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Law Office Technology & E-Discovery

Managing Your Client's E-Discovery Obligations

Identify any vulnerabilities in client systems, treat them proactively

By Jennifer Rothstein

How tempting would it be to echo Bartelby the Scrivener's words, "I would prefer not to," upon receipt of a request for electronically stored information (ESI). Although he is Herman Melville's fictional character, the 2006 amendments to the Federal Rules of Civil Procedure have augmented the discovery task to a level where Bartelby's passive words could be easily be a litigant's gut reaction. It is crucial that attorneys advise their clients proactively, comprehensively and defensively about electronic discovery requests, no matter how burdensome that task may appear to be.

Get acquainted with your digital client. To advise your client, you must know your client. Knowing your client has a different connotation in this digital age. Preparing a client for litigation carries with it unprecedented responsibilities that should be assumed by both counsel and client even before the litigation begins. The amendments to the Federal Rules suggest that lawyers now have a duty to understand their client's

ESI so that they may respond properly and comply with the rules. The Malpractice Standards of Care and the Ethical Rules may be reasonable standards to measure how effectively you are meeting your professional responsibility in representing your client. Therefore, during a client intake, assess the current condition of your client's electronic information. If you identify any weaknesses or vulnerabilities in their systems, treat them proactively.

Ask general operating questions. Ask whether your client has any document retention and/or destruction programs or knowledge management systems in place. These programs can provide the most effective defenses against potential future spoliation claims. The goal in establishing these programs is to create a regular and reliable way for the client's data to be destroyed in the regular course of business — and a method for suspending such destruction when necessary — so that an adverse inference of destruction of evidence could never be reached. Since retention and destruction programs address media as it is created and stored, it must be updated regularly, so encourage your client to track and record any permutations. Establishing stable document routines will become the foundation for a

smooth collection process.

Find Out if Your Client is Messy. Does your client know where its ESI resides? Map it out. Do not wait until litigation is filed to embark on a scavenger hunt. Not only is this strategy not cost effective, but more likely than not, an aggressive plaintiff's attorney will stumble upon the treasure first. Go through your client's closets. Backup tapes are the digital skeletons you are looking for. Find out how much your client relies upon mixed media. For example, do their executives receive their faxes in their e-mail inboxes? Can they read their voicemails as e-mail? Do they ever e-mail documents to themselves at home? Engage the client's IT staff or a third party to draw a data map connecting all this convergent technology. Learn where the servers are, find out to what extent remote access is permitted, and also inquire about any paper files that might exist.

Taking the time to understand your client's ESI before any of it needs to be collected or produced makes future joint decisions easier. Once there is a reasonable expectation of litigation, the duty to preserve relevant information is triggered. You and your client will be thankful you can pull the data map and document retention programs off the shelf. You can draw upon the maps as a basis for developing a legal hold policy,

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which extends to relevant data. The systematic data mapping and retention policies make it much easier to identify relevant ESI and target appropriate personnel who control the data (“custodians”). Document the legal hold process to avoid sanctions for the incidental loss of relevant information. Also, be mindful that when the legal hold period expires, your client should circulate that information internally so that the corporate routine may commence again; otherwise unnecessary data may be trapped in a preservation abyss forever.

Pick a winning team. Once the litigation begins, consider yourself the captain of the team and recruit all the players that should be engaged. This should include your client’s in-house counsel, the IT department and the insurers, if appropriate. Although some clients may desire to handle the process themselves, depending on the size of the project, it may be prudent to engage a third-party vendor. Relying upon a third party has several benefits. First, it helps avoid potential conflict. Second, a vendor will be able to focus its attention on the process, whereas your client might suffer some business interruption if it were to assume this task. Finally, the right vendor most likely will be able to save money by recommending techniques to contain costs.

Process creatively. Creativity is not just for legal arguments anymore. Creativity can apply to how data is produced and reviewed. Today’s sophisticated technology allows for countless permutations of searches not only to find key data but also to reduce the amount of

irrelevant data to be processed and reviewed.

Consider the timing of processing the various data collections into an organized, document repository. If there is a third-party vendor on your team, find out its capabilities. You might be surprised at how the techniques could even help you prepare for the “meet-and-confer” conference. An early document assessment could give you a statistically sound snapshot of potentially responsive electronic evidence. The search and retrieval process is also flexible enough to build in conceptual searches. Knowing such information prior to the conference will allow you to make more informed decisions with your client and improve negotiations with your adversary about keyword searches and other production decisions.

Review collaboratively. Melville’s scrivener’s demise was that he refused “to help examine his copy,” as he was supposed to do as a copyist. Discuss the various review options with your client and listen to their needs. Offshore review is an option that many corporate clients are choosing to help manage costs. If your client is considering this path, collaborate with the offshore attorneys to ensure that everyone is comfortable with the review platform and properly trained for determining responsiveness and/or privilege. Oftentimes, the majority of the litigation cost is in the review of documents, so limiting review and making it more efficient are big cost savers. Additionally, make sure you understand the client’s insurance policy. If an insurance carrier is funding the case, find out

if there is a policy limit in place and keep an eye on that budget.

Many third-party vendors have a way to rank relevant documents. Begin the review process with a review of the most relevant documents this will facilitate a quicker analysis of potential liability, allowing for settlement discussions or other alternative dispute resolution.

Leave an electronic trail. With the advent of technology, e-mails and metadata have been compared to DNA: a forensic technologist can trace data just like they track criminals on television. As you work with your client to implement the various culling techniques and review tools, make sure that you have an electronic audit trail. Know what you have deemed to be irrelevant data and why. If you are working with a third-party vendor, make sure that they are comfortable testifying about their techniques if necessary. Most culling techniques will allow for you to later re-evaluate data you may have marked as irrelevant or nonresponsive. In order to help your client avoid sanctions, you will need to have a record for the documents you did not produce.

As technology continues to evolve and data is stored in ways that are at once more complex and more convenient, the litigation process will respond by continuing to morph at a rapid pace. Studying this new technology can be exciting or laborious (depending on your interest). Whether or not you’d “prefer not to,” it is important to incorporate at least a modicum of knowledge in order to litigate and advise clients in this digital age. ■