eDiscovery:
When Knowledge Doesn't Always Equal Power

LITIGATION

As the digital age reshapes the practice of law, financial executives who best understand the challenges of electronic discovery and the resources needed to strategically address them will be better equipped to manage what could likely be an uncertain future.

By Benjamin R. Barnett

While knowledge is often equated with power, one current exception in the field of modern United States litigation is electronic discovery, or eDiscovery. Since the Federal Rules of Civil Procedure were amended in December 2006 to address eDiscovery, many companies have implemented systems to address its costs and challenges.

Yet nearly every month brings a news story about a large company sanctioned for destroying data or violating a discovery order. Despite having vendors to address eDiscovery problems and setting up internal task forces to map data systems, companies continue to see their eDiscovery costs escalate. The question arises: *Why hasn't the internal knowledge of a company's own systems and data helped reduce costs and avoid protracted eDiscovery battles?*

Stock answers, while undoubtedly valid, offer little value in terms of strategic planning and preparation. Plaintiffs' lawyers ask for everything under the sun and employ discovery strategies aimed at inflicting maximum burden and cost on companies. That's not likely to change. The rules favor broad discovery and are divorced from the evidentiary rules at trial. Absent legislative or judicial action, this isn't likely to change any time soon.

Rather, the real near-term solution is for companies to better harness what they know about their data and systems in a way that is meaningful for litigation.

A skeptic might ask what a finance officer is supposed to do about a problem managed primarily by colleagues in an organization's legal and information technology departments. The short answer is: Plenty.

Few events can have as immediate and profound an effect on corporate budgets as eDiscovery gone awry in litigation. As such, each of these departments and their personnel has a professional and financial stake.

Here are seven concrete steps companies can take to better understand and manage eDiscovery in the future.

1. Treat Litigation as What It Is: A Business Function

Recognize that litigation — and the eDiscovery that comes with it — is here to stay and should be treated as a business function. No one other than lawyers wants to be in the business of litigation. But if you are in business at any significant level, there will be litigation. Therefore, you can't afford to treat litigation as a one-off situation.

Lawyers will say that litigation is different from business. Litigation is

not making widgets. Each case is different. The law is not always clear. Judges and juries are unpredictable. There is no way to accurately predict whether litigation can be resolved on terms favorable to your company.

Though some of these observations are undoubtedly true, the appropriate response may be "So what?" Other equally unpredictable aspects of your business are subjected to financial scrutiny and active management. Why should the eDiscovery be any different?

2. View Data Through the Lens of Litigation

In the aftermath of The Sarbanes-Oxley Act of 2002 and the 2006 amendments to the Federal Rules of Civil Procedure, data "mapping" became all the rage. The idea — mapping all of an organization's IT systems in a single document — was sound in concept. But that concept doesn't necessarily provide the company or its lawyers with the information needed to effectively handle eDiscovery in litigation.

Having a PowerPoint slide or wall chart is not going to provide answers to the basic questions needed to effectively preserve, collect and produce data, or to represent the company at a Rule 26(f) conference, where discovery is discussed. To design an effective system, the lawyers need to work with the IT group and others to create a litigation data map that captures the right details.

Those details can include when systems came online, whether it contains migrated data from a predecessor system, the interrelationship of systems, the nature of data on the systems, the names of key company employees who know the system cold, the operating system and how data would be produced if it were ordered in litigation.

Capturing all of this information in a meaningful document geared for litigation is essential to protecting a company from losing critical knowledge if key personnel leave. It's also crucial in preparing counsel for early eDiscovery discussions about the relevance and accessibility of the data. Without that information, a so-called data map will lead nowhere.

3. Integrate Records Management, Preservation and eDiscovery Processes

Ever wonder why your company has millions of emails that have to be collected, reviewed and produced in litigation? Chances are the company does not have a functional, effective records management plan in place, which means that employees simply save everything.

That decision has enormous cost implications. Similarly, have you ever scrambled to locate data being requested in litigation to make sure the information is actually being preserved? How much did it cost to find the data, or deal with the consequences when it was not found or preserved? If it took too long to find the data, or to find the employees who actually knew where the data was, then it is very likely your company has not done an effective data inventory as described in the second step above.

There is no sound reason for independent records management, preservation and eDiscovery processes.

What is needed is an end-to-end system that identifies the data your business needs to operate on a daily basis (records management), flags documents and systems that need to be retained for regulatory or litigation purposes (preservation) and feeds the relevant data to a review system (eDiscovery). Integrating these processes will ensure consistency, drive efficiency and fully exploit cost savings from process improvements in these interrelated areas.

4. Create a Dedicated, Cross-Functional eDiscovery Team

One eDiscovery challenge is to develop consistent, coordinated positions across multiple litigation matters to address the myriad technical and legal issues inherent in the process. Opposing counsel will try to exploit any such inconsistencies to increase the costs and burdens associated with discovery

and to attack the credibility of your company or counsel.

One immediate solution to help manage this risk is to create a dedicated team of in-house employees from the relevant departments (legal, IT, finance) that will responsible for considering and putting in place an overall eDiscovery strategy for litigation and investigations. The team should be charged with developing the necessary expertise to understand and anticipate eDiscovery issues.

Using that knowledge, the team can advise senior management on how to mitigate current or future eDiscovery risks, drive consistent litigation decisions and help ensure that the company does not face unanticipated or unwarranted costs.

In considering whether to create such a team, consider two important caveats. First, this team does not require additional staffing. Rather, the team should be composed of existing employees who either have the appropriate background or have demonstrated an interest in or aptitude for eDiscovery issues.

Second, this team is to act as advisers and educators and should not be viewed as replacing a company's in-house and outside counsel in terms of matter-specific litigation strategy.

5. Evaluate the Current eDiscovery Process

Most companies that have been in the crucible of eDiscovery have some procedure by which company documents are preserved, collected, reviewed and produced. Among the key considerations that must be asked and answered:
■ When was the last time that an appropriate team evaluated that process?
■ Was the same system used for all cases and if not, why not?
■ Does it rely on outmoded or endangered technology?
■ Is the system integrated with the company's IT structure?
■ Does it permit early case assessment or targeted collections of key data?
■ Is the system scalable to handle

significant national litigation and a single third-party subpoena?

6. Take a Hard Look at All eDiscovery Costs

Every company wants to reduce its eDiscovery costs, but most don't examine the entire picture. Cost assessments tend to focus on what are perceived as higher costs associated with vendors and document review. But that narrow focus likely misses the true costs of eDiscovery. Instead, every cost driver should be examined using questions such as these:

■ What are your internal company costs?

■ Does the company have dedicated in-house IT resources for eDiscovery and if so, how much do they cost annually and is there a return on investment?

■ Does it make sense to outsource some of these functions or might that end up costing more and reducing quality?

■ Are different vendors used for the same task and does that make sense given the economies of scale?

■ Can the number of vendors be streamlined to reduce costs and drive down the number of "hand-offs" where mistakes normally happen?

■ Are all the company's eggs in one potentially fragile basket?

If the previous questions haven't been asked, they should be. Just consider: How are you going to demonstrate process improvements and cost reductions if you don't know your current eDiscovery baseline?

7. Educate Senior Management About eDiscovery Risks and Potential Costs

The work outlined above is not without cost. In the current cost-conscious environment, senior management must show support and commitment to ensure this work doesn't become another shelved project that leaves the company ill-prepared for eDiscovery challenges and cost exposure.

Yet, these upfront costs pale in comparison to the potential fees and costs that could be incurred for not building an effective and integrated eDiscovery plan based on current IT knowledge and expertise. The key is educating senior management on the potential risks and the steps that the finance team has taken to address them. Hiring dedicated counsel to handle growing eDiscovery demands is another option senior management might consider to save money in the long term and reduce confusion, cost, and work duplication.

The steps outlined here should not only guide company management in navigating the often difficult waters of law practice in the digital age. They also reinforce an important lesson for corporate leadership: When it comes to risk management and cost containment challenges posed by eDiscovery, with the right plan and personnel in place knowledge can indeed equal power.

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