



LAW JOURNAL
NEWSLETTERS

LJN's

LEGAL TECH

Newsletter®

An ALM Publication

Volume 27, Number 12 • April 2011

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

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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.

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.

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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 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 non-responsive. 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 alphanu-

meric 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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