the world of litigation, attorneys say. And as corporations get smarter about information management and e-discovery, the issues are likely to become just another business process.

"Any discovery is a challenge," said Brian Wright, an attorney at Faruki Ireland & Cox whose practice areas include business, commercial, advertising and technology litigation.

"What's happened over the past few years is that data keeps growing. What is most important is to guard against it before a claim ever happens," Wright said.

To do that, businesses need strong document retention and security policies in place that are used and followed routinely. Litigation hold procedures also are necessary, to make sure companies are preserving evidence.

KNOW THY DATA

E-discovery is the electronic aspect of identifying, collecting and producing electronically stored information in response to a lawsuit or investigation. It includes emails, documents, presentations, databases, voicemail, audio and video files, social media, and web sites.

The age of the Internet is wonderful for its access to reams of electronically stored information, "but there is so much at our fingertips and too much is stored by too many people in too many places," said Carolyn Taggart, an attorney at Porter Wright whose practice areas include product liability, legal malpractice and complex commercial cases.

To get a handle on the depth and breadth of data, companies should designate a point person who is responsible for knowing what the firm's electronic information is and how it is stored. That person, who may be a "chief data officer," should also be able to assess the data and prepare a data map, Taggart said.

A data map is a visual that illustrates how data is stored. It is a catalog of a company's records, according to Lexis Nexis. And it helps comply with the Federal Rules of Civil Procedure, amended in 2006 to include rules for e-discovery. Those rules require parties to be ready for litigation by understanding their IT and network architecture. The courts expect companies to know what potentially relevant data they possess and how much it will cost to produce.

INFORMATION MANAGEMENT

Taggart recommends her clients create an information governance policy that involves all levels of the business, from legal to compliance to human



Carolyn
Taggart



Gregory
Ahrens

resources. Collaboration among departments will determine what documents and information should be preserved and what is not relevant or not associated with the business that can be deleted, Taggart said.

"Companies also need to communicate to employees how to hold that information and decide what employees are told about the process," Taggart said.

As firms arm themselves for e-discovery, they should do so in lock-step with their attorneys, so that if a claim arises, everyone is on the same page.

This can be especially helpful in reducing the costs of e-discovery.

If a law firm knows how a client is managing its data, it can more quickly execute a discovery process. For example, companies may store emails on one server and use a separate server for other documents and databases, said Gregory Ahrens, an attorney at Wood Herron Evans who handles patent and intellectual property cases.

"Oftentimes, our electronic discovery has to touch on two different sources and that can be problematic when the custodian of documents is not as easily identified," Ahrens said.

Computer or technology assisted review or "predictive coding" is now being used by attorneys to "teach" computers how to recognize and distinguish between relevant and non-relevant documents, Taggart said.

The coding reduces the amount of data that needs to be reviewed by attorneys.

"It doesn't do away with the human element, but it does help reduce costs and man-hours and allow us to be more efficient and effective," Taggart said.

A MULTITUDE OF DEVICES

As more technology is used on the job, businesses must also instruct their employees about and create security measures for the use of personal devices for work.

The "bring your own device" atmosphere means that there "are all kinds of ways that information is disseminated than just being in an office and getting emails," Taggart said.

Now smartphones, iPads, Facebook and Twitter are all part of the data mix. And if a personal device is used for work, it's fair game when it comes to discovery searches.

E-discovery on social media is what Wright sees as the next hot button issue, given how much sharing and marketing takes place on that platform.

The amount of data that falls into e-discovery is staggering. Consider these facts, according to Cincinnati-based Salix, an information management and discovery firm:

- 90 percent of all documents generated today are electronic.
- 60 billion emails are sent worldwide on a daily basis.
- A single hard drive can contain more than 40

million pages.

AN E-DISCOVERY PLATFORM

The issues surrounding e-discovery affect all industries and companies of all sizes, attorneys say.

It is most common now in banking, product liability and commercial cases involving business disputes and partnership splits. But it reaches "anyone touched by litigation, even an individual," Wright said.

In the future, e-discovery will certainly be a matter of course, but it may also become even more expensive as the data we create mushrooms.

Yet Ahrens said he is seeing the pendulum swinging back toward reasonableness. He said some courts are requiring parties to agree to search protocols with a limited number of search terms and target custodians. If a party wants to search beyond those limits they must show cause.

"E-discovery can be the single-most costly part of the discovery process," Ahrens said.

It will only increase in frequency, attorneys say, but will become easier to manage as courts clamp down and impose search limits and technology vendors create more efficient ways to search and mine the data.

To make it all work, law firms and the companies they represent must also ensure they have teams of people in place who know how to seamlessly process the e-discovery search results into useable forms to avoid bottlenecks in the discovery process.

"Eventually we will look back at this and laugh at how cumbersome it used to be," Taggart said. "But I know from a practical standpoint how difficult it is to put into practice."

HOW TO MAP YOUR DATA

A data map is the first step in creating a records retention plan and a litigation hold procedure. It also can include facts that attorneys can use to convince courts and their opposition that certain information is too difficult or costly to produce. Lexis Nexis offers the following guidance in how to map data:

- Create a multidisciplinary team from all departments that create or maintain electronic information that could be subject to litigation or regulatory requirements.
- Conduct interviews with key personnel, especially those responsible for maintaining records in each department.
- Research technical resources to determine exactly where data may be lurking: on hardware, in software systems and on servers and portable drives.
- Consider less "active" data, like that found on backup systems and deleted files.
- Keep the data map current.